

OCTOBER 1979

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

Secretary of Labor, MSHA v. Freeman United Coal Mining Co.,
VINC 78-395-P; (Judge Cook, August 30, 1979)

Secretary of Labor, MSHA v. Pacer Corporation, DENV 79-257-PM;
(Judge Michels, August 28, 1979)

Secretary of Labor, MSHA v. Davis Coal Company, HOPE 79-195-P, etc.;
(Judge Moore, September 21, 1979)

Secretary of Labor, MSHA v. Co-Op Mining Company, DENV 79-1-P;
(Judge Koutras, October 16, 1979)

Secretary of Labor, MSHA v. Sewell Coal Company, WEVA 79-31;
(Judge Kennedy, September 20, 1979)

Secretary of Labor, on behalf of Arnold J. Sparks, Jr., v. Allied
Chemical Corporation, WEVA 79-148-D; (Judge Kennedy, September 27, 1979)

Review was Denied in the following cases during the month of October:

Secretary of Labor, MSHA v. Swope Coal Company, HOPE 78-644-P, etc.;
(Judge Stewart, August 27, 1979)

Local Union No. 1124, UMWA v. Old Ben Coal Company, LAKE 79-197-C,
Petition for Interlocutory Review.

Westmoreland Coal Company v. Secretary of Labor, MSHA, HOPE 78-236
was remanded to an administrative law judge from the U.S. Court of
Appeals for the Fourth Circuit.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 9, 1979

PITTSBURGH COAL COMPANY (DIVISION OF :
CONSOLIDATION COAL COMPANY) :
 :
 :
 v. : Docket No. PITT 76-123-P
 : IBMA No. 77-6
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C.A. §961 (1978).

In its petition for assessment of civil penalty filed under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) ["the Act"], the Secretary alleged that Pittsburgh Coal Company, a division of Consolidation Coal Company, violated 30 CFR 75.1405. That mandatory standard requires, in pertinent part, that "All haulage equipment ... shall be provided with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment." The administrative law judge found the company had violated the regulation and assessed a civil penalty of \$5,000. The company appealed. For the reasons set forth below, we affirm the judge's decision.

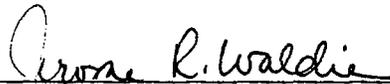
On April 11, 1974, a fatal accident occurred at the company's Monitor No. 4 Mine. An employee of the company was fatally injured attempting to uncouple two haulage cars. At the mine, clearance differed along the two sides of the track. One side, the "tight side," had a clearance of 3 feet. The other side, the "wide side," had a clearance of 6 feet. All haulage cars had disconnect levers on the wide side. In addition, some, including the car the victim was attempting to uncouple, also had levers on the tight side. The parties stipulated that all of the uncoupling devices on the wide side were operable, but that some of the levers on the tight side were inoperable. When the victim attempted to uncouple the cars from the tight side, and the uncoupling device did not work, the victim reached between the ends of the cars to manually disconnect them. Unaware that the victim was between the cars, the locomotive operator started the train and the victim was crushed.

79-10-4

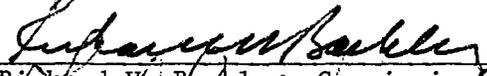
The company argues that by equipping its mine cars with operable uncoupling devices on the wide side, it complied with the standard. We disagree. The purpose of the standard is to prevent miners who must couple and uncouple haulage equipment from subjecting themselves to injury by going between the ends of haulage cars. This purpose is best effectuated by requiring that all uncoupling devices be maintained in operable condition. An inoperable device might induce a miner to go between the ends of the haulage equipment to attempt manual uncoupling. Here, a miner died going between the ends of the haulage cars after unsuccessfully attempting to use an inoperable device. The standard is designed to prevent exactly this type of accident. The judge properly interpreted 30 CFR 75.1405, and his finding of a violation is affirmed.

The company also contests the penalty assessed as excessive. We have reviewed the company's arguments in this regard and find them without merit. We conclude that the penalty assessed for the violation was reasonable and in accord with the statutory criteria specified in the Act.

Accordingly, the decision of the judge is affirmed.



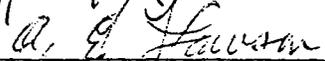
Jerome R. Waldie, Chairman



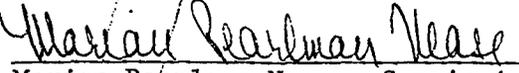
Richard V. Backley, Commissioner



Frank F. Jastrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 1979

SOUTHERN OHIO COAL CO. :
 :
 v. : Docket No. VINC 79-98
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :

DECISION

This case is before the Commission on interlocutory review. On June 19, 1979, we directed review of an order of continuance entered by the administrative law judge. We reverse and remand for further proceedings consistent with this opinion.

On December 5, 1978, the Secretary of Labor issued a citation under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1978) ["the 1977 Act"] to Southern Ohio Coal Company. The citation alleged that Southern Ohio had driven the 008 Section of its Raccoon No. 3 Mine adjacent to the abandoned Lawler No. 7 Mine in a manner that violated 30 CFR §75.1701. 1/ Later that same day, the Secretary issued to Southern Ohio a withdrawal order under section 104(b) when it allegedly failed to abate the violation alleged in the citation. 2/ Southern Ohio then closed the 008 Section in accordance with the order.

Southern Ohio sought review of both the citation and the withdrawal order. An administrative law judge held a pre-hearing conference with Southern Ohio and the Secretary on January 11, 1979. At the conference,

1/ That section requires in part the drilling and the maintaining of a "borehole or boreholes" in advance of a working face that approaches (1) within 200 feet of an abandoned area of the mine that cannot be inspected and may contain dangerous accumulations of water or gas, or (2) within 200 feet of any workings of an adjacent mine.

2/ Section 104(b) provides for the issuance of a withdrawal order during a follow-up inspection of a mine where: (1) the violation described in the citation has not been totally abated within the time period originally fixed, and (2) the inspector finds that the abatement time should not be further extended.

the parties stipulated that Dr. Kelvin K. Wu, a technical expert from the Secretary's Mine Safety and Health Administration, would conduct an on-site evaluation of Southern Ohio's Raccoon Mine, and that he would report his findings to Southern Ohio, the United Mine Workers, and the judge. On February 15, 1979, Dr. Wu submitted his report. The report stated that there was "no hard evidence" to indicate that the Raccoon Mine and the Lawler Mine were within 200 feet of each other. Dr. Wu's report also stated, however, that the 008 Section of the Raccoon Mine had a water problem and that, with respect to the water's source, the Lawler Mine was the "prime suspect".

On March 30, 1979, a status hearing was held. The hearing opened with the judge's recitation of the "understanding" reached during a preceding two hour off-the-record discussion before the judge. The judge stated that by a certain date Dr. Wu was to submit his proposal for the taking of core samples at the Raccoon Mine in order to determine the extent of the saturation of the coal in the 008 Section. The judge further stated that after Dr. Wu submitted his proposal, the parties would stipulate to a method for conducting the core sample testing, or that, in the alternative, Southern Ohio was to submit a counter-proposal. In the latter event, the judge stated that he would then determine the method for conducting the test. Following the judge's recitation of the agreement, counsel for both Southern Ohio and the Secretary stated that they understood its terms and that they had no objection to it. At the conclusion of the hearing, the judge ordered that the terms of the agreement were to be carried out by a designated time.

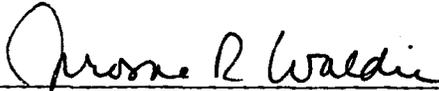
In early April of 1979, Dr. Wu submitted his proposal for the taking of the core samples. Dr. Wu proposed the horizontal drilling of four 60-foot probe holes into the working face of the No. 3 Entry of the 008 Section and one 60-foot probe hole into the right rib of that entry. In response to Dr. Wu's proposal, Southern Ohio notified the judge that it "elected not to undertake the drilling of [the probe holes]." Reiterating its earlier expressed views, Southern Ohio stated that the results of the core sample testing would be irrelevant to the issue of whether the two mines were within 200 feet of each other and that it had already provided substantial evidence that it was not in violation of the standard.

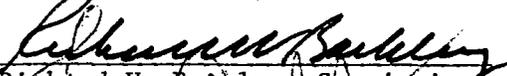
On April 26, 1979, the judge issued an order finding that Southern Ohio had "chosen to dishonor its commitment to cooperate in the development of a plan to test for saturation core samples". The judge continued the case until Southern Ohio "cures its delinquency". Southern Ohio

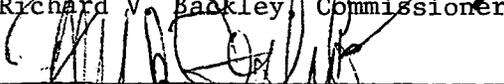
then sought interlocutory review of this order. We granted Southern Ohio's petition for interlocutory review to determine whether the judge erred in using an indefinite continuance as a sanction for a failure to comply with a discovery commitment. 3/

The last sentence of section 105(d) of the 1977 Act requires the Commission to "take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104." This provision evinces a congressional concern that contests of withdrawal orders be expeditiously heard, at least where, as here, the underlying violation has not been abated. 4/ The congressional concern with prompt disposition of withdrawal order contests under the 1977 Act makes inappropriate the use of a continuance as a sanction here. We therefore conclude that the judge erred. In so concluding, however, we hold only that an indefinite continuance is not an appropriate sanction in contests of withdrawal orders. We leave to the judge the question of whether any other sanction may be imposed.

Accordingly, the judge's order of April 26, 1979, is reversed and the case is remanded for further proceedings consistent with this opinion.


Jerome R. Waldie, Chairman


Richard V. Backley, Commissioner


Frank E. Jastrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

3/ We do not at this time pass upon the other issues raised by the parties.

4/ See, also, S. Rep. No. 95-181, 95th Cong., 1st Sess. 48 (1977) ("Committee strongly believes that it is imperative that the Commission strenuously avoid unnecessary delay"), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 636 (1978).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 23, 1979

SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA) :
 :
v. : Docket No. MORG 75-393
 :
EASTERN ASSOCIATED COAL : IBMA No. 76-55
CORPORATION :

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. 30 U.S.C.A. §961 (1978).

On May 15, 1975, a Mine Enforcement and Safety Administration inspector observed a track-mounted, self-propelled personnel carrier (a jitney) with an inoperable parking brake. The condition violated 30 CFR 75.1403. The inspector issued a notice of violation and gave the company until the following morning to abate. The abatement period was then extended to May 20, 1975, based upon the fact that the company had expressed a need for more time to repair the brake and had placed a danger sign on the jitney. On May 20 the danger sign was still on the machine, but nothing had been done to repair the jitney or to otherwise eliminate the danger posed by the inoperative brake. The inspector determined that the time for abatement should not be further extended and thereupon issued a withdrawal order under section 104(b) of the Federal Coal Mine Health And Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). 1/

1/ Section 104(b) of the 1969 Act provided, in pertinent part:

... if, upon an inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall ... promptly issue an order requiring the operator of such mine to cause immediately all persons, ... to be withdrawn from, such area....

The company sought review of the order. In his decision, the administrative law judge vacated the order. He found that a roof fall on the track haulage made it impossible to remove the jitney to the maintenance shop for repair and that the risks of attempting to repair the jitney in any place other than the shop outweighed the danger of postponing the repair because the machine had been tagged out of service. He therefore held that placing the danger tag on the equipment constituted abatement of the violation prior to the issuance of the order. We do not agree.

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. 2/ To abate under these circumstances, the jitney should have been made inoperable. There is no suggestion in the record that the jitney could not have been rendered inoperable safely, thus eliminating the danger posed within the abatement period.

The company also argued, and the judge held, that the time set for abatement was unreasonable in view of the difficulties involved in repairing it. However, as noted above, there is no evidence that the jitney could not have been made inoperable within the abatement period. We therefore find that the time set for abatement was reasonable.

2/ The judge cited Plateau Mining Company, 2 IBMA 303 (1973), in support of his finding that the company had abated the violation prior to the issuance of the order of withdrawal. There the Board of Mine Operations Appeals held that if an operator establishes that the equipment in question is under repair, has not been used, and will not be used until repaired, no violation exists. Without passing judgement on the merits of that decision, we note that unlike the jitney in this case, the equipment in Plateau (a pneumatic drill) had been rendered inoperable through removal of the plug on the cable that connected it to its power source.

The decision of the judge is reversed, and the withdrawal order is reinstated.

Jerome R. Waldie
Jerome R. Waldie, Chairman

Richard V. Backley
Richard V. Backley, Commissioner

Frank F. Bestrab
Frank F. Bestrab, Commissioner

A. E. Lawson
A. E. Lawson, Commissioner

Marian Pearlman Nease
Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 25, 1979

PONTIKI COAL CORPORATION

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

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Docket No. PIKE 78-420-P

DECISION

This penalty proceeding arises under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §801 et seq (1969) (amended 1977).

The Secretary seeks penalties for violations alleged in three orders of withdrawal issued under section 104(c)(2) of the Act. 1/ The company did not seek review of the orders. At the hearing the Secretary offered evidence as to the existence of the violations and as to the statutory criteria to be considered when determining the amount of the civil penalties. The Secretary did not offer evidence as to the underlying section 104(c)(1) notice and order which served as a foundation for the three section 104(c)(2) orders. The judge found the violations occurred as alleged. However, due to the Secretary's failure to present evidence regarding the underlying notice and order, he vacated the three section 104(c)(2) orders. Because the orders were vacated he mitigated the penalties for the violations set forth in the orders.

We granted petitions for discretionary review filed by both parties. Two issues are before us: whether a violation of 30 CFR 75.200 occurred, 2/ and whether the validity of an order of withdrawal is properly at issue in a civil penalty proceeding.

1/ Section 104(c)(2) of the Act provided, in relevant part:

"If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection. ..."

2/ Review was not sought for the judge's finding that the two other violations existed.

79-10-13

As to the first issue, the company's approved roof control plan allowed a maximum width of 20 feet for entries and crosscuts. 3/ The inspector testified that he measured widths exceeding 23 feet at six entries and one crosscut, with, as the judge found, "the longest measure averag[ing] 24 feet 9 inches." The company urges us to overturn the judge's finding of a violation because the measurements of the inspector were faulty. It argues that some of the inspector's measurements included the depth of undercuts which existed at the bottom of the ribs. 4/ The company asserts that entry and crosscut widths should be measured exclusive of such undercuts. The judge accepted the testimony of the company's assistant superintendent that the depths of the undercuts were 6 to 12 inches. If we assumed arguendo that the undercuts should be excluded, any measurement over 22 feet, (excluding two maximum undercuts of 12 inches each), would be in violation of the 20 foot width allowed by the approved plan. Thus, at least some of the widths exceeded those allowed in the approved plan even if undercuts are excluded. There is, therefore, substantial evidence to support the judge's finding that a violation of 30 CFR 75.200 occurred, and we affirm it. 5/

Next, we turn to the question of whether the validity of a withdrawal order may be at issue in a civil penalty proceeding. We decided this question in Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979), where we concluded it was error to vacate a withdrawal order in a penalty proceeding. We therefore reverse the judge with respect to his vacation of the three withdrawal orders.

Accordingly, the finding of a violation of 30 CFR 75.200 as set forth in order No. 7-0106, 2 FDG, 12/06/77 is affirmed. The vacation of order Nos. 7-0106, 2 FDG, 12/06/77; 7-0081, 1 TE, 12/05/77; and 7-0088, 1 MM, 12/05/77, is reversed and the orders are reinstated. The case is

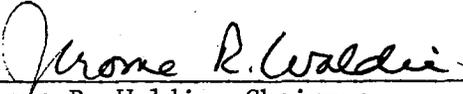
3/ 30 CFR 75.200 provides, in pertinent part:

A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted. ...

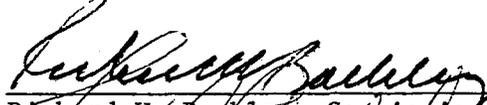
4/ The company used a conventional mining system. As its cutting machine moved across the face, the cutting bar at times protruded too far to the left or right and thus undercut the ribs.

5/ Because certain widths exceeded the maximum width permitted by the roof control plan in any event, we need not reach the company's argument that undercuts should not be included in measuring entry and crosscut widths.

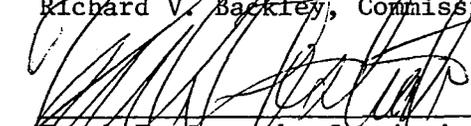
remanded for reassessment of penalties for the violations contained in the reinstated orders without consideration of the vacated orders as a mitigating factor. 6/



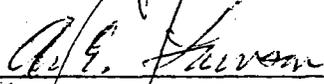
Jerome R. Waldie, Chairman



Richard V. Backley, Commissioner



Frank R. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

6/ Because the trial judge retired on July 30, 1979, remand is directed to the Chief Administrative Law Judge so that the case may be reassigned.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 25, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

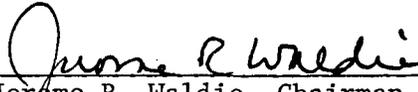
v.

B.B. & W. COAL CO., INC.

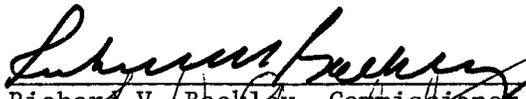
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: Docket Nos. PIKE 77-48-P
: PIKE 77-88-P
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DECISION

The administrative law judge's decision is affirmed.



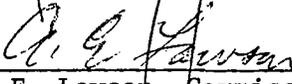
Jerome R. Waldie, Chairman



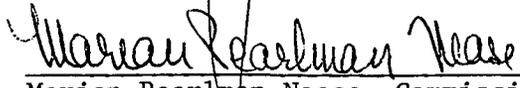
Richard V. Backley, Commissioner



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

79-10-14

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 29, 1979

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VINC 79-119
	:	
v.	:	
	:	
OLD BEN COAL COMPANY	:	

DECISION

The issue in this case is whether Old Ben Coal Company (Old Ben) is responsible for a violation of the Federal Mine Safety and Health Act of 1977 1/ committed by its contractor, ANSCO, Inc. (ANSCO). In his decision, Chief Administrative Law Judge Broderick found that Old Ben violated a provision of the Act and assessed a \$750 penalty for the violation. For the reasons that follow, we affirm.

The material facts are not in dispute. ANSCO contracted with Old Ben to construct a building at Old Ben's No. 2 strip mine near Petersburg, Indiana. On April 12, 1978, a Mine Safety and Health Administration (MSHA) inspector conducted an inspection of Old Ben's mine. The MSHA inspector was accompanied by Old Ben's safety inspector and a representative of the United Mine Workers of America. During the inspection, the MSHA inspector observed an ANSCO employee working on an I-beam 15 to 20 feet above the ground. The employee was not wearing a safety belt. Believing that there was a danger of the employee falling, the MSHA inspector informed Old Ben's safety inspector that he was issuing a citation for violation of 30 CFR §77.1710(g). 2/ Old Ben's inspector requested the ANSCO employee to come down and the employee complied. The citation was issued to Old Ben.

1/ 30 U.S.C. §801 et seq. (1978) (hereafter "the 1977 Act" or the Act").

2/ This standard, in pertinent part, provides:
§77-1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

- (g) Safety belts and lines where there is a danger of falling

79-10-17

Old Ben does not argue that a violation of the standard did not occur. Rather, Old Ben argues that as a matter of law under the 1977 Act it is neither absolutely liable nor jointly and severally liable for a violation of the Act committed by its contractor. Old Ben urges the Commission to hold that ANSCO, as an independent contractor, was the operator solely responsible for the violation at issue. The Secretary of Labor argues that under the 1977 Act an owner-operator is absolutely and vicariously liable for violations attributable to its independent contractors. The Secretary further argues that his decision to proceed against an owner-operator for a contractor's violation is exempt from judicial review. In the alternative the Secretary argues that, if his decision to proceed solely against Old Ben is reviewable by the Commission, it should be upheld because it resulted from a rationally based interim policy.

The 1977 Act defines "operator" as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. §802(d). The enforcement provisions of the Act all speak in terms of operator: the Act provides for the issuance of citations and orders to the operator for violations of mandatory standards and imminent dangers (30 U.S.C. §§814, 817); requires the assessment of civil penalties against the operator of a mine in which a violation occurs (30 U.S.C. §820(a)); and provides for the compensation by the operator of miners idled by withdrawal orders. 30 U.S.C. §821. Analogous provisions under the Federal Coal Mine Health and Safety Act of 1969 have been construed to permit the imposition of liability on owner operators, for violations occurring in their mines "regardless of who violated the Act or created the danger requiring withdrawal". Bituminous Coal Operators' Assoc., Inc. v. Secretary of Interior ("BCOA v. Secretary") 547 F.2d 240, 246 (4th Cir. 1977); Republic Steel Corp., 1 FMSHRC 5, 9 (1979), pet. for rev. filed, No. 79-1491, D.C. Cir., May 11, 1979; Kaiser Steel Corp., 1 FMSHRC 343 (1979); Consolidation Coal Co., 1 FMSHRC 347 (1979). See Republic Steel Corp. v. IBMOA, 581 F. 2d 868, 870 n. 5 (D.C. Cir. 1978). For the reasons stated in those decisions, the same conclusion is warranted under the 1977 Act.

The amendment of the 1969 Act's definition of "operator" to include "any independent contractor performing services or construction at such mine" does not require a different result. On its face, the additional language in the 1977 Act's definition of "operator" does not affect the question of an owner's responsibility for contractor violations. Rather, the amendment simply appears to settle an uncertainty that arose under the 1969 Act, i.e., whether certain contractors are "operators" within the meaning of the Act. See, e.g., Association of Bituminous Contractors, Inc. (ABC) v. Morton, No. 1058-74 (D.D.C., May 23, 1975), rev'd sub nom. ABC v. Andrus, 581 F. 2d 853 (D.C. Cir. 1978); BCOA v. Secretary, supra; Cowin and Co., Inc., 1 FMSHRC 20 (1979).

To the extent that the legislative history concerning the amended definition bears on the question of owner responsibility for contractor violations, it supports the imposition of such liability. The Senate

Committee Report on the 1977 Act explained the amended definition as follows:

...[T]he definition of mine "operator" is expanded to include "any independent contractor performing services or construction at such mine". It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the [1977 Act]. In enforcing this Act, the Secretary should be able to assess civil penalties against such independent contractor as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of Interior, 547 F. 2d 240 (C.A. 4, 1977).

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978) ["1977 Act Legis. Hist."].

The Conference Committee Report stated the following regarding the amended definition:

The Senate bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine.

S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess., at 37 (1977); 1977 Act Legis. Hist. at 1315.

We read these passages simply as a more complete explanation of that which was accomplished by the amendment to the definition, i.e., a clarification that certain contractors are operators under the Act. The addition of independent contractors to the definition of operator was done solely to dispose of any remaining doubt that independent contractors can be held liable as mine operators. It was not the intention of the Congress to limit the number of persons who are responsible for the health and safety of the miner, nor to dilute or weaken the obligation imposed on those persons. Viewed in this light, the citation in the Senate Report to the Fourth Circuit's BCOA decision is explainable as a reference to that portion of the BCOA decision holding that certain contractors were operators under the 1969 Act. In view of the approving reference to the BCOA decision in the Senate Report, however, we cannot conclude that the drafters were unaware of that decision's further holding that owners can be held solely responsible "regardless of who violated the Act or created the danger requiring withdrawal". 547 F. 2d at 246. Given this fact, and the fact that the

1977 Act and the legislative history are otherwise silent on this important question of law, we conclude that Congress endorsed the conclusion that owners can be held solely responsible for contractor violations. Cf. National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 702-703 (3rd Cir. 1979).

For these reasons, we find that, as a matter of law under the 1977 Act, Old Ben, as an owner-operator, can be held responsible without fault for the violation of the Act committed by its contractor. 4/ When a mine owner engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation.

We emphasize that our conclusion regarding an owner's liability does not affect a contractor's duty to comply with the Act or its liability for violations that it commits. The amendment of the definition of operator in the 1977 Act makes it clear that contractors can be proceeded against and held responsible for their violations. Indeed, as discussed more fully below, direct enforcement against contractors for their violations is a vital part of the 1977 Act's enforcement scheme.

Our inquiry in the present case does not end with the conclusion that as a matter of law Old Ben can be held responsible for its contractor's violation. The Secretary's argument that Commission review of his decision to proceed against Old Ben is precluded by 5 U.S.C. §701 because it is a matter committed entirely to his discretion by law is without merit. 5/ The structure and intent of the detailed administrative review provisions of the 1977 Act compel the conclusion that the Secretary's decision may be reviewed by the Commission.

First, section 507 of the 1977 Act provides:

Except as otherwise provided in this Act, the provisions of ... sections 701-706 of title 5

4/ In view of our conclusion, it is unnecessary to reach the Secretary's argument that a mine owner is vicariously liable for a contractor's violation because the contractor is an "agent" of the owner under section 3(e) of the 1977 Act, 30 U.S.C. §802(e).

5/ 5 U.S.C. §701, in pertinent part, provides:

- (a) This chapter applies, accordingly to the provisions thereof, except to the extent that
 - (1) statutes preclude judicial review; or
 - (2) agency action is committed to agency discretion by law.

of the United States Code shall not apply to the making of any order, notice, or decision made pursuant to this Act, or to any proceeding for the review thereof.

The 1977 Act does not otherwise make 5 U.S.C. §701 applicable to Commission / proceedings. Therefore, the authority the Secretary cites as controlling on the question of reviewability is not even applicable.

Second, we reject the Secretary's attempt to equate the Commission with a court of appeals and have the judicial review provisions of the Administrative Procedure Act, including 5 U.S.C. §701, applied to Commission proceedings by analogy. The Commission stands in a fundamentally different position in relation to the Secretary than does a court of appeals. The Commission was established as the "ultimate administrative review body" under the Act due to the recognition that "an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program". 1977 Act Legis. Hist. at 601, 635. The Commission is comprised of persons who "by reason of training, education, or experience" are qualified to carry out its specialized functions under the Act. Section 113(a). The Commission is authorized to review, on a discretionary basis, decisions of its administrative law judges on statutorily specified grounds, including whether the decision presents a "substantial question of ... policy", is "contrary to ... Commission policy", or presents a "novel question of policy". Section 113(d) (2) (A) and (B). The Commission's authority to review judge's decisions extends even to cases in which no person has filed a petition for review. Section 113(d) (2) (B). These powers were given to the Commission to enable it to "develop a uniform and comprehensive interpretation of the law", providing "guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law". 6/ These provisions demonstrate that the Commission was intended to play a major role under the 1977 Act by reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis. Thus, the Act provides a clear basis for distinguishing the Commission's role from that of a court reviewing agency action, thereby rendering application of 5 U.S.C. §701 by analogy inappropriate. Cf. Brennan v. Gilles & Cotting, Inc., 504 F. 2d 1255 (4th Cir. 1974). The Commission's review authority extends to "determining operator responsibility and liability" for violations of the Act. 1977 Act Legis. Hist. at 89.

For these reasons, we conclude that the Secretary's decision to proceed against an owner-operator for a contractor's violation is reviewable by the Commission.

6/ Nomination Hearing, Members of Federal Mine Safety and Health Review Commission Before the Senate Committee on Human Resources, 95th Cong., 2d Sess. 1 (1978) (statement of Senator Harrison A. Williams, Jr., Chairman).

Having decided that in a contested case the Secretary's decision to institute enforcement proceedings against an owner for its contractor's violations is reviewable by the Commission, we must determine an appropriate standard of review. The Secretary argues that, if his decision is reviewable, the appropriate standard of review is that set forth in section 10(e) of the Administrative Procedure Act, 5 U.S.C. §706 (2)(A). This provision, in pertinent part, provides that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". As noted above, however, section 507 of the 1977 Act specifically provides that 5 U.S.C. §706 is not applicable to Commission proceedings.

In reviewing this case, some latitude must be given to the Secretary's determination as to how to enforce the Act for contractor violations. The Secretary, by virtue of his enforcement responsibilities, has direct experience with the nature of the working relationships of owners and contractors on the jobsite. The experience makes it possible for the Secretary to be apprised of the diverse economic and technical considerations that should be taken into account in formulating a policy on liability for contractor's violations. Also, the Secretary's enforcement policy must be coordinated among hundreds of inspectors in the field. These considerations require that the Commission not employ a broad standard of review in this case. Thus, in these circumstances we believe that an appropriate inquiry is for the Commission to determine whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purpose and policies of the 1977 Act. Skid

We turn now to examining the record in the case before us. It is clear from the record that the particular facts of this case had no bearing on the Secretary's decision to issue the citation to Old Ben. The Secretary concedes that Old Ben was proceeded against under an agencywide policy to directly enforce the Act against only owner-operators for contractor violations. The record is far from clear as to the basis of this policy. The Secretary admits that the policy, in part, represents a continuation of past practice under the 1969 Act. The policy under the 1969 Act of citing only owner-operators for contractor violations had its roots in the district court's decision in ABC v. Morton, supra, holding that contractors were not "operators" under the 1969 Act. On February 22, 1978, however, the district court's decision was reversed in ABC v. Andrus, supra, and after that date it was clear that the Secretary could enforce the Act directly against contractors. More importantly, when the 1977 Act became effective on March 9, 1978, any doubt concerning the Secretary's ability to proceed directly against contractors was dispelled. Therefore, if the Secretary's decision to proceed against Old Ben was made pursuant to an enforcement policy based solely on the discredited foundation of ABC v. Morton, there would be no doubt that his decision was improper. Cf. Republic Steel Corp. v. IBMOA, 581 F. 2d 868 (D.C. Cir. 1978). *

The Secretary, however, has provided another reason explaining his

decision to proceed against Old Ben for its contractor's violation. The Secretary asserts that, although Old Ben was proceeded against in accordance with a Secretarial policy of directly enforcing the Act only against owners, this policy is an interim one pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors. In the Secretary's view, this interim policy is necessary to avoid the "unpredictability, confusion, and potential unfairness" that would result if each of more than 1,600 inspectors determined the appropriate operator to proceed against on an individual ad hoc basis.

On October 23, 1978, MSHA made public a draft of proposed regulations indicating its intent to enable inspectors to proceed directly against contractors for their violations. On August 14, 1979, the proposed regulations were published. 44 Fed. Reg. 47746-47753 (1979). The proposed regulations provide a firm indication of the Secretary's intent to enforce the Act directly against contractors for violations that they commit.

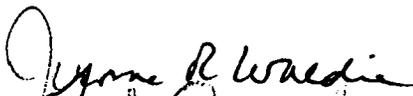
We note that the interim policy being pursued by the Secretary is not in line with the view expressed in his proposed regulations of how best to enforce the 1977 Act. Also, we have doubts concerning the necessity of the Secretary's blanket "owners only" enforcement policy even on an interim basis. In many circumstances, as in the present case, it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring. Thus, we fail to see the overriding need for adherence to a uniform policy in instances where it is clear that proceeding against a contractor is a more effective method of protecting the safety and health of miners. Nevertheless, we recognize that it takes some time for the development of new policies and procedures by a department newly assigned the enforcement of a major program designed to protect the health and safety of miners. ^{7/} Therefore, because the Secretary's decision to proceed against Old Ben was grounded on considerations of consistent enforcement, it was made for reasons consistent with the purposes and policies of the 1977 Act and we will not disturb his choice.

We emphasize, however, as the Secretary has recognized in his proposed regulations, that the amendment of the 1977 Act's definition of operator to include independent contractors was intended to accomplish a specific purpose, i.e., to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act. The Secretary has also recognized in his proposed regulations that enforcement against owners for contractor violations, although a legally permissible method of effecting miner safety and health, oftentimes proves to be an inefficient and unsatisfactory manner of achieving the Act's purposes. See also ABC v. Andrus, supra, 581 F. 2d at 863. We note that there is no indication of when the interim policy will be replaced by a new one. If the Secretary unduly prolongs a policy that prohibits direct enforcement of the Act against contractors, he will be disregarding the intent of Congress. In view of the Secretary's express recognition of the wisdom and effectiveness

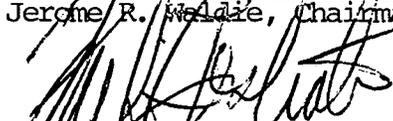
^{7/} The 1977 Act became effective on March 9, 1978. The citation in this case was issued to Old Ben on April 12, 1978.

of subjecting contractors to direct enforcement, continuation of a policy that forecloses such enforcement will provide evidence that the current policy is grounded solely on improper considerations of administrative convenience, a basis that would not be consistent with the Act's purpose and policies. The ability to proceed against owners for contractor violations was intended to provide an effective tool for protecting the safety and health of miners. To use this tool as a mere administrative expedient would be an abuse.

For these reasons, the decision of the administrative law judge finding that Old Ben violated the Act is affirmed.



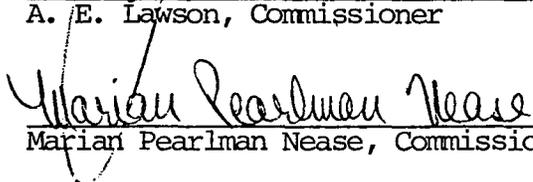
Jerome R. McArdle, Chairman



Frank H. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

Bakley, Commissioner, dissenting:

This case arises under the Federal Mine Safety and Health Act of 1977 (1977 Act), but poses the same question as was presented to the Commission in Republic Steel Corporation (Republic), ^{1/} a case that was decided under the Federal Coal Mine Health and Safety Act of 1969 (1969 Act). Under the 1969 Act, the term "independent contractor" was not included in the statutory definition of "operator". ^{2/} However, court decisions, in interpreting that word, held that under the definition of "operator" in the 1969 Act an independent construction contractor could be considered a coal mine operator. ^{3/} In the enactment of the 1977 Act, Congress, noting with approval such judicial interpretation, ^{4/} amended the definition of "operator" to include independent contractors performing services or construction at a mine.

^{1/} Secretary of Labor v. Republic Steel Corporation, Docket Nos. IBMA 76-28, MORG 76-21, IBMA 77-39, MORG 76X95-P, Comm. No. 79-4-4.

^{2/} 30 U.S.C. §802 (d).

^{3/} Bituminous Coal Operators' Association v. Secretary of the Interior, 541 F.2d 240 (4th Cir. 1977), (BCOA); Association of Bituminous Contractors Inc., (ABC) v. Andrus, 581 F.2d 852 (D.C. Cir. 1978).

^{4/} The Senate Committee Report specifically cites the BCOA decision. S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977).

Accordingly, under both Acts an independent contractor can be held liable as a mine operator. The underlying question thus presented in both Republic and the instant case is under what circumstances should liability of the contractor attach. Today's majority opinion sheds little light on this question. As in Republic, the majority has held the owner-operator liable on a theory of absolute or strict liability without any consideration of the action or inaction of the independent contractor. 5/

However, it is apparent that the majority has retreated from its rigid position, as enunciated in Republic, of approving without meaningful review the Secretary's imposition of absolute liability on the owner-operator and now considers such policy of the Secretary to be "permissive" dependent upon the Secretary's promulgation of regulations discussed later herein. The fact remains, however, that the majority has disregarded the facts presented in this case and, accordingly, has deferred to the Secretary's present ill-founded policy of citing only the owner-operator. Accordingly, I must dissent.

As in Republic, I do not dissent from the court supported proposition that the statutory language permits the imposition of absolute liability on owner-operators for independent contractor violations. However, the Secretary of Labor and this Commission have an obligation to determine under what circumstances imposition of the statutorily permissible concept of absolute liability will best promote the safety and health of miners. Thus the thrust of my dissent, both in Republic and in the instant case, goes to the question of whether the owner-operators, under the facts presented to us, should be held liable for the violations of their contractors. I submit that the answer to the latter question depends on the factual situation presented in each case measured against a standard of preventative control. 6/

5/ In lieu of the term "absolute liability", the majority finds Old Ben can be held responsible "as a matter of law ... without fault ...". The phrase, "a distinction without a difference," I believe, is appropriate.

6/ While conceding that "one operator may be in a better position to prevent the violation," the majority then, surprisingly, proceeds to reason that that "issue" need not be decided, attributing such reasoning to Congress. It would appear that the ability to prevent a violation from taking place would do more for the promotion of health and safety, than the blind assertion that Congress allows "the imposition of liability on both operators" regardless of their relative position insofar as a violation is concerned. The rationale that Congress "endorsed the conclusion that owners can be held solely responsible for contractor violations" does not support the conclusion that they should. This leap in logic ignores safety, for to hold one party liable who is in a lesser position to prevent violations provides little comfort for the miners.

Thus, as I indicated in Republic, I would impose liability on the person most able to prevent the violation and to correct it quickly should it occur. In my opinion that person would be the party who has functional control of, or supervision over, the work activity in that portion of the mine where the violation occurred.

Accordingly, I submit that there must be, at a minimum, some rational relationship between the owner-operator and the wrongdoing alleged in the citation before the owner-operator should be held legally responsible for the violation. Such relationship does not exist under the facts of this case as examined below. Therefore, I conclude that Old Ben should not be held liable for the violation committed by its independent contractor. Application of the concept of absolute liability of the owner-operator regardless of the facts can produce only unreasonable results as this case clearly demonstrates.

An inspection of the Old Ben No. 2 Strip Mine was made by Department of Labor inspector Joseph Hensley on April 10, 11 and 12, 1978. During the inspection employees of an independent construction contractor, ANSCO, Inc., were working at two different locations on the mine property. ANSCO had been contracted by Old Ben to construct a structure to be used in repairing the dragline shovel buckets used at the No. 2 strip mine. ANSCO employees were also on mine property constructing an addition to the tipple.

On April 11th, Inspector Hensley visited the construction site at the tipple and observed four men working in an elevated position with neither safety belts nor scaffolding. Hensley pointed out this safety hazard to Dale Wools, the Old Ben representative accompanying him, who asked the men to "come down." Hensley and Wools then contacted William Wagner, ANSCO's superintendent of construction at the No. 2 mine. Inspector Hensley explained to Mr. Wagner "at that time what the law said about safety belts and what was required for his men to do when working on an elevated platform and he assured me [Hensley] at that time that he would have none of his men working from an elevated position again unless they were wearing safety belts." (TR. 20)

On April 12th Inspector Hensley was again accompanied on the continuation of his inspection by Old Ben's representative, Dale Wools. While driving by the bucket building construction site with Mr. Wools, the inspector observed an employee of ANSCO working 15 to 20 feet in the air standing on an I-beam. The employee, who was welding, was not wearing a safety belt and was not using scaffolding which was available at the site. The inspector instructed the Old Ben representative to have the man come to the ground, which he did. When the employee descended the inspector considered the violation to be abated. (TR. 32) There were no other Old Ben hourly employees or supervisors in the immediate vicinity of the construction site. ANSCO's construction supervisor, Mr. Wagner, was on the mine property but he was not at the bucket building construction site at the time of the violation. (TR. 34, 35)

The ANSCO employee who was cited for failure to wear the safety belt stated to Inspector Hensley at the time of the violation "that he knew that he was required to wear safety belts but he was instructed" by Mr. Wagner "that he had to get the job done and that there were no belts available for him so he went up" without the safety belt. (TR. 37) The ANSCO employee had further explained that "he had just a quick job. His foreman was in the office making a phone call and he thought he would get the job done right away while the foreman was gone and have it done when he got back." (TR. 50)

Inspector Hensley also testified that he issued the citation to Old Ben under the unwarrantable failure provisions of section 104(d) 7/ because he had previously explained the safety belt requirements to the ANSCO supervisor and because the ANSCO employee admitted that he knew he was violating a safety standard. (TR. 35)

The contract between Old Ben and ANSCO provided that ANSCO was to erect the building for a fixed sum according to certain specifications. The administrative law judge made a finding that under the terms of the contract and in carrying it out, ANSCO was independent of any control by Old Ben. He further found that ANSCO's employees were supervised by its own supervisor and Old Ben did not hire, fire, direct or control them in their duties. (Dec. p. 2, 3) The employee in question was not directly or indirectly under Old Ben's control. (Dec. p. 4)

Thus under these facts, Old Ben has been assessed a civil penalty of \$750.00 as a result of the poor safety practices of a construction company's employee over which they had no practical control. Furthermore, Old Ben's No. 2 Strip Mine was subjected to the potential closure sanctions of the unwarrantable provisions of section 104(d) of the Act not because of any action or inaction of Old Ben, but, according to the testimony of the inspector, because of the laxity of supervision by ANSCO and the act of the ANSCO employee in flagrantly committing the violation.

The transcript of the evidentiary hearing in this case indicates that the inspector felt he had been placed in an awkward position by the MSHA policy as enunciated by counsel at the hearing. In response to a question from the Judge as to why the inspector did not cite both the owner-operator and the independent contractor, the Secretary's counsel stated that "there are no regulations out now that state we can cite independent contractors for violations." (TR. 7) Counsel further stated:

"The present practice of the Secretary is to cite the owner-operators of all violations that are committed on the (mine) property ..." (TR.8)

The inspector was clearly aware of this policy to cite only owner-operators and not independent contractors. However, his testimony indicates that he sensed he was citing an improper party, but was helpless to remedy the situation because of the restrictions placed upon him.

7/ 30 USC §814(d)

Inspector Hensley was asked at the evidentiary hearing why Old Ben was cited instead of ANSCO. He replied as follows:

"I had no provisions to cite ANSCO at that time. We were aware of the law, the '77 Act that they were trying to promulgate laws for construction people to get them to stand on their own merits but at the time, there were no laws in effect at which there is not yet, as far as I am aware of, maybe there is but as far as I am aware of there is no law governing contractors. They still come under the jurisdiction of the mine while they are on mine property. If you will note on my citation, I did write in the body of the citation that it was ANSCO." (TR. 28)

There is, of course, a "law governing contractors." What does not exist, however, is a rational application of that law -- only a policy of what can best be described as one based principally on administrative convenience.

As noted by the majority, the Secretary made public in October 1978, a draft of proposed regulations establishing criteria by which independent contractors would be designated operators. On August 14, 1979, 17 months and 5 days after the effective date of the Act the revised proposed rules were published by the Secretary. In both the draft version and the final ^{8/} proposed version of the rules, the preambles make it clear that in determining liability as between the owner-operator and the independent contractor, the paramount concern is improved safety and health conditions for miners. I am in full agreement with that underlying premise. The preamble to the proposed rules published in August further states that "MSHA's experience under the 1969 Coal Act and the 1977 Act has been that persons controlling a mine are generally in a position to act more responsibly and effectively with regard to safety and health conditions at the mine." (F.R. p. 47747) I believe that conclusion of the enforcement arm of the Secretary is most important and should be given careful consideration. So as to fulfill the Congressional mandate to most effectively promote the health and safety of the miner, the Secretary then concludes as follows:

Accordingly, under the proposed rule the primary criterion for identification of independent contractors as operators would be whether the contractor will have effective control over an area of the mine during the performance of its work.

^{8/} The proposal of August 14, 1979, provides for a 60-day comment period. Accordingly the finality of the proposal is, at this point, tenuous.

In Republic, I set forth criteria I would utilize in determining the responsible party. Those criteria have much in common with what the Secretary proposes. What I fail to understand is why the implementation of principles with which the Secretary agrees would more effectively promote the safety and health of the miners must await this interim period of formal departmental rulemaking with all of its delays, some inherent and some not. No satisfactory answer to this question has been advanced. I do not believe there is one. 9/

Certainly, administrative convenience, in and of itself, is an inadequate reason to sacrifice miners' safety. But the Secretary argues that continuation of the policy of prosecuting owner-operators for independent contractors violations is not only rational but necessary. The Secretary states:

If each inspector were to exercise the Secretary's prosecutorial discretion without guidelines, as the inspector saw fit, the resulting unpredictability, confusion, and potential unfairness would harm the Secretary's enforcement program and, potentially, disrupt the mining industry. (Brief of Secretary, p. 27, Monterey Coal Company v. Secretary of Labor HOPE 78-469, et al.)

I believe that the Secretary has overstated the practical difficulties which inspectors encounter at the mine site in the vast majority of situations involving violations of independent contractors. The portions of the record cited above in the instant case serves to illustrate this point. The record reveals an inspector who knew through experience which party should have been held responsible, but who was unable to exercise this expertise as a result of the Secretary's interim policy.

The majority opinion correctly, in my view, outlines the Commission's role vis-a-vis that of the Secretary in reviewing the latter's enforcement policy. In this regard, I agree with the majority's statement that "... The Commission was intended to play a major role under the 1977 Act by reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis." [Emphasis supplied] Unfortunately, having said that, my colleagues defer again to the Secretary in this case, notwithstanding the facts of this case, let alone their own well articulated description of their roles as members of the Commission. One can only hope, in reading their decision, that their patience is growing thin insofar as the Secretary's failure to establish a policy that allows the enforcement of the Act against the

9/ While this issue is not before us, the question as to why one class of "operator" must be further defined beyond the statutory definition, gives me some problems. The Secretary's regulations will condition liability in the case of independent contractors but not in the case of an owner-operator. I find no such distinction in the Act.

"other operator," the independent contractor. Even more important it remains to be seen what their position will be if the Secretary continues to be dilatory in his promulgation of such a policy. Nothing in their opinion suggests an answer to this question.

For the reasons set forth herein and in Republic, I would reverse the decision of the administrative law judge.


Richard V. Backley, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1979

PEABODY COAL COMPANY : Docket Nos. VINC 77-12-P
 : VINC 77-13-P
 v. :
 : IBMA No. 77-57
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C. §961 (1978). Peabody is appealing the decision of an administrative law judge finding that it violated two mandatory standards of the Act, 30 CFR 77.404(a) and 30 CFR 77.1713(a). 1/

The two notices of violation were issued following a fatal accident at Peabody's Lynneville Mine. On June 18, 1975, the foreman assigned two mechanics to change a flat tire on a coal haulage truck. After the mechanics removed the tire from the truck, it was transported with a forklift to a storage area. They then lifted the new 2,500 pound tire onto one of the tines of the forklift and transported it back to the truck to install it. When the mechanics began to put the new tire on the truck they realized that two of the studs on the wheel were broken. They backed the forklift away from the hub of the wheel and parked it. One of the mechanics went to advise the foreman, who had left the vicinity, that a nut had to be welded on a stud before the tire could be replaced. The victim came and welded a nut to the stud. While the weld cooled, the victim and the mechanics took a coffee break. The foreman returned to the area while the men were on their break. He observed the parked forklift and saw the tire suspended 18 inches from the ground. When the men returned from their break, one of the mechanics noticed the forklift tines had descended so that the bottom of the tire was resting on its treads on the ground. As the mechanics and the victim approached the forklift the tire fell on its side, striking the victim and fatally injuring him.

The accident investigation revealed that during the time the tire was on the forklift its tines were slowly descending toward the ground due to hydraulic leakage. The leak was internal and not visible. It caused the tines to descend at a rate of approximately one inch per minute.

1/ Two additional alleged violations of 30 CFR 77.1708 and 30 CFR 77.208 were dismissed by the judge and are not at issue in this appeal.

79-10-20

In August 1973, a similar fatal accident occurred at Peabody's Will Scarlett Mine. During a tire changing operation a tire toppled off the tines of a forklift fatally injuring a mechanic. 2/ The foreman knew of the prior fatality.

The judge held that Peabody violated 30 CFR 77.404(a), which provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." He found "the operator was in violation of the section because of the internal hydraulic leakage" and assessed a penalty of \$6,000 for the violation.

We affirm the judge's finding of a violation of 30 CFR 77.404(a). The regulation imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation. The company admitted the presence of the hydraulic leak. In doing so, it admitted the forklift was not maintained in "safe operating condition." The existence of the violation was established. The company argues it could not violate the regulation without knowledge of the leak, and it would have us condition liability upon prior knowledge. This we cannot do. The regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability upon an operator regardless of its knowledge of unsafe conditions. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred.

The judge also determined that Peabody violated 30 CFR 77.1713(a). 3/ The judge acknowledged that the foreman did not know of the leak, but based on his knowledge of the past fatality, and the proximity of the tire and forklift to the truck, the foreman "should have realized that the lives and safety of the miners were dependent upon the integrity of the hydraulic system of the forklift truck." A penalty of \$6,000 was assessed by the judge.

We also affirm the judge's holding that the company violated 30 CFR 77.1713(a). The regulation is broadly worded and requires, among other things, that a designated certified person examine working areas for hazardous conditions as often as is necessary for safety and that any conditions noted be corrected by the operator. In this instance the foreman assigned the miners the task of changing the tire. He observed the unsecured tire hanging from the forklift in a working area. The

2/ See MESA v. Peabody Coal Company, VINC 74-927-P (May 3, 1976).

3/ Section 77.1713(a) provides:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

foreman knew of the prior accident. He should have known that the practice of changing tires with a forklift was potentially hazardous. The failure to correct the hazard by, for example, insuring that the hydraulic system was functioning properly, or by securing the tire, or by removing it from the working area constituted a violation of the regulation.

Finally, Peabody's contention that the judge erred in assessing penalties of \$6,000 for each of the violations is without merit. The penalties assessed are appropriate and will not be disturbed.

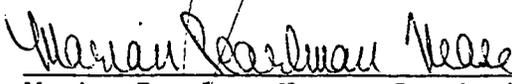
Accordingly, the judge's decision is affirmed.



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

Waldie, Chairman, and Backley, Commissioner, concurring in part and dissenting in part:

While we concur with the majority in affirming the administrative law judge's finding of a violation of 30 CFR §77.404(a), we must dissent from their conclusion regarding the violation of 30 CFR §77.1713(a). We do so because the findings of the judge as set out on page 6 of his decision do not support a violation of that regulation, 1/ the key to which is the "examination for hazardous conditions" and the reporting thereof.

1/ The Administrative Procedures Act requires the decision to include such support. 5 U.S.C. 557(c) reads, in pertinent part:

"All decisions ... are part of the record and shall include a statement of--

- (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; ..."

Either the majority has misinterpreted the findings of the judge or has rewritten them to conform to the record so as to support a violation of the regulation in question. Regarding the "hazardous condition" requirement of the standard, the judge found that the "lives and safety of the miners were dependent upon the integrity of the hydraulic system" (emphasis added). He went on to hold that, although the foreman had no personal knowledge of this hazard, such knowledge could be imputed to the operator. Evidently, the judge imputes this knowledge from the recognized fact that "hydraulic systems do occasionally leak" and the operator's "past experience with a similar fatality." However, the "similar fatality" to which he refers did not result from a hydraulic leak, the basis of the judge's findings, but involved similar tire changing procedures which produced the unfortunate results to which the judge refers. Accordingly, we find it difficult to impute knowledge of a hydraulic leak where there is no basis for such imputation in the record.

If the judge had made the findings attributed to him by the majority, we would have little problem in affirming him. However, such is not the case. The judge based his finding solely on imputed knowledge of the hydraulic leak, the fact of which, the record discloses, the foreman was unaware. The judge found no breach of the duty to inspect the forklift nor did he find any breach of the duty to report the hazardous conditions as to the latter. The judge specifically found that the foreman "did not know it [the forklift] was hazardous because he did not know of the hydraulic leak." Having said that, he then imputes knowledge of such leak based, in part at least, on a faulty premise--the operator's past experience with a similar fatality which did not involve a hydraulic leak. 2/ We do not believe such imputation is contemplated, permitted or warranted under the cited standard, yet alone the facts.

Furthermore, the majority opinion fails to address a major argument of the applicant. Counsel's brief argues that under the findings of the judge, a violation of §77.1713(a) is duplicative of a violation of §77.404(a) and the imposition of a penalty for each constitutes an unreasonable multiplication of violations and assessments. The judge found a violation of §77.404(a) on the basis that the hydraulic leak demonstrated that the operator failed to properly maintain the forklift and failed to remove it from service when it became unsafe. The judge then imputes to the operator the knowledge that maintenance and inspection

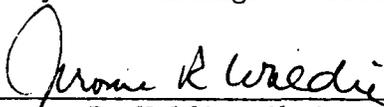
2/ It is far from clear as to the finding of a violation of §77.1713(a) is concerned, what role, if any, "common knowledge that hydraulic systems do occasionally leak" played. The opinion, as written, does not refer to this "fact" in support of the violation in question, but to the violation of §77.404(a).

of the forklift was not taking place and finds a violation of §77.1713(a) for failure of the operator to discover and correct the condition of the forklift in the course of the on-shift examination. In summary, the appellant has argued that an operator should not be sanctioned twice for what, in essence, is the same conduct--failure to discover the condition of the forklift. We agree. The majority refuses to disassociate itself from the finding of the judge that the "hazardous condition" necessary for a violation of §77.1713(a) consisted of the leaking hydraulic system on the forklift. In so doing, today's decision fails to cure what appears to us to be duplicative findings of the judge.

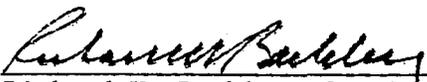
One final comment is in order. We do not believe that Congress intended our role as a reviewing body to include the authority to substitute our findings for that of the trial judge unless such findings are unsupported by substantial evidence of record. Section 113(d)(2)(A)(ii), Federal Mine Safety and Health Act of 1977.

The majority opinion provides no analysis as to whether the judge's findings upon which he bases his conclusion that §77.1713(a) was violated are supported by substantial evidence of the record. On the contrary, in order to support the violation, the majority provides supposition and example, none of which are part of the findings.

Accordingly, we would reverse the judge as to his conclusion that a violation of §77.1713(a) is supported by the findings of record.



Jerome R. Waldie, Chairman



Richard V. Backley, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1979

CLIMAX MOLYBDENUM COMPANY,	:	
a division of AMAX INC.	:	
	:	
v.	:	Docket Nos. DENV 79-102-M
	:	through
SECRETARY OF LABOR, MINE SAFETY	:	DENV 79-105-M
AND HEALTH ADMINISTRATION	:	
(MSHA),	:	
	:	
and	:	
	:	
OIL, CHEMICAL, AND ATOMIC	:	
WORKERS' INTERNATIONAL UNION,	:	
LOCAL 2-24410	:	

ORDER

On September 21, 1979, the Commission granted a petition for discretionary review, filed by Climax Molybdenum Company, of an administrative law judge's decision. Climax has filed its brief on review of that decision and has also filed a motion to accept attachments to its brief "as part of the record". The attachments are a deposition of an MSHA inspector, with an outline of the deposition; and a Mine Safety and Health Administration (MSHA) document purporting to interpret and explaining MSHA's enforcement of the silica dust standard. Climax states that the material would support its arguments in its brief, and that the Secretary of Labor would not be prejudiced by the granting of the motion, because attorneys for the Secretary were present at the deposing of the inspector and received copies of the deposition transcript, and because the Secretary supplied the MSHA document.

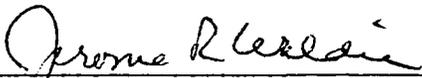
Section 113(d)(2)(C) of the Federal Mine Safety Health Act of 1977, 30 U.S.C. §801, states what constitutes the record on review of a judge's decision: the record upon which the decision of the judge was based, the rulings on the parties' proposed findings and conclusions, the judge's decision, the petition for discretionary review and responses thereto, the direction for review, and the parties' briefs on review. The section also states that "[n]o other material shall be considered by the Commission upon review. ... If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge." These provisions evince the Congress' view that the

79-10-21

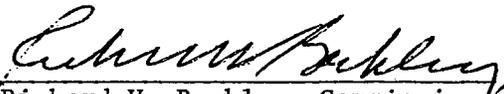
adjudication process is best served if the administrative law judge is first given the opportunity to admit and examine all the evidence before making his decision. The motion to accept the attachments is therefore denied; the attachments will not be considered by the Commission. See Helvetia Coal Co., 1 FMSHRC 26, 1 BNA MSHC 2070 (1979).

We note that Climax's brief relies upon the material attached to its brief. References to this material appear on pages 4, 5 and 12 of the brief. Within 15 days of the issuance of this order, Climax may either file revisions of those pages or a new brief that does not cite or rely upon the excluded material.

The Secretary of Labor has filed a motion requesting an extension of time for filing its response brief from November 5, 1979 to November 19, 1979. In view of the need for modifications in Climax's brief, the Secretary's brief is due within 20 days after Climax's new brief or revisions are served upon the Secretary.



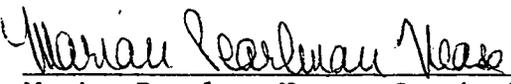
Jerome R. Waldie, Chairman



Richard V. Backley, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS.

OCTOBER 1 - 31, 1979

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 1, 1979

SECRETARY OF LABOR : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-29-P
Petitioner : A.C. No. 05-003001-03001F
v. :
: Dutch Creek No. 1 Mine
MID-CONTINENT COAL AND COKE :
COMPANY, :
Respondent :

DECISION

Appearances: James Abrams, Esq. and James Barkley, Esq., Office
of the Solicitor, Department of Labor, Denver
Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney and Balcomb,
Glenwood Springs, Colorado, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding was heard on the merits before Judge Malcolm P. Littlefield, in Denver, Colorado, on June 12 and June 13, 1979. Judge Littlefield retired from Federal service on June 30, 1979, before he was able to issue a decision in the case. With the consent of counsel, the matter was assigned to me for decision based upon the record made before Judge Littlefield and the contentions of the parties. Posthearing briefs were filed on behalf of both parties. To the extent of the proposed findings and conclusions are not incorporated in this decision, they are rejected.

Philips Gibson, Jr. and Freeman Staples, Federal mine inspectors, testified on behalf of Petitioner. Donald Ford and John Turner testified on behalf of Respondent.

The case arises under the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* The Act was amended by the Federal Mine Safety and Health Act of 1977 which became effective March 9, 1978. The amendments do not affect this case.

STATUTORY PROVISION

Section 109 of the Coal Mine Safety Act provides in part:

The operator of a coal mine in which a violation occurs of a mandatory health or safety standard * * * shall be assessed a civil penalty * * * [of] not more than \$10,000 * * *. 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.

REGULATORY PROVISION

30 CFR 75.1725(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

ISSUES

1. Whether Petitioner established that the violation charged in the notice occurred; more specifically whether the Respondent was shown to have failed to maintain the hoist assembly and wire rope used in raising and lowering the ventilation door on the inby end of the No. 50 crosscut between No. 6 and No. 7 slopes in the subject mine in safe condition on January 17, 1978?

2. If a violation occurred, what is the appropriate penalty and with respect to the questions of gravity and negligence, was the violation related to the fatality which occurred on January 17, 1978?

MOTION TO REOPEN RECORD AND ADMIT EXHIBIT

On September 4, 1979, Petitioner moved to reopen the record for the purpose of admitting into evidence Petitioner's Exhibit G-2, a computer printout of the history of violations of the operator at the subject mine from January 18, 1976 to January 17, 1978. Respondent has not filed a reply. The motion is GRANTED and Petitioner's Exhibit G-2 is received in evidence.

FINDINGS OF FACT

1. Respondent, Mid-Continent Coal and Coke Company, on January 17, 1978, and prior thereto, was the operator of a coal mine in Petkin County, Colorado, known as The Dutch Creek No. 1 Mine, I.D. No. 46-01477.

2. The record does not contain evidence concerning the size of Respondent's business.

DISCUSSION

Petitioner's posthearing brief states that "this firm registered over 1-1/2 million production tons per year when the proposed assessment was issued." I have not found evidence in the record to support this statement either by way of testimony, exhibits, stipulations or otherwise. I can assume from Exhibit G-2 showing the number of prior violations that the operator is not small. In the absence of more specific evidence on this issue, I will treat the size of the business of Respondent as moderately large.

3. There is no evidence that the assessment of a penalty herein will affect Respondent's ability to continue in business, and therefore, I find that it will not.

4. Exhibit G-2 shows a total of 419 paid violations occurring at the subject mine between January 18, 1976 and January 17, 1978, including eight violations of 30 CFR 75.1425. I find this to be a substantial history of prior violations and if a penalty is assessed herein, it will reflect this finding.

5. The evidence establishes that Respondent showed good faith in promptly abating the condition after the notice was issued.

6. On January 17, 1978, a fatal accident occurred at the subject mine. The driver of a battery-powered scoop tractor was killed when his chest was crushed by a partially opened airlock door located on the inby end of the No. 50 crosscut between No. 6 and No. 7 slope in the subject mine.

7. On January 17, 1978, Philip R. Gibson, a coal mine inspector and a duly authorized representative of the Secretary, issued Respondent a notice in which he alleged a violation of 30 CFR 75.1725(a).

VIOLATION

8. On January 17, 1978, one of the two wire ropes used to lift the airlock door was frayed and abraded; four of its six strands were broken. The frayed portions of the cable would not pass through the pulley system used in lifting the door.

9. On January 17, 1978, the "keys" in the griphoist cranking lever used to raise the airlock door were missing and were replaced by a nail and a screw. It was necessary for one operating the lever to hold the nail and screw in place while operating the cranking lever with his other hand.

10. The condition found in Finding of Fact No. 8 was unsafe, in that it could result in injuries to miners if the cable broke.

11. The conditions found in Findings of Fact No. 8 and No. 9 were unsafe in that it rendered raising the door more difficult and required more physical exertion.

GRAVITY

12. Three employees were potentially exposed to the unsafe conditions found to exist in Findings of Fact No. 10 and No. 11, one on each shift.

13. The employees referred to above were material handlers who carried supplies to the working section. When such employees reached the door, they were required to leave their vehicles, open the outby door, drive through the door, lower the door and repeat the process for the inby door, thereby maintaining an airlock and preventing disruption in mine ventilation.

14. The door in question was 4 feet high, and 13 feet 9 inches wide with a 6 inch flap on each side. It was constructed of 1/4 inch plate steel, and weighed over 850 pounds. The capacity for lifting materials of the griphoist mechanism in question was 2,000 pounds.

15. The crosscut in question was 20 to 22 feet wide and 7 to 8 feet high.

16. On January 17, 1978, an employee of Respondent, the driver of a battery-powered scoop tractor was killed when his chest was crushed by the inby airlock door as he was driving through. There were no witnesses to the accident.

17. The tractor headlight was damaged, indicating that the vehicle struck the door in proceeding through the opening before the fatal injury.

DISCUSSION

Much of the testimony at the hearing and much of the discussion in the posthearing briefs of counsel is directed to the question of the cause of the fatality. Whether in fact the alleged safety violation caused the fatality is not per se an issue in this proceeding. However, if the alleged safety violation did or could have contributed

to a fatal injury, it would of course be important in determining the gravity of the violation. The evidence of record would not support a finding that the fatal injury was in fact the result of the conditions found herein to exist in Findings of Fact No. 8 and No. 9. However, the record does show, and I find that the conditions just referred to could have resulted in or contributed to serious injuries to miners including fatal injuries. The conditions were very serious.

NEGLIGENCE

18. The conditions of the wire ropes described in Finding No. 8 and of the griphoist cranking level described in Finding No. 9, were evident to visual inspection. They were or should have been known to Respondent's management as the result of preshift examinations. The conditions had existed at least for some days prior to January 17, 1978.

CONCLUSIONS OF LAW

1. Respondent on January 17, 1978, and prior thereto, was subject to the provisions of the Coal Mine Health and Safety Act of 1969, with respect to the operation of the subject mine.
2. As an Administrative Law Judge of the Mine Safety and Health Review Commission I have jurisdiction of the parties and subject matter of this proceeding.
3. The conditions found in Findings of Fact Nos. 8 and 9 constituted a violation of the mandatory safety standard contained in 30 CFR 75.1725(a).
4. The violation described in Conclusion No. 3 was very serious and was the result of Respondent's negligence.
5. Based on the above findings of fact and conclusions of law and considering the criteria in section 109 of the Act, I determine that an appropriate penalty for the violation is \$7,000.

ORDER

Respondent is ordered to pay, within 30 days of this decision, the sum of \$7,000 as a civil penalty for the violation of the mandatory safety standard in 30 CFR 75.1425(a) on January 17, 1978.


James A. Broderick
Chief Administrative Law Judge

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

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-61-PM
Petitioner : A.O. No. 40-00840-05001
v. :
: Knoxville Quarry
IDEAL CEMENT COMPANY, :
Respondent : Docket No. BARB 79-267-PM
: A.O. No. 40-00840-05002
:
: Knoxville Mine & Mill

DECISIONS

Appearances: Darryl A. Stewart, Attorney, U.S. Department of
Labor, Nashville, Tennessee, for the petitioner;
Norman H. Williams, Esq., Knoxville, Tennessee,
for the respondent.

Before: Judge Koutras

Statement of the Cases

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent on October 26, 1978, and January 31, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, charging the respondent with eight alleged violations of certain mandatory safety standards set forth in Part 56, Title 30, Code of Federal Regulations.

Respondent filed timely answers to the proposals, a hearing was convened at Knoxville, Tennessee, on May 23, 1979, and the parties appeared by and through counsel. Respondent filed posthearing proposed findings and conclusions, but petitioner did not.

Issues

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

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

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 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 CFR 2700.1 et seq.

Discussion

Docket No. BARB 79-61-PM

The proposals for assessment of civil penalties filed in this docket allege seven violations set forth in the following citations:

Citation No. 107001, March 14, 1978, 30 CFR 56.9-87, states as follows: "The automatic reverse alarm for the b w 15 quarry haulage truck did not function properly when the truck was backing up to be loaded by the shovel in the quarry."

Petitioner's Testimony

MSHA inspector Donald F. Downs testified that respondent operates a quarry where material is extracted and hauled approximately half a mile out of the quarry to the primary crusher where it is sized and processed through more crushers, mills, slurry tanks, kilns, and then to the bagging system. Some of the ingredients for the cement product come from gypsum, limestone, clay, and iron, and after the ingredients are combined, the cement is bagged and loaded on flatbed trucks and hauled to or loaded into railroad cars.

The inspector confirmed that on March 14, he issued Citation No. 107001 and served it upon Dave Ross, respondent's safety director,

after finding that the automatic reverse alarm was not working on the quarry haul truck LW 15. The haul truck was hauling quarried broken limestone from the quarry to the primary crusher and the backup alarm was not working, and prior to issuing the citation, he discussed the condition with Mr. Ross and possibly the quarry foreman (Tr. 10-14).

Inspector Downs indicated that while an alarm was installed on the truck, it was not functioning properly in that it was not emitting a noise louder than the surrounding noise, and, in fact, was not emitting any sound. He did not notice anyone around the vehicle while it was operating, and did not notice anyone giving signals prior to the vehicle being placed in reverse. Prior to his issuing the citation, Mr. Ross did not say anything about the alarm other than to acknowledge that it was not working, and he indicated that it was going to be repaired. In Mr. Downs' opinion, any men immediately behind the truck would be obstructed, and a person would have to be at least 25 to 30 feet behind the truck before the rear view mirror would be able to pick him up. He does not know how long the truck was operating prior to his citing the condition. He fixed the abatement time as 3 p.m., March 14, 1978, and it was abated at 1:30 p.m. the same day. The operator corrected the condition in good faith (Tr. 15-18).

Inspector Downs stated that the hazard presented was the possibility of someone being run over, but the chance of this happening was improbable due to the fact that there was no flow of traffic in the area during the hour or so he was there. A heavy-duty truck running over someone could result in a fatality, and Mr. Downs believed that the condition should have been known by the operator because the quarry foreman is present in that area at various times during the day (Tr. 18-20).

On cross-examination, Inspector Downs testified that when the truck was purchased he was aware of no safety requirement that required it to have an alarm installed, and he did not know how long the alarm had been inoperative. He did not discuss the matter with the truck driver, the driver may or may not have known that the alarm was inoperative, and because of the outside noise he may not have been able to hear the alarm while the truck was in operation. Compliance could have been achieved by having a flagman or an observer present, but he saw no such person there, although the loader operator was present. He stated that the truck does back up because it has to do so in order to dump and he has seen it dump in the past. He does not remember whether or not he ever rode in the truck, and could not state whether there was an obstructed view from the driver's seat (Tr. 25-38).

On redirect examination, Inspector Downs testified that quarry operations and mills were covered by the 1969 Act and that since the alleged violation occurred at a quarry, it would have been covered under the 1969 Act even though the cement processing plant and the

mill may not have been covered under the 1969 Act. He did not know whether there was any state, Federal, or other type of law prior to the enactment of the subject standard that required a reverse alarm. The front-end loader would not be able to specifically see the truck driver. Whether or not the truck driver can hear the reverse alarm depends on how loud the backup alarm sounds and this is because the alarm must be louder than the surrounding noises. The truck engine is located in front of the reverse alarm, which, in turn, is in front of the driver, and the truck driver must also be able to hear the reverse alarm (Tr. 38-42).

In response to a question from the bench, Mr. Downs indicated that he did not review the company records on the particular truck to see whether it had been previously inspected, and he indicated that the driver is supposed to check out the truck (Tr. 44). He also testified that he had been in a truck of the same model before, but had never been in the driver's seat, and he does not recall the weather on March 14, 1978 (Tr. 47). Since he has never been in the driver's seat, he did not know whether the truck driver could see an observer to the rear (Tr. 51).

On further redirect examination, Mr. Downs testified that the normal truck-operating procedure is to back up and take a load of limestone up to the primary crusher. There were three trucks operating out of the quarry with one driver and one loader operator on each truck. The loader operator simply loaded materials on the back of each truck (Tr. 52).

Citation No. 107002, March 15, 1978, 30 CFR 56.14-6, states as follows: "The guard for the coal elevator chain drive was not kept in place. The coal elevator is located over the east end of the kiln building. The repair crew failed to replace the guard when through repairing the chain drive."

Petitioner's Testimony

Inspector Downs testified that he issued Citation No. 107002 because the guard for the coal elevator chain drive was not kept in place, and he served the citation upon Dave Ross. He observed that the top half of the guard for the enclosed chain drive was off and lying some 2-1/2 feet from the walkway. The elevator had been guarded, but the guard was not secured in any fashion, and it was lying on the ground (Tr. 56-58).

According to Mr. Downs, the bucket coal elevator brought the coal up to the top of the kiln building where it was dropped onto a screw conveyor for transportation to a storage tank. The walkway by the screw was full of coal and clinker dust, and the fact that he saw clinker dust on the walkway and the screw full of coal indicated to him that the buckets were operating. The kiln was burning, he could

hear the noise of the kiln, and he therefore concluded that the machinery was operating and thus required a guard. There were no tools or equipment located near the guard that would give an indication that it was being tested. The coal elevator was enclosed, he could not see the buckets, and he is uncertain as to whether he ever saw the chain moving (Tr. 59-62).

Mr. Downs further testified that he does not know whether the guard was replaced before the equipment was operated, although it is possible that it was. Other than the inspection party, there was no one else in the vicinity, and although there was no pedestrian traffic around the unguarded chain, the coal operator and the crusher operator pass by the unguarded chain three or four times a day while they are checking the chutes (Tr. 63-68). Although he did not see a repair crew at this location, Mr. Downs testified that he knows that the repair crew was responsible for failing to replace the guard because they are the only persons in the plant who do this work. Assuming that the repair crew did in fact fail to replace the guard when they were repairing the chain drive, it was negligence to leave it unguarded and not be around it (Tr. 63).

On further recross-examination, Inspector Downs testified that he does not know how long the guard had been off, and he elected to cite the condition as a violation of section 56.14-6 rather than 56.14-1 because it was not necessary that the machine be operating at the time in order to create a hazard. The only reason for anyone taking the guard off would have been either for testing or maintenance. Abatement of the condition was performed immediately and even before the citation was reduced to writing (Exh. P-2). There was no guarding by "location," and the provision of section 56.14-6 stating that "the guard shall be securely in place while machinery is being operated," does not mean to him that the machinery must be in operation at the time it is observed before a violation can be issued, and this is because the machinery will eventually be started up and operated.

In response to questions from the bench, Inspector Downs stated that in his experience, he does not consider guard railings or hand-railing to be acceptable in lieu of the guarding requirement. The walkway in question is not a normal course of travel for people in and out of the plant, but rather it is a place that somebody would go to do some specific chore (Tr. 77).

Respondent's Testimony

Alphas K. Klashak, respondent's safety manager, testified regarding the safety standards issued pursuant to the 1977 Act, and indicated that he had experienced difficulties in obtaining copies of the standards. He indicated that in addition to being

covered by state mining laws, safety regulations, workman's compensation laws, union demands, union contracts on safety, respondent also has instituted company policies on safety. There have been inconsistencies or conflicts between all of the various regulatory groups and bodies, and from 1969 or 1970 until the fall of 1976, respondent was under the jurisdiction of OSHA, and therefore both the backup alarm and the conveyor had previously been regulated by OSHA. Respondent did its best to comply with former regulations under OSHA and is presently trying to comply with regulations under the 1977 Mine Safety Act.

With respect to the alleged violation pertaining to the backup horn, Mr. Klashak testified that he spoke with the driver about a week and a half after the inspection, and during that discussion, he specifically asked the driver if he had complied with company policy by checking the backup alarm that morning before he took the truck from the yard. The driver advised him that the backup alarm was working when he left the yard that morning because he put the truck in reverse before starting the engine, and he further stated that the truck engine makes so much noise it cannot be heard anyway. No one else was in that area other than the loader and the truck driver (Tr. 89-90).

Mr. Klashak stated that although the truck backs up to the loader, the truck driver knows when to stop because he usually watches the loader operator, and the loader operator signals to him with his hand, and this is the universal procedure that is followed. Although respondent has taken steps to put a backup alarm on all of its equipment, and has attempted to maintain such alarms to the best of its ability, it cannot have a mechanic riding on the truck to repair such alarms when they break down. The truck in question was a 1962 model, and the backup alarm which had been in place for a number of years had been installed to meet OSHA requirements. The reason why the alarm was not working was due to a simple maintenance problem, namely, the vibration of the truck had loosened the activating device and all that was necessary to correct the condition was to reposition the alarm on the shift rod and tighten down a screw that was loose (Tr. 91-92).

With respect to the alleged violation involving the chain drive, Mr. Klashak stated that there is a walkway around the other side of the top of the conveyor where the drive is located, but this is not in the area that is frequented by the person who traverses the bucket elevator and the coal conveyor system once a day to check on the operation and condition of the chain, belt, and the walkway (Tr. 92). In his opinion, the machine in question is guarded by location, and as he recalls, there is some semblance of a guard installed. It is difficult to gain access to the side of the conveyor because one has to squeeze through some tight areas in order to reach the unguarded area. The only people who are in the unguarded area are maintenance personnel who would be there to test the machinery and to make necessary repairs when it was not working.

Mr. Klashak stated that even with the guard installed, it is possible to get into the chain drive by sticking one's arm in a little place around the edge of the shaft, but to do so would be to attempt suicide. One could reach over from the other side of the conveyor and possibly get caught in the conveyor while doing so. With the guard on at all times, and never removed whether the machinery is running or not, he would not expect a citation to be issued under normal circumstances. However, there is still the remote possibility that someone could be hurt with or without the guard, e.g., someone could break his arm falling on the guard (Tr. 94).

On cross-examination, Mr. Klashak testified that he was not present when the inspections were conducted and that his knowledge concerning the citations was derived from discussions with others relating to questions and problems that were raised by the inspection. He does not know whether the operator of the loader actually waved to the driver, and he indicated that the truck and the loader both move at different times. He could not say who moves last, the truck or the loader (Tr. 95-98).

Mr. David Ross, respondent's plant administrator at the time the citations issued, testified that respondent has a safety program, safety guidelines, and conducts inspections. He was present when the backup alarm citation was issued. He explained that the backup alarm device failed to operate because the activating switch was mounted on the shift lever so that when the shift lever was put into reverse position, it would activate an instantaneous on-off switch, and as long as the reverse lever was in the reverse position and the switch was activated, the alarm would sound. In this case, the mounting brackets had worked loose due to the vibrations caused by operating the truck up and down the roads that day, allowing the switch to move out of the range of the shift lever. When the shift lever was moved to the reverse position, it would not physically activate the switch. These events could have occurred at anytime, and the truck operator's last trip down the road could have provided sufficient vibration to jar the mounting loose. The truck in question is a heavy-duty truck which makes a lot of noise, and he was unable to hear the backup horn when driving the truck with the windows down and with the engine operating at excessive rpms. When the window is rolled up, he cannot hear the backup alarm. The front-end loader gathers a bucket of material and waits for the truck to back up into position to be loaded, and the loader operator signals the driver either visually or audibly, by blowing the horn, to let him know when he is in position.

At the time of the inspection, Mr. Ross indicated that he and the inspector and an employee member of the plant safety committee were watching the loading operation, but were unable to hear the backup alarm. No one else is required to be between the loader and the truck, and normally no one is there. Regardless of whether or not there is a backup horn, the truck driver has to know when to stop,

and he knows when to stop either by seeing a signal or by visually observing his position. There is nothing to obstruct the view of the driver of the front-end loader since he positions himself and his machine where he can be seen by the truck driver and where he can see the truck driver. Thus, both parties have at all times full view of each other, and abatement was achieved immediately (Tr. 106-112).

Mr. Ross testified that he was present when the inspection was made on the guard on the chain drive. The physical location of the headwheel, or the top of the elevator, is on a walkway-type platform at the top of the kiln building, and the chain drive is on the side away from the normal passageway or walkway where any employee would be required to be during the normal course of his duties. An employee would have to walk around both the head wheel of the elevator and the screw conveyor to reach the chain drive or the elevator. There is a guard which is fabricated for the chain drive, but he could not recall when it was installed, although he knows that it was years ago. Other than to perform maintenance on the chain and drive, he knows of no other reason for the guard to be removed, and when such maintenance is performed, the chain drive is always shut down. The guard in question was put back on before the citation was even written (Tr. 113-115).

On cross-examination, Mr. Ross testified that the truck involved was a Leternal Westinghouse 27-ton unit with a bed approximately 20 feet in length, and 10 feet wide, and he has seated himself in the driver's seat of one of the trucks. The truck is equipped with side view mirrors, and assuming someone was standing 1 foot behind the end of the truck in the center of the truck, the driver would not be able to see that person since his view would be obstructed by the end of the truck bed. At the time of the alleged violation, the truck began to back up approximately 50 feet from the loader. He simultaneously observed the full course of reverse as well as the loading process, and was standing at a position that enabled him to also see the full side of the loader as well as the full front of the truck. The loader was positioned at right angles to the direction of travel that the truck was backing at, and he was able to see the left side of the driver of the loader. He did not hear any horn, noise, or audible reverse being emitted at the time of the alleged violation, and he could not state whether he saw the loader operator put his hands up or hear him beep his horn. With regard to the chain drive, the repair crew would be the only persons traveling completely around the housing walkway (Tr. 115-121).

Citation No. 107004, March 15, 1978, 30 CFR 56.20-3, states as follows: "The walkway by the coal screen feed over the outside coal storage tank was not kept clean of coal buildup and clinker dust. The coal and clinker dust was built up to where footing was unstable."

Citation No. 107005, March 15, 1978, 30 CFR 56.20-3, states as follows: "The walkway for the incline coal conveyor belt at the east

end of the kiln building was not kept clean. A build up of clinker dust and coal on the walkway made the footing unstable. The coal belt operator traveled this walkway daily to check the coal chutes."

MSHA inspector Downs confirmed that he issued Citation No. 107004 because of the buildup of coal and clinker dust on the coal screw walkway which runs the full length of the screw. Clinker dust is dust that originates from the clinkers of the kiln, and "clinker" is dried cement. The walkway involved was elevated, approximately 20 feet in length, and was being used by respondent's employees. It was located on top of a coal storage tank which was in a cone shape and it was approximately 40 feet off the ground. The walkway itself was flat as opposed to angled, and the clinker dust was crushed up coal which was compacted rather than being hard (Tr. 121-124).

The clinker dust and coal material was approximately 2- to 2-1/2 feet deep and was built up throughout the entire length of the walkway. The width of the walkway was approximately 3 feet, he did not take a cross-section measurement of the depth of the material, and he was given no explanation as to why the condition existed. The purpose of the standard cited is to prevent someone from slipping and falling, and in this case, if an individual had fallen at the highest point, he could have fallen off the walkway onto the tank and then down approximately 40 feet. While coal is not slippery by nature, clinker dust is slippery. The condition should have been known to management, and he believed that respondent was negligent in not keeping the area cleaned. One person would go to the area to check it out. He allowed 2 days, that is, until March 17, 1978, to abate the condition, and it was abated on March 15 (Tr. 125-129).

Mr. Downs testified that he also issued Citation No. 107005, alleging a violation of 30 CFR 56.20-3, and served it upon Mr. Ross. He issued the citation after walking down the elevator walkway, where he observed some material, namely, coal and clinker dust, built up on the inclined belt of the conveyor to the top of the kiln building in certain areas, and the accumulation ranged from 6 to 8 inches in depth. The buildup of the material across the width of the sidewalk would fluctuate where it would be rolling or dipping in and out. However, the material had accumulated throughout the entire length of the walkway with the greatest accumulation at the top rather than towards the bottom. The coal crusher operator was exposed to the accumulation since he walked up the belt or walkway when he checked the chutes to see if there was any plugging. If an employee slipped and fell on the walkway, it is possible that he could have fallen completely off the walkway. In his opinion, the condition should have been known by the operator, and at the time that he issued the citation he did not believe that the operator exercised any care in preventing the condition from occurring. He allowed 2 days for abatement, that is, to March 17, 1978, but the condition was abated the same day that the citation was issued, that is, March 15, 1978, at 3:45 p.m. (Tr. 131-135).

On cross-examination, Mr. Downs testified that both conditions were corrected and abated before he reduced the citations to writing. The unsure footing would result from the material rolling or moving around, and while the handrail on the walkway would protect a person from falling off, it would not adequately protect a person from falling off in this case because of the accumulation and material buildup on the walkway which placed the handrail at knee level. He did not know how long it took for the material to accumulate, and he did not know how often one would use the walkway (Tr. 135-140).

Mr. Downs testified that Mr. Ross told him there was a leak in the breakover screw point. Mr. Downs conceded that when he filled out his "inspector's statements," he noted that the condition or practice cited in Citation Nos. 107004 and 107005 could not have been known or predicted. With regard to gravity, he indicated that it was improbable that any harm would have occurred as a result of the cited conditions, and in fact the condition was abated before the citations were ever written up. His last prior inspection of the mine was around 1977, and he is unable to remember whether he cited the same walkway or not (Tr. 141-151).

Mr. Downs stated that the cleanup process took 2 or 3 hours since the material involved was not solidified like cement. The walkway around the screw consisted of loose material, namely, crusher coal with clinker dust mixed into it, and the elevated inclined walkway had solid material on it which he believed was coal with clinker dust spilled onto it. The accumulation did not move, nor was it unstable, and it was possible to trip over it due to the fact that it was not completely level. It was not "clean and orderly," and one had to hold onto the handrail in order to walk down the walkway (Tr. 159-160). Approximately four or five men were dispatched to clean up the walkways, and this resulted in the walkway being cleaned up before the citation was written (Tr. 161-162).

Respondent's Testimony

Mr. Klashak testified that the material on the walkway that was cited in Citation No. 107004, consisted of clinker dust and coal dust, the coal dust being of a course, grainy material that has not been pulverized into the finest that is necessary to feed the furnace at that point, but it is fine with a consistency a little bigger than course sand. In explaining the cause of the accumulation, he indicated that when the material is traveling up the conveyor, if a blockage occurs in the conveyor system, in the screw conveyor, or any of the transfer hoppers, some moist material may become solidified and it can stop in the mouth of the conveyor, build up a pile of material, dump it on the conveyor, and in a very short period of time, there can be an accumulation of 2-1/2 feet or more. Dampness or moisture in the air could cause the clinker dust to "set-up" in a very short period of time, and the crew had not yet had an opportunity to clean up, and

this would also apply to Citation No. 107005, since it involved similar conditions (Tr. 167-170). He was not present on the date that the citations were issued. The platform walkway was approximately 20 to 30 feet long, but four or five men would not have room to be on the platform at the same time because the spill was not the whole length of the conveyor walkway (Tr. 170-175).

Citation No. 107006, March 15, 1978, 30 CFR 56.14-1 states: "The pinch point between the take-up pulley and the cross conveyor belt that runs between the coal crusher and incline coal conveyor belt was not guarded. The coal belt operator walks by this takeup pulley several times a day."

Petitioner's Testimony

Inspector Downs confirmed that he issued Citation No. 107006, citing a violation of section 56.14-1, because there was an exposed pinch point between the belt and the takeup pulley. The "pinch point" is the place of initial contact where the belt and pulley join. The takeup pulley was accessible, there was a walkway immediately next to it, the pinch point was approximately 6 to 8 inches above the walkway, and the walkway was within 4 or 5 inches of the pulley belt. He believed it was possible for a person to become caught in the pinch point and be injured (Tr. 180-183).

Mr. Downs testified that he has never seen anyone injured by being caught in a pinch point, nor has he investigated any such accidents, but MSHA "fatalgrams" occasionally come through his office where such incidents are reported, and he has seen films concerning such hazards (Tr. 184).

On cross-examination, Mr. Downs testified that a guard is something that will cover a tail pulley, a head pulley, conveyor belt drive, and takeup pulley, etc., at the pinch point. At the time he observed the tail pulley, there was no guard on it, but there was a guard on it at the time he abated the citation. Despite the presence of a guard, it is humanly possible for someone to get into a pinch point if a person wishes to do so. In his view, section 56.14-1 requires that all kinds of pulleys be guarded, and even though the standard specifically states that head, tail or takeup pulleys have to be guarded, the language "and similar exposed moving machinery parts" covers the citation in question (Tr. 193). He could not recall the size of the unguarded opening, and even though the pulley was designed and installed under other safety regulations, he would still cite it under section 56.14-1, if it were not guarded. A corrugated metal covering was put over the tail pulley in order to abate both Citation Nos. 107006 and 017089, and in his opinion, good faith was shown (Tr. 191-195). On Citation No. 107006, he indicated that the condition "could not have been known or predicted," but on Citation No. 107089, he indicated that the condition "should have been

known to the operator" since there were other guards on other takeup pulleys in the plant. It was possible for someone to trip on the walkway itself, although he did not cite the walkway. There were handrails on the walkway, and it would not matter whether or not machinery was running insofar as a hazard is concerned. He would issue a citation regardless, since he assumes that machinery is going to be operating in the future, and the coal crusher operator walked through the area (Tr. 195-198).

Mr. Downs testified that the reason the "good faith" portion of his inspector's statement was not filled out on Citation Nos. 107006 and 107089, was due to an oversight on his part. He then corrected himself with respect to Citation No. 107006, and stated that since Citation No. 107006 was not abated the same day that it was issued, it is customary for an inspector to fill out a second sheet pertaining to good faith. He did fill out a second sheet, however, but he has no idea what he indicated on it with respect to whether the condition was corrected within the time specified for abatement, or whether management took extraordinary steps to gain compliance. He assumes that extraordinary steps were taken to gain compliance, since the condition had been corrected when he arrived at the mine and he believes that Mr. Ross told him that the condition was corrected within the time specified. With respect to Citation No. 107089, Mr. Downs indicated that the condition was abated within the specified time and he believes that management exhibited good faith. Even with the recommended guards installed, it would still be possible for someone to go to the plant and stick his hand in both pulleys that are involved in Citation Nos. 107006 and 107089, assuming that person really wanted to get into the pulleys (Tr. 199-202).

Respondent's Testimony

Mr. Klashak testified regarding Citation Nos. 107006 and 107089, and he indicated that there are differences in different kinds of pulleys. The American National Standards Institute (ANSI) recognizes that in any conveyor system certain pulleys are guarded by their relative position inside the conveyor frame. At the locations cited, there was a kickplate to keep tools or a foot from protruding over the walkway, and there was also a stop cord, and these were safety devices installed by respondent. Despite the fabrication of a guard over the particular bend pulley cited in Citation No. 107006, it did not completely seal the bend and it is still reachable by someone's hand. It would be possible for someone to lay down on the conveyor and stick his hand in, and it would also be very easy for someone, if he wanted to do so, to get his foot in over the guard and over the existing kickplate. In his view, there has been no substantial change in any danger or hazard from that which existed before the citation was issued. Prior to the time the citation was issued, there was no hazard, and if any hazard did exist it would have been only caused by someone intentionally trying to injure himself (Tr. 210-214).

Mr. Klashak stated that with regard to Citation No. 107089, as well as Citation No. 107006, the conveyor system was designed according to ANSI Standards, and it also had a stop cord and a kickplate. In his opinion, someone could intentionally get to the pulley cited, even after a guard was put on it, and there was a nonslip, grid surface on the walkways near both of the pulleys in question (Tr. 214-215).

On cross-examination, Mr. Klashak testified that the kickplate on both conveyors is approximately 4 inches high and the top of the bend pulley is approximately 4 inches above the base of the conveyor walkway at the point where the alleged violation occurred. He was unable to say how high the pulley is located above the kickplate, and he did not know how long the belts had been installed, but he did know that they were installed prior to the time he came to work for the respondent (Tr. 219-220). He believed it would be extremely remote for anyone to come in contact with the pulley, except if it were done intentionally (Tr. 221).

Citation No. 107007, March 15, 1978, 30 CFR 56.11-1, states:

A safe access was not provided for the kiln operator to the kiln floor due to the excessive material buildup. An area 40 feet by 40 feet on the kiln roof over the kiln controls had approximately 20 to 24 inches of clinker dust buildup on the roof. The cross beams supporting the roof in this area were bent due to the weight on them.

Petitioner's Testimony

Inspector Downs confirmed that he issued and served upon Dave Ross, Citation No. 107007, alleging a violation of 30 CFR 56.11-1, after finding an excessive material buildup on the roof above the kiln floor. Due to the conditions, he believed that safe access was not provided for the kiln operator, and people who travel through that area. The roof area above the kiln floor was approximately 40 feet by 40 feet, and the material there was approximately 20 to 24 inches deep. Prior to the issuance of the subject citation, he had read an MSHA fatalgram concerning two incidents of fatalities resulting from roof cave ins due to clinker dust buildup, and he was of the opinion that due to the buildup of material on the roof in question, the person working below the roof was not provided safe access (Tr. 228-231). He could not recall what he stated in his inspector's statement regarding the elements of negligence or gravity, and he did not know exactly how many people were working on, or had access to, the kiln floor (Tr. 234).

On cross-examination, Mr. Downs indicated that he issued the citation because of "alarm" over the previous incidents brought to his attention, and he also received complaints from some of the men

working in the area. He cited section 56.11-1 because this was the closest standard available, and he confirmed that everyone does not go under the kiln roof to reach their work station (Tr. 234-235). He looked at the roof crossbeams and thought they were bent due to the weight of the dust buildup, but he did not know how long the crossbeams had been in that condition. Even if he knew, he would still have issued the citation, because he believed the roof was going to "imminently fall" (Tr. 237). Although MSHA technical support is available to test crossbeams, he talked to no structural engineers about the conditions, performed no tests to determine the structural integrity of the crossbeams, and he did not know the weight of the material on the roof (Tr. 240).

Respondent's Testimony

Mr. Klashak testified that the mill where the roof was located has since been closed down, but he viewed the roof about a week after the citation issued. After the roof was cleaned, the bend in the crossbeams was still there and he was informed that the "bend" condition of the beams had existed since the late 1950's (Tr. 245). He did not see the conditions cited since they were abated when he viewed the area (Tr. 246). Based on the buildup described by the inspector, he believed it was doubtful that the buildup was heavy enough to cause the deflection in the crossbeams. Abatement was achieved immediately (Tr. 248). Work is performed under the roof, and at the time the citation was issued, a decision had been made to shut down that portion of the mill, and it has in fact been closed down (Tr. 255).

Citation No. 107008, March 16, 1978, 30 CFR 56.9-2, states:

The brakes for the 922-B Caterpillar front end loader were not functioning properly. The loader was loading a dump truck at the gypsum stockpile. There were no persons in the immediate area. This condition had been reported to the yard foreman on Friday the 10 of March at the weekly safety meeting.

Petitioner's Testimony

MSHA's Inspector Downs testified that he issued the citation because the brakes on the front-end loader were not functioning in that they would not stop the equipment. The loader operator told him that the brake conditions were previously reported at a safety meeting held on March 10, and two or three times earlier than that, and that he had used the loader after making those reports. He issued the imminent danger order because the loader was operating throughout the plant around pedestrian traffic and the only way it could stop was for the operator to drop the bucket and "throw it in reverse." There was no pedestrian traffic at the time of the citation, and the loader was operating in the gypsum storage area, which was a

flat area, and it was loading a truck. He issued the order to take the loader out of service to repair the brakes, and to preclude anyone from being run over or the loader turning over on a hill. The loader was taken out of service immediately, and Mr. Ross admitted to him that he knew the loader had no brakes, but that it would be taken out of service (Tr. 258-264).

On cross-examination, Mr. Downs indicated that he was alone at the time of the inspection, and was on his way to the electrician shop after lunch when he happened to see the loader. He was aware of the requirement that a representative of the operator and miners should be given an opportunity to accompany an inspector. He stopped by the mine office in the morning to let them know that he was on an inspection, Mr. Ross was with him in the morning, and he was certain he issued other citations. He was on his way back from lunch when he saw the loader and cited it (Tr. 268-276). Mr. Downs stated he asked the loader operator to drive forward and brake his machine, and when he did, it would not stop (Tr. 285).

Respondent's Testimony

David Ross confirmed Inspector's Downs' testimony with respect to the manner in which he conducted his inspection. After Mr. Downs took the loader out of service, he (Ross) instructed the operator to drive it to the garage some 100 yards away so that a mechanic could determine the brake problem. Mr. Ross stated he was aware that the machine had a problem with the braking system and had heard that it had something to do with a leaking master cylinder. The delay in repair was caused by the fact that another production loader was being repaired, and he believed the loader cited could still be operated with reasonable care while the other one was being repaired (Tr. 280-283). He confirmed that he was not with Mr. Downs when the loader was cited, but had agreed to meet him after lunch (Tr. 283).

Docket No. BARB 79-267-PM

The proposal for assessment of civil penalty filed in this docket alleges one violation of the provisions of 30 CFR 56.14-1, as set forth in Citation 107089, issued on August 8, 1978, which states as follows:

The take-up pulley along side of the primary crusher belt walkway was not guarded so a person could not come in contact with the pinch point. An employee walks this walkway four or five times a day. The pinch point is approximately 6 to 8 inches above the walkway.

Petitioner's Testimony

Inspector Downs confirmed that he issued Citation No. 107089 and served it on Mr. Ross. The takeup pulley was alongside the walkway

within 4 or 5 inches away, and some 6 to 8 inches above the walkway, and a person could come in contact with it (Tr. 185-186). Abatement was achieved within the time permitted (Tr. 186). With respect to the negligence involved, he indicated on his inspector's statement that the condition "should have been known by operator," and based this conclusion on the fact that other takeup pulleys alongside the walkway were guarded. This was the only unguarded takeup pulley alongside this particular walkway (Tr. 187). Prior to March 14, 1978, he had been at the site of the subject citation, and had previously issued notices to respondent for lack of guards. He does recall, under the 1969 Act, however, having issued one notice for an unguarded takeup pulley which subsequently was guarded. Approximately 5 months after issuing Citation No. 107006, he issued Citation No. 107089, for the same violation (Tr. 187-190).

Respondent's Testimony

Mr. Klashak previously testified concerning this citation and that testimony has been considered by me and is incorporated herein by reference.

Findings and Conclusions

Docket No. BARB 79-61-PM

Citation No. 107001--Fact of Violation

Respondent is charged with a violation of 30 CFR 56.9-87, which states:

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

The standard requires that heavy-duty mobile equipment be provided with audible warning devices. I believe the obvious intent of this standard is to protect against miners being run over or otherwise injured by such equipment while it is operating in reverse, and the audible alarm requirement is obviously intended to provide such miners with an audible warning that such equipment is in operation in or around their particular work environment. The standard also requires that such heavy-duty equipment be provided with an automatic reverse signal alarm which is audible above the surrounding noise level. However, this second requirement is only applicable "when the operator of such equipment has an obstructed view to the rear." In the event that the view to the rear is not obstructed, the standard

permits an observer to be present to signal when it is safe for the equipment to back up. If such an observer is present, the equipment need not be provided with a reverse alarm.

The citation asserts that the haulage truck in question had a malfunctioning reverse alarm which was not operating when the truck was backing up to be loaded. Since the petitioner has the burden of proof to establish the alleged violation, it is incumbent on the petitioner to establish that the truck in question was "heavy-duty mobile equipment," that it was being operated in reverse at the time the alleged infraction was observed, that the reverse alarm was in fact inoperative, and that the operator of the truck had an obstructed view to the rear.

In support of the citation, petitioner presented the testimony of the inspector who observed the truck in operation and issued the citation. He testified that the truck was a heavy-duty truck and that a backup alarm was installed on the truck. However, after viewing the truck operating in reverse, and hearing no sound being emitted from a backup alarm which was installed on the truck, he surmised that the alarm was inoperative, and in effect treated the situation as if no alarm was in fact provided. However, the inspector indicated that he never sat in the driver's seat and made no determination as to whether the truck driver could see anyone to the rear while he was backing up. Although he expressed an opinion that any men working to the rear of the truck would be obstructed from view by the truck operator and that they would have to be positioned some 25 to 30 feet behind the truck to be brought within the view of the rear-view truck mirror, I cannot conclude that this conclusion on his part is supported by anything other than mere conjecture on his part. The inspector did not interview the truck driver, he did not position himself in the driver's seat, and he testified that he observed no one working around the vehicle and saw no one giving any signals to the driver before putting the truck in reverse.

I find that the evidence and testimony adduced with respect to this citation supports a finding that the truck in question was in fact heavy-duty mobile equipment, and that fact is not in dispute. I further find that while the truck was provided with a backup alarm at the time of the citation, it was inoperative and emitted no sound which was audible above the surrounding noise. As a matter of fact, it emitted no sound at all and respondent has not rebutted this fact. Further, although respondent attempted to establish that a loader operator was in a position to either give hand signals to the driver or sound his loader horn as a signal, I do not believe that the standard intended that someone operating another piece of equipment may also serve as an observer. I believe that the observer contemplated by the standard is a person such as a flagman who is in a position to devote his full time and attention to the operation of the truck and to insure that anyone on foot in the area is not exposed to any

danger of being run over. It seems to me that someone operating a loader would be more concerned with positioning the truck in such a fashion to facilitate loading and that his attention to that chore would preclude his observing other pedestrian traffic in the area.

Having established that the truck was of the kind that required an audible alarm while operating in reverse, and having established that the alarm was inoperative, the next critical question presented is whether the petitioner has established that the view to the rear was obstructed. I conclude and find that the petitioner has not established this fact by any credible and probative evidence. Since the inspector obviously issued the citation because he believed someone out of the so-called obstructed view of the driver could be run over while the truck was operating in reverse, it was incumbent on him to establish the rear-view obstruction. It seems to me that the most logical way to establish this fact is to either talk to the truck driver who should be able to tell the inspector whether or not he has an obstructed view. If the driver refuses to talk to the inspector, there is nothing to preclude MSHA from calling him as a witness to testify. Another most logical method is for the inspector to sit in the driver's seat of the truck and take a look for himself. In this case, the inspector did neither. Although respondent's witnesses testified on cross-examination that a person standing a foot behind the truck would be obstructed, I believe that the burden of initially establishing this point rests with the petitioner. All too often in proceedings of this type, the parties will engage in last-minute, after-the-fact, semantical boxing matches trying to reconstruct and back fill with purported facts to support their positions. I simply give little or no weight to such last-minute trial tactics. The citation is VACATED.

Citation No. 107002--Fact of Violation

30 CFR 56.14-6 provides that "[e]xcept when testing the machinery, guards shall be securely in place while machinery is being operated."

Respondent asserts at page 3 of its posthearing brief that "the citation stated that the coal elevator chain drive guard was removed for repair." This is not altogether accurate. Respondent is charged with a failure to keep the coal elevator chain guard in place. The statement in the citation indicating that "the repair crew failed to replace the guard" is a speculative gratuitous statement made by the inspector in his attempt to explain why the guard was not in place when he observed the condition. The inspector's testimony that he observed the top half of the chain drive guard off the equipment and lying next to the walkway is unrebutted, and I find that it supports the citation. Respondent has presented no credible evidence that the equipment was being tested, and the fact that the inspector did not specifically recall whether the chain drive was in fact moving at the time he observed that it was unguarded may not serve to vitiate the

citation. Although the standard does indicate that the guard must be in place while machinery is being operated, and makes an exception when it is being tested, the fact is that in this case the inspector's observations concerning the presence of coal in, on, and around the buckets, coupled with the fact that the kiln was burning and operating, led him to conclude that the machinery in question was in operation. Respondent has not rebutted this fact; nor has respondent presented any evidence that production was not going on, that the equipment was not operating, or that it was down for maintenance or testing. In these circumstances, I conclude and find that petitioner has established a prima facie case and has established that the guard was in fact not in place. The citation is AFFIRMED.

Gravity

The testimony establishes that the cited equipment had been guarded, but that part of the guard had been taken off and not replaced. The area in question was apparently not heavily traveled, there is no indication as to how long the portion of the equipment was left unguarded or whether anyone was exposed to any hazard, and abatement was immediate. In these circumstances, I cannot conclude that the citation was serious.

Negligence

The guard in question was apparently removed to facilitate some maintenance work, and someone apparently forgot to put it back on. Since it was lying in full view, I believe that it is reasonable to expect that someone inspecting the belt line would have observed it, and the inspector indicated that mine personnel would have occasion to pass by the area during the shift. In the circumstances, I conclude that the respondent failed to exercise reasonable care to insure that the guard in question was kept in place as required by section 56.14-6, and that its failure to do so constitutes ordinary negligence.

Good Faith Compliance

The evidence establishes that the condition cited was corrected immediately and I find that respondent achieved rapid abatement of the citation.

Citation Nos. 107004 and 107005--Fact of Violations

These citations charge the respondent with alleged violations of the provisions of 30 CFR 56.20-3, which provides as follows:

At all mining locations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and

orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

The inspector's testimony concerning the presence of accumulated coal and clinker dust, including his measurements regarding the extent of the accumulations and buildups of this material at the two locations cited has not been rebutted by the respondent, and I find and conclude that petitioner has established the violations as cited. The standard cited requires workplaces, passageways, and the floor of workplaces be maintained in a clean condition. The evidence establishes that the walkways in question were used by employees in the course of their work, and they therefore are "working places" within the meaning of the definition of that term as used in section 56.2 of the regulations. Although one may view the intent of the standard as a "housekeeping"-type of standard, the fact is that the locations cited were not kept clean as required by the standard. And, the fact that the inspector did not specifically cite the (a), (b), or (c) clauses of section 56.20-3 does not, in my view, render the citation illegal. The citations and testimony of the inspector adequately and specifically describe the conditions which the inspector believed were in violation of the cited standard, and I conclude and find that they support the citations which were issued.

Respondent's defense is based in part on an assertion that the spillage of material in question was caused by a sudden interruption and blockage which were promptly abated, and an argument that there are periods during the production cycle, such as construction and repair work, when obstructions do exist, and a suggestion that walkways or passageways simply cannot always be kept clean and orderly (Brief, p. 4). These are mitigating factors which I believe may be considered in connection with the criteria of negligence and good faith compliance, but they may not serve as an absolute defense to the violations. I take note of the fact that one does not reasonably expect a mine or plant to be "spic and span," and that the production process does generate dust, dirt, etc. However, the extent of the coal and clinker dust accumulations described by the inspector in the citations in question go beyond any reasonable "fall-out" that one would ordinarily expect in any production mine or plant. And, when such conditions deteriorate to the point where they constitute a potential hazard to the work force, one can reasonably expect that they be cleaned up.

During the course of his testimony in support of the two citations in question, the inspector candidly and honestly admitted that

when he filled out his inspector's statements with respect to these citations, he checked the box under the negligence portion of the form which states "[c]ould not have been known or predicted; or occurred due to the circumstances beyond the operator's control." He did so at that time because he knew that the assessments levied for these citations would be increased if there was any indication of negligence on the part of the operator and he "didn't want the companies to be fined so much" (Tr. 161-163). In justification of his actions in this regard, the inspector alluded to the fact that mine inspections under the newly-enacted 1977 Act were a "new ball game" for operators such as the respondent, and he apparently assumed that the operator in this case would not be aware of the newly-enacted requirements (Tr. 162). Respondent has now seen fit to raise this as an issue, and at page 5 of its brief asserts that the inspector "was obviously relieved to be able to express the hardship on the operator or trying to enforce brand new rules under an administrative scheme that was unfair and capricious," and that respondent should not be penalized in light of this testimony.

Although the actions by the inspector with respect to the foregoing incident raises a serious question of his credibility concerning his testimony of negligence connected with the citations, his candid admissions must be taken in context and must be considered in light of the then prevailing circumstances. In this regard, I take note of the fact that the citations here were issued on March 15, 1978, less than a week after the effective date of the 1977 Amendments to the 1969 Act, and while it is true that metal and nonmetallic mine operators were previously subjected to citations for violations of mandatory standards promulgated under the now repealed Metal and Nonmetallic Mine Safety Act, that statute did not provide for the imposition of monetary civil penalties for proven violations. In this limited context, the only significant change resulting from the enactment of the 1977 law was the fact that such mine operators are now liable for civil penalties for violations of mandatory standards, and in this sense it is a "new ball game" as suggested by the inspector. The enactment of the 1977 Act in no way lessened the responsibility of a covered mine operator to insure compliance with mandatory standards. Respondent's suggestion that it cannot be held accountable for or liable for the citations issued here is REJECTED, and the citations issued are AFFIRMED.

Gravity

I find that the conditions concerning the accumulations of clinker dust on the walkways constituted serious situations. The extent of the accumulations were such that it could have resulted in someone falling or tripping on the walkway, and possibly falling over the railing. In the circumstances, and notwithstanding the fact that the conditions were promptly corrected, I find that the citations were serious.

Negligence

In view of the extent of the accumulations of materials on the walkways, it is difficult for me to understand why corrective action was not initiated before the inspector happened on the scene. I can understand a sudden blockage or malfunction resulting in leakage of materials onto the adjacent walkways, but I cannot understand the apparent disregard for prompt cleanup before the arrival of the inspector on the scene. Although the inspector's credibility was damaged somewhat by his candid admissions with respect to the filling out of his inspector's statements, the fact is that there is ample evidence of record independent of those statements to support findings that the respondent failed to exercise reasonable care to discover the accumulations or to clean up the walkways prior to the arrival of the inspector on the scene. Accordingly, I find and conclude that the failure of the respondent to exercise reasonable care constituted ordinary negligence as to both citations in question.

Good Faith Compliance

I find that the record supports findings that the respondent exercised rapid abatement in correcting the conditions cited in both citations.

Citation No. 107006--Fact of Violation

This citation charges a violation of mandatory standard 30 CFR 56.14-1, which states: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

The inspector cited the violation because he obviously believed that someone walking by the adjacent walkway could possibly become caught in the pulley pinch point. Respondent's witness Klashak identified a photograph (Exh. R-3) of the pulley in question and stated that he took it a week or so after the citation issued. The inspector testified that the pulley pinch point, where the conveyor belt and pulley join, was approximately 6 to 8 inches above the adjacent walkway and that the walkway was some 4 or 5 inches from the belt.

In defense of the citation, respondent argues that the cited pulley was in fact a "bend pulley," and since a "bend pulley" is not specifically included in section 56.14-1, the standard does not apply. In addition, respondent argues that the reason the "bend pulley" is not specifically included in the standard is the fact that such pulleys were exempted out of recognition of the fact that due to their position on a belt system, they do not require guarding. Further,

respondent argues that the kickplate installed on the nonskid walkway would prevent someone from projecting his foot over the edge of the walkway and into the pinch point, and that a stop cord along the walkway would have stopped the conveyor belt instantaneously upon contact with the cord. Finally, respondent suggests that if any hazard did exist, it could only be the result of someone deliberately placing his hand or foot into the pinch point, and that even with the installation of the metal guard to abate the citation, someone could still deliberately reach into the pinch point.

Respondent's first defense is rejected. I conclude that on the facts here presented, the fact that a "bend pulley" is not specifically mentioned in the standard does not render the citation illegal. The standard refers to "similar exposed moving machine parts," and I conclude that the pulley in question, as described by the witnesses, is such a similar moving part and comes within the scope and intent of the standard, and respondent has not produced any credible evidence to convince me otherwise. As for the presence of the kickplate and stop cord, while this may mitigate the gravity of the situation, I am not convinced that those devices may serve as substitutes for the guarding requirements of the cited standard.

As I previously stated in a recent decision concerning the guarding requirements of section 56.14-1, Massey Sand and Rock Company, Docket No. DENV 78-575-PM (June 18, 1979), petition for discretionary review denied (July 27, 1979), I believe that when an inspector cites a violation of this section of the mandatory standards, it is incumbent on him to ascertain all of the pertinent factors which leads him to conclude that in the normal course of his work duties at or near such exposed machine parts, an employee is likely to come into contact with such exposed parts and be injured if such parts are not guarded. Here, it seems obvious to me from the inspector's testimony in support of the citations, that he relied chiefly on the fact that a person coming in contact with such unguarded machine parts could possibly be injured, and that conclusion was based on certain MSHA reports which apparently reflect that employees who are caught in unguarded pulleys are in fact injured. While I accept the general proposition that a person who becomes entangled in an unguarded machine part is likely to be injured, this conclusion simply begs the question as to whether a specific pulley location in a mine is required to be guarded pursuant to the requirements of section 56.14-1. In this regard, the key words of the regulatory language, "may be contacted," is critical to any determination as to whether the standard has been violated. As I construe that language, it means that on a case-by-case basis, petitioner must establish that the unguarded area in question, by its location and proximity to the comings and goings of mine personnel, exposes them to the hazard or danger of being caught in the unguarded pulley. In my view, this question can only be determined by consideration of the prevailing circumstances at the time the citation issued.

In the circumstances here presented, the evidence establishes that the exposed pulley pinch point was located above the level of the adjacent walkway which itself was within 4 or 5 inches of the conveyor belt. The inspector was concerned that someone walking along the belt could fall into the exposed area in the event he were to trip on the walkway. Although the inspector could not state the dimensions of the unguarded area in question, I believe the unguarded area was situated in such a location that would expose someone to the danger of being caught in the pinch point in the event they were to trip or fall while walking along the walkway. The question of the likelihood of this happening goes to the gravity of the situation and not to the question of whether or not the pinch point was readily accessible. The citation is AFFIRMED.

Gravity

Although the adjacent walkway was protected to some extent by a stop cord, kickplate, and handrail, thus mitigating somewhat the possibility of someone being exposed to the unguarded pinch point, the fact is that those devices would not prevent someone's leg or arm from becoming entangled in the unguarded pulley area were they to trip or fall on the walkway, which was in close proximity to the unguarded area. Further, while the chances of this happening may have been somewhat remote, a hazard did exist and I find that the condition cited was serious.

Negligence

Under the circumstances presented here, namely, the fact that the operator had installed kickplates, stop cords, and handrails, I believe it is reasonable to assume that the respondent could not reasonably have known of the fact that the pulley in question was required to be guarded, and in the circumstances, I cannot conclude that the respondent was negligent.

Good Faith Compliance

The evidence establishes that the respondent achieved rapid compliance of the cited condition and that is my finding.

Citation No. 107007--Fact of Violation

Respondent is charged here with a violation of the provisions of 30 CFR 56.11-1, which requires that "[s]afe means of access shall be provided and maintained to all working places." In this instance, the inspector cited the violation after observing accumulations of clinker dust on the roof of the kiln. He described the roof area which was allegedly covered as 40 feet by 40 feet and described the extent of the accumulation as "approximately 20 to 24 inches of clinker dust built up on the roof." The citation also asserts that

the crossbeams supporting the roof were bent due to the weight of the accumulated dust. He was concerned that the person working in and under the kiln roof area and persons passing under or through the roof kiln area were exposed to the danger of a roof collapse, and his alarm in this regard was triggered by the fact that he was aware through the reading of MSHA fatalgrams of identical roof cave-ins in other areas. Although the inspector indicated that MSHA technical support advice was available to him through consultations with structural engineers to determine the structural integrity of the kiln roof, he did not avail himself of this advice, no tests were performed to determine the strength of the roof support beams, and while he calculated and estimated the extent of the accumulations, he did not determine the weight of the materials which he observed on the roof. In addition, he made no inquiries as to the length of time that the materials were on the roof, the length of time that the support beams were in the alleged "bent" condition, and while he alluded to the fact that he had received some complaints from some of the men, there is no indication in the record that he attempted to interview any of the men to ascertain some of these details and none of the men were called as witnesses. He simply viewed the conditions, "thought the crossbeams were bent due to the weight of the accumulated materials," and concluded that the roof would "imminently fall."

When asked on cross-examination whether he was aware of the fact that the crossbeams had been in a bent condition for decades, the inspector answered that "[a]t the time, I wasn't worried about that" (Tr. 237). As a matter of fact, he stated that even if bends had been present for decades, it would have made no difference to him because he believed the roof was going to "imminently fall" (Tr. 237). When asked whether he issued the citation out of alarm due to the previously-reported incidents, he responded "Yes, plus the fact that I had got a few complaints from the men working in that area" (Tr. 235). When asked whether he really knew what standard to cite, he responded "You can look completely through that book and you won't find nothing else" (Tr. 235). When asked whether he considered the situation presented to be an imminent danger, he answered that he did not, and that if he did he would have issued an imminent danger withdrawal order (Tr. 238). In short, his conclusion that the roof was about to fall in as a result of the weight of the accumulations was a pure judgment call on his part and he candidly admitted that this was the case (Tr. 240). He also candidly admitted that faced with the reports of previous roof cave-ins, "I had very definitely been told in my office to get out there and look at them roofs on cement plants" (Tr. 242).

The petitioner bears the burden of proof to establish by a preponderance of the evidence that the kiln roof in question was in danger of falling due to the weight of the accumulated materials which the inspector observed. If that fact can be established, I could conclude that a safe means of access had not been provided as

required by section 56.11-1. However, after close examination of the testimony and evidence produced by the petitioner in support of the citation, I conclude and find that petitioner has not proved that the conditions cited by the inspector were in fact dangerous or hazardous. I believe that the inspector was influenced by past incidents of roof failures and that he really had no factual knowledge that the roof was about to fall. It seems to me that if he really believed the roof was about to fall in, he should have taken immediate steps to close the area down and withdraw men from the danger zone. Here, he issued the citation and initially allowed the respondent one week to abate the conditions. Assuming that the operator availed himself of the one full week to clean off the accumulations, one must assume that men still worked in and around the area which the inspector believed was unsafe, and at least one man worked under a roof which the inspector believed would fall at any time. Such enforcement practices simply defy logic. I am of the view that when an inspector cites a violation of a mandatory safety standard, he should be able to support it with facts and not with conjecture and speculation. The citation is VACATED.

Citation No. 107008--Fact of Violation

I find that the petitioner has established by a preponderance of the evidence that the brakes on the front-end loader which is the subject of this citation were not functioning properly. The cited section requires that defective equipment be corrected before it is used, and the failure of the respondent to correct the brake defects constituted a violation of section 56.9-2 as cited in the citation. Respondent's evidence does not rebut the prima facie showing of a violation by the petitioner and the citation is AFFIRMED.

Gravity

Although the inspector observed no pedestrian traffic in the immediate area where the loader was being operated at the time the citation issued, had he not issued the order taking it out of service, it is likely that an accident would have occurred and someone would have been injured. This likelihood is supported by the evidence which establishes that the only means for stopping the loader was by dragging the bucket or putting it in reverse. I find that the violation was serious.

Negligence

The evidence establishes that Mr. Ross was aware of the fact that the defective loader had some problem with the brakes. However, he permitted the equipment to be operated "with reasonable care" until another piece of similar equipment undergoing repairs could replace the defective loader. I believe and find that such a course of action on the part of mine management was a reckless disregard of the safety requirements of section 56.9-2, and constitutes gross negligence.

regulated by OSHA rather than MSHA (Tr. 290). In addition, the parties agreed that any reasonable civil penalties, or the civil penalties initially assessed by MSHA, if levied, will not adversely affect respondent's ability to remain in business (Tr. 290).

History of Prior Violations

Petitioner's Exhibit P-13 is a computer printout reflecting prior paid violations for violations resulting from inspections at respondent's Knoxville Mine and Mill. For the period August 9, 1976, through August 8, 1978, the printout reflects two citations for which respondent paid civil penalty assessments totaling \$214. There is no history for the Knoxville Quarry. Based on this information, I find that respondent has no significant prior history which would warrant increased penalty assessments for the citations which I have affirmed.

Additional Issues Raised by the Respondent

Validity of the Regulations

Both at the hearing and in its posthearing arguments, respondent asserts and argues that it should not be held responsible or accountable for the mandatory standards cited by the inspector because the standards have been imposed by the Secretary and not Congress. Respondent argues that Congress never intended to legislate by regulation, and that its intent was to impose mandatory time schedules on the Secretary for the purpose of developing safety standards through the rulemaking process. Further, respondent argues that petitioner has not established that there have been any hearings held to carry out the Congressional intent and mandate requiring a showing of a demonstrated need for the standards in question. Respondent also alluded to the fact that it did not participate in, or comment on, any of the standards at the time of their promulgation.

Respondent's arguments concerning the validity of the regulations are rejected. It seems clear to me that section 301(b) of the Act expresses the intent of Congress that those mandatory standards promulgated pursuant to the now repealed Federal Metal and Nonmetallic Mine Safety Act which were in effect at the time of the 1977 Amendments to the 1969 Federal Coal Mine Health and Safety Act were to remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines. With regard to respondent's assertion that it was not given an opportunity to comment on the standards before they were promulgated, I can only observe that it is common knowledge that the standards which appear in Parts 55, 56, and 57, were in fact the result of advisory committees composed of both industry and Government members purportedly knowledgeable in health and safety matters, and that the mining industry was given full and ample opportunity for input and comment during the rule-making process connected with the promulgation and adoption of the

standards. Mr. Klashak candidly admitted as much during his testimony, and he also admitted that he was generally aware of the fact that the 1977 Act incorporated the then existing standards by reference and that the respondent's mining operations were covered by the Act. Although one can sympathize with Mr. Klashak's frustrations connected with his belief that he is being "put upon" through over-regulation by many state and Federal inspection agencies, that fact may not serve a legal defense to the citations.

Alleged Failure of the Inspector to Permit Respondent's Representative to Accompany Him on His Inspection

In connection with Citation No. 107008 dealing with the brakes on the front-end loader, respondent argues that a representative of a mine operator has a statutory right to accompany the inspector during his inspection rounds, and that in connection with this citation, the inspector failed to afford Mr. Ross that opportunity and in effect conducted an ex parte inspection. After due consideration of the argument, it is rejected; and based on the circumstances and facts presented in this case, I conclude and find that respondent's statutory right to accompany the inspector were not violated, and my reasons in this regard follow.

Section 103(f) affords an opportunity to both the representative of the mine operator and the miners to accompany the inspector during his inspection of the mine and to participate in any post-inspection conferences held at the mine. On the facts presented here, it is clear that on the day of the inspection on March 16, Mr. Ross was aware that Inspector Downs was on mine property conducting an inspection since Mr. Ross was with him that morning. The inspector took a lunch break after his morning rounds and intended and agreed to meet with Mr. Ross after lunch to continue his inspection rounds. After eating his lunch, Mr. Downs was on his way to meet Mr. Ross when he happened to observe the front-end loader which he believed constituted an imminent danger. Rather than ignoring the situation, he decided to issue his order taking the loader out of service before finding Mr. Ross. In these circumstances, I cannot conclude that the inspector acted unreasonably, and the fact that Mr. Ross was not with him at the precise moment he observed the loader infraction, does not prejudice the respondent, and does not, in my view, render the citation illegal. Mr. Ross was aware of the inspector's presence on the mine property, Mr. Ross was with him during his earlier morning rounds when other citations were issued, and Mr. Ross and the inspector discussed the loader citation after it was issued.

ORDER

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

Docket No. BARB 79-61-PM

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>
107001	3/14/78	56.9-87
107007	3/16/78	56.9-2

On the basis of the foregoing findings and conclusions, the following citations are AFFIRMED, and considering the six statutory criteria set forth in section 110(i) of the Act, civil penalties are assessed as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
107002	3/15/78	56.14-6	\$ 75
107004	3/15/78	56.20-3	90
107005	3/15/78	56.20-3	125
107006	3/15/78	56.14-1	100
107008	3/16/78	56.9-2	375

Docket No. BARB 79-267-PM

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
107089	8/08/78	56.14-1	\$ 125

Respondent IS ORDERED to pay the civil penalties assessed in these proceedings, as indicated above, in the total amount of \$890 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 3 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-99-PM
Petitioner : A.O. No. 10-00089-05004
v. :
Sunshine Mine
SUNSHINE MINING CO., :
Respondent :

DECISION

Appearances: Marshall P. Salzman, Attorney, U.S. Department of
Labor, San Francisco, California, for the petitioner;
Daniel L. Poole, Esq, Boise, Idaho, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on November 29, 1978, through the filing of proposals seeking civil penalty assessments for five alleged violations of the provisions of certain mandatory safety standards set forth in Part 57, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest, and a hearing was held in Wallace, Idaho, on July 11, 1979.

Issues

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

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

Stipulations

The parties stipulated as to the Commission's jurisdiction, and respondent conceded that the citations in question were issued and served. Further, the parties agreed that respondent is a large mining company, paid 14 assessed violations prior to the date of the 1978 inspections in issue here, and that any civil penalties assessed in this matter will not impair respondent's ability to remain in business (Tr. 2-3).

Citation No. 347006, April 10, 1978, 30 CFR 57.12-30, states as follows: "The 4400 west side switch rack and sub station (electrical) had loose ground, timber, chain link fencing material along with ground water falling into onto and around the electrical components creating the hazards of shorting and fire."

Petitioner's Testimony

MSHA inspector James Arnoldi Confirmed that he inspected the mine in April 1978, and that the mine is a large multilevel silver-producing mine. The switch rack in question supplied power to the 4400 mine level. He indicated that corrugated fiberglass which had been placed over the switch rack to keep water off had fallen into the rack area, chain link fencing had fallen over and was lying against the rack, loose rock was located throughout the area and probably caused the fence to fall down, and water was dripping in the area of approximately 10 by 6. The switch rack consists of electric components used to distribute power and he "imagined" it was energized and "believed" the voltage was 2300. Dripping water and the fence against the electrical components posed the possibility of shorting out and creating a fire. People were not working in the

immediate area, but there was timber there which could cause any fire to spread. He did not know how far away people were working, but believed they would be affected by a fire because the air course would carry smoke throughout the mine. He indicated that the operator should have been aware of the condition because "they walk by it every day" and preparations were being made to move the switch rack to another raise. The condition of the area led him to believe that it was in that condition for several weeks. Abatement was achieved by moving the switch rack (Tr. 5-9).

On cross-examination, Mr. Arnoldi indicated that he has taken some 40 to 60 hours of electrical courses at MSHA's academy in Beckley, West Virginia. The switch rack unit itself was approximately 4 feet long and some 3 feet high, and it was located within 100 feet of the 4400 station off the main line in a small deadend "cubbyhole" drift which was some 30 or 40 feet deep. He viewed the rack from a distance of 10 to 15 feet and did not walk up to it. A muck pile high enough to knock over the chain link fence was present and it was some 3 to 4 feet high. The ceiling was some 9 to 10 feet high and one would have to climb over the muck pile to reach the switch rack. No supplies were stored in the area, and miners would have no need to reach anything located around the switch rack. He saw no miners working around the area or the service raises (Tr. 10-14).

Inspector Arnoldi discussed the matter with a company safety engineer who advised him the switch rack was being moved to another raise, but he did not discuss the air ventilation patterns in the area, nor did he inquire as to the number of men working in the mine on the day in question. A short in the switch rack could cause a fire, but he made no inquiry as to any protective devices which may have been installed to protect against any shorts. He confirmed that he was familiar to some extent with millisecond circuit breakers, and indicated that in case of an overload or short circuit, power would be cut off instantaneously by these breakers, but he did not inquire as to whether such circuit breakers were installed on the switch rack in question because he did not think about it. The wooden timber raise he referred to was 15 to 20 feet from the switch rack area, and there was nothing combustible between the timber and switch rack, except for the corrugated fiberglass which he "assumed" was combustible. The drift in question was not a travelway, and no miners would have any reason to be there except for an electrician or repairman (Tr. 14-18).

Inspector Arnoldi indicated that the equipment was energized and that he issued no order requiring that it be deenergized. He cited section 57.12-30 because it was "the most applicable to get the situation corrected," although he agreed the standard was "poorly written." He was not familiar with the type of switches installed on

the switch rack in question, the wiring insulation, or what a person would have to do in relationship to the switch rack in order to be exposed to an electrocution hazard. The presence of water posed a potentially dangerous situation, but he did not know what could happen with dripping water. He made no inquiries concerning the switch rack wiring insulation factor, the resistance rating of the wiring or insulation, or whether the rating was a water rating for the insulation factor (Tr, 19-25).

On redirect, Inspector Arnoldi confirmed that the presence of a switch breaker would make the likelihood of a fire a remote possibility (Tr, 26). He believed a fire hazard existed because of water dripping in the area, and the fact that the chain link fence was lying on the switch rack components. Even though power was shut off by the circuit breaker, he believed people would be exposed to a fire wherever and whatever the ventilation pattern (Tr, 28).

On recross, Mr. Arnoldi distinguished between a substation and a disconnect rack, and indicated that the former involves transformers, while the latter involves switches. The citation concerns a switch rack and he conceded that he should not have characterized it in part as a substation in his citation. A switch rack has a lower fire potential, and while he discussed the length of time the condition cited had existed with the operator's representative, he could not recall the time, and his notes do not reflect any time frame. He was told the new raise would be ready in 2 or 3 weeks (Tr, 28-30).

In response to bench questions, Mr. Arnoldi indicated that the switch rack was in operation at the time of the citation. He conceded the citation was a "type of housekeeping" condition that could lead to and contribute to a dangerous condition. The relocation work connected with moving the switch rack caused the deterioration of the area, and he did not believe the area would have deteriorated were it not for the move. He had observed the condition of other similar electrical equipment in the mine and it was in good condition. He knew that the operator was preparing to move the switch back, and he could think of no other standards which could be applicable to the situation he found (Tr, 30-32).

Respondent's Testimony

Malcolm McKinnon, former mine superintendent at the Sunshine Mine, identified Exhibit R-101 as a partial level map of the west side of the 4400 level. He was familiar with the switch rack citation, the location of the cited rack, and he was the superintendent at the time the citation issued. He was in the area in question periodically, and he indicated that several days before the citation, work had been completed to enlarge some drift pipe lines, and in that process ground had to be removed and taken down with a muck pile.

The switch rack was located close to the rear wall, at a deadend, and the area was not a travelway. Pipe construction was taking place, and the ground condition between the 4400 and 4600 areas was poor. Two men were working on one shift a day working on the repairs, and a repairman and an electrician would be in the area, and the area was under repair for 1 or 2 days before the citation was issued. He examined the rack from a distance of 5 or 6 feet and observed it from the top of the muck pile. He observed no timbers, fencing, or muck falling into and onto the electrical components, nor could he recall seeing anything leaning against the switch rack. He observed no water falling into or onto the electrical components and recalled no fiberglass. The chain link fence was partially buried in the muck pile, but he did not recall that it was in contact with the with the rack (Tr. 41-48).

Mr. McKinnon described the ventilation pattern and marked it on the exhibit. He indicated that smoke from any fire would exit directly to the mine surface rather than through any work places downstream. However, if the electrician or repairmen were in the area, they would be affected. He perceived no potentially dangerous situation on the day the citation issued (Tr. 48-50).

On cross-examination, Mr. McKinnon conceded he was not present during the inspection. He indicated that ground water was present some 20 feet from the switch rack. He observed the area within a week or 10 days after the inspection, and the area had been cleaned-up, the ground flagged off, and the fencing was back up (Tr. 50-53).

George Clapp, underground electrical supervisor, stated that he was responsible for the switch rack in question, was in the area quite often, and after the fall of ground took place prior to the citation, he was there daily. He was supervising the work in the area prior to the citation and went there after the citation issued. He described the area around the switch rack after the fall of the ground, and he indicated that the switch racks are capable of handling 5,000 volts, and the wiring is rated at 5,000 volts wet. The disconnect switches are porcelain and are rated at 5,000 volts wet. There were 2,300 volts on the rack at the time of the citation. The wet ratings are UL, (Underwriters' Laboratories) ratings, and they relate to the electrical components operating under a wet condition. Water was going down the drift at a distance of some 15 or 16 feet from the switch rack, and while the area was damp and the humidity high, he saw no dripping water. The work area for the repairmen was separated from the switch rack by a pile of rocks. He cautioned his repairmen to be careful of the energized switch rack, and he believed that experienced miners could safely remove the muck pile and loose ground without deenergizing the equipment. He saw no loose ground, timber, or chain link fencing falling into or onto the switch rack or electrical components. Maintenance had not been neglected on the rack or wiring. The probability of the facility shorting would

depend on a lot of factors, and while shorting from water was not impossible, the chances were very, very slight. Westinghouse vacuum breakers had been installed some 4 months prior to the citation, and they are ultra fast. The only thing that could catch fire was the insulation of the wiring itself, but he saw nothing flammable that could contact the wiring. The area was damp and wet and he saw no danger of a fire, and did not believe the repairmen working in the area were exposed to any unreasonable danger (Tr. 54-67).

Mr. Clapp stated that the cables from the service raise to the switch rack were insulated with bore hole steel, that a person would have to reach under the switch rack and touch an exposed part of a disconnect door before being exposed to an electrocution hazard. The disconnect switches and rack are insulated and not exposed to the front (Tr. 67).

On cross-examination, Mr. Clapp confirmed that he did not believe it necessary to deenergize the switch rack wires because experienced miners were working around them. However, he conceded that carelessness could lead to a dangerous condition. Wooden lagging was in the muck pile and an old piece of water pipe was about a foot from the rack. Had Mr. Arnoldi not inspected the area, the conditions would have prevailed for 2 weeks at most while the new raise was being constructed (Tr. 70).

In response to bench questions, Mr. Clapp indicated that even if the fencing were leaning across the switch rack, there would be no hazard since the UL rating of the cable was such that it was engineered to operate under wet conditions (Tr. 72).

Sidney R. Barker, repairman, testified he had a job assignment repairing the area at the switch rack in question. He confirmed that Mr. Clapp advised him to be careful and not to take any unnecessary chances. He also worked in the area after the citation issued. When he began his repair work, he observed no timber, water, fencing material, or muck falling into or onto the switch rack. He did not believe he was exposed to any unreasonable danger while performing repairs or cleanup (Tr. 77).

Citation No. 346811, May 11, 1978, 30 CFR 57.19-100, states:
"The shaft landing at the 4500 pocket was not provided with gates between the pocket and the shaft opening."

Citation No. 346812, May 11, 1978, 30 CFR 57.19-100, states:
"The shaft landing at the 4800 pocket was not provided with gates between the pocket and the shaft opening."

Citation No. 349610, May 11, 1978, 30 CFR 57.19-100, states:
"The shaft landing at the 5400 level pocket was not provided with safety gates between pocket and shaft opening."

Citation No. 349611, May 11, 1978, 30 CFR 57.19-100, states:
"The shaft landing at the 5000 level pocket was not provided with safety gates between pocket and shaft opening".

MSHA inspector Donald L. Myers, testified that he conducted the inspection and issued the citations concerning the shaft landings, and that fellow Inspector Guttromson accompanied him during the inspection of the skip pockets at the 4500, 4800, 5000, and 5400 levels. He described a "skip pocket" as a cutout or offset off the side of the shaft that is connected to the dumping point above where the ore comes into the pocket loading chute for transportation up the shaft on the skip. People were working on the day in question loading ore onto the hoists from the pockets. A rope or chain was installed between the skip pocket and shaft openings, but it was not being used and had not been used for some time. No gates were installed. The depth of the pockets from the rear to the front of the shaft varied from 4 to 8 feet back to where the men were working (Tr. 84-87).

Inspector Myers stated that the hazard presented by the conditions cited was the possibility of a man slipping or falling in the shaft or something coming down the shaft and hitting him. Water and wet muck sometimes come into the pocket and may cause a spill. On the day of the citations, two persons were exposed to the hazard, and they rotated their work among the four pocket-level locations which were cited. There was nothing to prevent the men from falling on the day in question, and he believed the operator should have been aware of the conditions since a chain or rope was installed but not used, and he believed there was some reason for their installation. The conditions were readily observable and he saw no safety line or lanyard and could not recall whether the employees had safety belts. After the inspection, safety lines were obtained and provided. The conditions were abated by fabricating and constructing a chain link gate on a rail or piece of metal across the upper portion of the shaft opening. The gates were mine management's idea, he agreed that they would be satisfactory, and the conditions were timely abated. He considered the skip pocket to be a shaft landing because any landing where men have to get off and on a conveyance is a landing. Machinery would be taken on and off the conveyance at a normal landing, and if repairs are made in the skip pocket, equipment could be taken there. He believed that a "skip pocket" is a point in the shaft where the cage can be lowered with men or materials (Exhs. R-2 R-2, R-3, Tr. 88-93).

On cross-examination, Inspector Myers characterized a "level" as a working area where work such as mining or timber repair takes place, as distinguished from loading muck or ore from the skip pocket. He described the areas referred to as levels, the "grizzly," and loading pockets, and marked them on Exhibit R-1 (Tr. 93-96). He also described a "shaft station" and indicated that it is not the same

as a "skip pocket." He also indicated it was customary to have gates at shaft stations and they have been used for at least 10 years (Tr. 98-99). In his view, a rope or chain does not constitute a gate, but it is a barrier of some kind (Tr. 101). He has never researched gate construction, has not issued citations at other mines for not having gates across the front of skip pockets, and he could remember seeing no other mines with such gates installed (Tr. 101). A chain or rope installed at a skip pocket would meet the requirements of the cited safety standard, but if installed at a shaft landing station, they would not. He conceded that he required the installation of gates, but that a single chain in a skip pocket is not adequate but "it beats not having anything at all" (Tr. 103-104).

Inspector Myers stated he did not discuss with the operator what was necessary to abate the citations. He confirmed that he was at the mine on a regular inspection and that someone had complained about flooding in a pocket and the lack of gates (Tr. 104, 106). He believed that any kind of a barrier would have been sufficient although he did specify a gate. Had another barrier been in place and in use he would not have cited a violation. He stated he did not talk to the operator about other options for abatement because he cannot tell an operator how to abate a citation. Since the gate was mine management's design, and he found it adequate, he simply thought it was "fine" (Tr. 118). The gates in question will not keep material from going under the gate into the skip pocket because it has no rigid bottom, but it will prevent things from coming down the shaft into the skip pocket, and it will keep men from going out through (Tr. 118).

Inspector Myers indicated that materials such as a welder and cutting torch might be unloaded at the skip pocket for repair work, but he did not know how often this would happen. Basically, the cagers are unloaded at this location. The activity taking place at a shaft station include the off-loading of materials such as timber, explosives, drill bits, and steel pipe, and a considerable number of miners would come and go from such a shaft station at any given shift. Considerably more activity takes place at a shaft station as opposed to a skip pocket, and there is a greater risk of materials falling from such a shaft station than would be the case of a skip pocket. Miners are required to wear safety belts where there is a danger of falling and that requirement is enforced at the mine. He would not have issued the citations if the miners were tied off to protect them against falling or being pushed into the shaft, and gates are not required at working deck locations. He has never heard of anyone referring to a skip pocket as a shaft landing, and he does not know whether miners consider skip pockets to be shaft landings, and he knows of no MSHA regulation that defines a "shaft landing." Standard 57.19-103 uses the term "loading pocket," and he believes it can be construed to mean "skip pocket," and he could not explain why

section 57.10-100 speaks in terms of "shaft landings." Respondent was in the process of developing protective "curtains" to keep material from falling down the shaft, and the one installed at the 5200 level (Exh. R-3), was developed as a result of complaints. Since it was reported that the operator "were dragging their feet" in installing the rest of the curtains, it was decided that a citation should be issued. After being in the skip pocket with the loaders, he decided they needed protection from falling into the shaft and from materials falling down the shaft, and that prompted him to issue the citations (Tr. 119-130).

Inspector Myers described the position of the skip loaders and cagers while performing their work tasks in the skip pocket, and the cagers told him that they sometimes went to the edge of the shaft and stuck their heads out in the shaft and looked down, and he understands that this is part of the cager's normal job responsibility. He also described the position of the skip and the loading process which takes place. In the normal course of business, a miner would not normally approach the open shaft at any time other than when the skip is parked right at his feet (Tr. 130-134).

On redirect, Mr. Myers indicated that at the time of his inspection no employees were exposed to danger and his inspection took place during the day shift. His primary concerns were employees falling or being pushed down the shaft or materials coming down the shaft and bouncing in on them. He would consider a chain or some type of barrier that a miner could grab onto as sufficient to abate the conditions cited (Tr. 135). He defined a "shaft landing" as any point in the shaft where men have to get off and on a skip (Tr. 137).

Respondent's Testimony

MSHA inspector Maurice Guttromson was called by the respondent as an adverse witness. He stated that he was aware of no mining texts that describe gate or curtain assemblies for skip pockets, but was familiar with mining or engineering publications that described gates for station landings or levels. The inspection in this case was the first time he had ever written citations for a loading pocket not having a gate, and subsequent to this time he has not issued any others because he has "never run across any yet that needed it." At the mine where he is presently assigned, gates are not needed because the landings are "set so far back" it makes no sense to have them. They are some 15 feet from the shaft and usually one or two cagers are present there to load the skip located in the shaft. Since the cagers are so far back, there is no way anything can come down the shaft and strike them. He defined "shaft landing" as a point in the shaft where the skip stops and men and materials are loaded on and off, and he believes that the term "shaft landing" is the same as a "shaft station or landing" (Tr. 143-144).

Robert E. Launhardt, safety director, Sunshine Mine, testified he was familiar with the citations issued in this case, and it is his understanding that the skip pocket was construed to be a shaft landing and therefore the citations were issued because the gates required by section 57.19-100 were not installed. He does not believe the citations were properly issued because he has never believed that a skip or loading pocket is synonymous with a shaft landing. It is his understanding that the term "shaft landing" or "shaft station" applies to an opening to a working level from which men and materials enter and leave a mine, and that section 57.19-100 was intended to apply to the shaft station or shaft landing gates. Had the intent been to cover skip pockets, the standard would have said so. He stated that in his experience, he has never heard the terms "loading station" or "skip pockets" used synonymously with shaft station or level. He does not believe that the cited standard applies to loading pockets or skip pockets. He can think of no reason why a cager would want to lean over a shaft and look down, and his job description does not require him to do that since it is an unsafe practice. A gate or curtain would not protect a miner if he decided to lean over the shaft with his head out. Company policy and safety rules dictate that cagers and shaft repairmen who regularly work in areas where there is a danger of falling shall wear safety belts or lines, and this safety rule is enforced. However, cagers and shaft repairmen as a group are reluctant to use safety lines when there is a shaft conveyance present because they do not want to be tied to anything in the event they have to move quickly, and the application of such a safety line in a pocket is questionable (Tr. 170-179).

Mr. Launhardt stated that he was not involved with the original design of the gates or curtains that were ultimately installed at the pockets in question, although he was aware of the fact that they were being developed, and he was not present when the citations were issued, nor was he aware of the timetable for installing the gates or curtains (Tr. 180).

On cross-examination, Mr. Launhardt testified as to his interpretation of the terms "shaft stations," "landings," "pockets," etc., and as to certain other safety standards dealing with shaft protection (Tr. 180-183). In response to further questions, he also defined the terms "stage" and "level," and indicated that the location where the gate was originally installed at the 5200 level is a skip pocket, as are the other locations cited (Tr. 189).

Wayne Baxter, shaft foreman, testified he was involved in the process of developing gates or curtains or some kind of barriers for installation at the skip pockets. Attempts were made to construct gates which swing out, but that proved unworkable. The cagers brought the problem to his attention and since the 5200 pocket was the worst location for possible falling material, work to install a gate was started there. Alternative devices prior to the gate which was

ultimately installed at this location were rejected because the cagers did not like them opening in or out. After working with the cager and a shaft mechanic, he devised the gate which was installed. He intended to install similar gates at all the pockets and had fabricated frames for the 5400 and 5000 locations, but since no two pockets were alike, each had to be measured individually. Gates are now installed at all skip pockets, and when he began the project no one told him that such gates were required. As for any delays connected with the construction of the gates, he was not aware of any, and the citations were abated on the Monday after they were issued. The abatement could not have taken place that soon had he not been actively involved in constructing the gates (Tr. 194-201). He contemplated finishing the construction of all of the gates within a week or week and a half of the inspection, and no one complained to him about any delays in this regard (Tr. 202-203).

Findings and Conclusions

Citation No. 347006, 30 CFR 57.12-30

Mandatory safety standard 30 CFR 57.12-30 states as follows: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

The parties waived the filing of any posthearing proposed findings and conclusions with regard to the citation in question. However, they were afforded an opportunity to make oral arguments with regard to their respective positions during the course of the hearings (Tr. 22-23, 26, 35-41, 77-82).

Respondent's Arguments

Respondent argues that the inspector picked the wrong standard to cite and that the record does not support a finding that the condition cited constituted a potentially dangerous condition within the meaning of section 57.12-30. Absent any detailed evaluation of all of the circumstances which prevailed at the time the citation issued, respondent takes the position that the inspector's judgment in issuing the citation simply cannot be affirmed and that petitioner failed to carry its burden of proof. While alluding to other standards which respondent believes could have been cited, counsel could not specifically state which ones he believed were more applicable except for a reference to section 57.12-23. Further, respondent argues that the inspection was superficial in that the inspector failed to completely evaluate what was required to result in a truly dangerous situation. Respondent emphasizes that while the standard requires that any potentially condition be eliminated before equipment is energized, the inspector allowed the equipment to remain energized.

Petitioner's Arguments

Petitioner argues that the dangerous condition need not predate the energizing of the equipment wires, and that the standard should be broadly construed to either require the deenergizing of the equipment or to correct the potentially dangerous conditions. Petitioner relies on the inspector's testimony that the conditions cited were potentially dangerous, and notwithstanding the fact the the inspector made only a cursory examination of the conditions, petitioner believes there was a potential for danger and asserts that that fact is controlling. The potential danger was that a fire could have occurred, and petitioner asserts that the standard cited by the inspector was in fact the applicable standard which pertained to the conditions found.

The parties are in agreement that the fact that the inspector saw fit to describe the electrical equipment in question as a switch rack and substation is not fatally defective. The parties are in agreement, and the testimony presented establishes that what is involved here is a switch rack and not an electrical substation. The question of substation is relevant only insofar as the element of gravity is concerned since the potential for fire or electrocution hazard is significantly higher at a substation, as opposed to a switch rack (Tr. 79-80, 82).

After careful review of the arguments presented by the parties, and based upon the preponderance of the evidence adduced, including close scrutiny of the testimony, I conclude and find that the petitioner has the better part of the argument and has established a violation by a preponderance of the evidence. I conclude that the cited standard is broad enough to apply to the situation presented on the day of the cited conditions. The deteriorated conditions at the area where the switch rack was located were obviously caused by respondent's decision to move the rack to a new underground location. Work was being performed to achieve this move, and in the course of that work the ground was disturbed, a chain link fence fell over, water was present, and other debris was adjacent to and resting against the switch rack. Faced with these conditions, the inspector believed that there was a potential hazard of shock and fire caused by a possible short circuit of the equipment.

Although it is clear that the inspector failed to make any detailed evaluation or examination of all of the elements which he should have looked into to determine the extent of the hazard, the fact is that the equipment was energized and at least two men were working in and around the area in question. While the mine ventilation system and circuit breaker protection on the switch rack may serve to mitigate the seriousness of the situation presented, I cannot conclude that these factors may serve as an absolute defense to the citation or serve as a basis for a finding that no potential danger was presented.

The former mine superintendent testified that the general ground conditions in the area were poor and that water was located nearby. However, he did not view the conditions cited during the inspection. Mr. Clapp, the electrical supervisor responsible for the switch rack, candidly testified that he cautioned his crew to be careful of the energized switch rack, and he was careful to point out during his testimony that experienced miners could safely remove loose rock and muck without deenergizing the equipment, although the equipment was not deenergized due to the fact that an experienced crew was working on it. Mr. Clapp conceded that carelessness could lead to danger, and it is obvious to me that he is a safety-conscious supervisor who is concerned for the safety of his men. Coupled with his warnings to his crew to be careful, I believe it is reasonable to conclude that Mr. Clapp was cognizant and aware of the fact that there was a potential danger present, notwithstanding his assertion that the men were not exposed to any "unreasonable" danger. In addition, Mr. Clapp conceded that the probability of a short circuit is dependent on many factors, and he stated that while the chances of a short occurring due to the presence of water were slight, it was not impossible and that the wiring insulation could catch fire. He also indicated that if the citation had not issued, the conditions found by the inspector would have prevailed for approximately another 2 weeks while the switch rack was being moved. In these circumstances, I conclude and find that the conditions at the switch rack area cited by the inspector constituted a potential danger within the meaning of the cited safety standard, and the citation is AFFIRMED.

Negligence

The evidence and testimony presented reflects that mine management personnel were in the area on a daily basis and I conclude that they should have been aware of the potential danger presented and taken corrective action prior to the inspection. In this regard, I find that the respondent failed to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence.

Gravity

Although I have concluded that the conditions cited presented a potential danger, the seriousness of the situation is mitigated somewhat by the fact that the switch rack was equipped with circuit breaker protection and was operating below its UL wet voltage rating at the time of the citation.

Good Faith Compliance

I find that the evidence adduced supports a finding that the respondent exercised good faith in ultimately abating the conditions cited.

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

The parties stipulated that respondent is a large mine operator and that a civil penalty assessment will not impair its ability to remain in business.

History of Prior Violations

Respondent's history of 14 paid prior assessed violations, does not, in my view, constitute a significant history of prior violations, and for a large operator I cannot conclude that it warrants any additional increase in the penalty assessed by me in this matter.

Citation Nos. 346811, 356812, 349610, and 349611 all concern alleged violations of the provisions of 30 CFR 57.19-100, in that respondent failed to install protective gates at four shaft landing pocket locations between the pockets in question and the shaft openings. Section 57.19-100 states as follows: "Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances."

The parties waived the filing of written proposed findings and conclusions, but were given an opportunity to present arguments on the record during the hearing in support of their respective positions (Tr. 207-211).

Petitioner's Arguments

Petitioner's counsel agreed that the language of the cited standard does not address itself to the protection of miners who may fall into the shaft. Counsel asserted that "the problem wasn't spillage into the shaft," but rather "the problem was materials coming in, not materials going out," and quite candidly, counsel asserted that petitioner is seeking to apply the cited standard broadly to the facts presented in this case (Tr. 189-191).

Petitioner asserts that the threshold question is whether the loading pockets in question are equivalent or equal to shaft landings as described in section 57.19-100. If they are not, petitioner concedes that the citations were incorrectly issued. In support of its case, petitioner relies on the testimony presented concerning the hazards of materials falling in and out of the pockets and the hazards of men falling into the shafts. Petitioner suggests that the recognition of such dangers supports a broad interpretation of the standard to include the pockets in question, particularly in light of the general introductory statement found in section 57.19 which petitioner asserts indicates that the intent of the standards is to include the protection of men who are performing work. As for the use of safety belts or lines in lieu of protective gates, petitioner points out that belts and lines were not being used, and that the standard requiring the use of such belts and lines simply does not apply to the facts presented (Tr. 207-208).

Respondent's Arguments

Respondent interprets the intent of the standard to protect against materials coming from the shaft landing going into the shaft and that the gate was intended to protect against that event. Further, counsel asserted that there simply is no applicable standard that relates to curtains, gates, or anything else in terms of skip pockets or loading pockets, and he emphatically believed that respondent was in the process of developing and installing protective curtains at all skip pocket locations and that its motivation in doing this was in the interest of safety and not because any particular safety standard required it. Counsel does not believe that respondent should be penalized for its efforts in this regard by being subjected to civil penalty citations and assessments. Further, counsel does not believe that respondent could have been alternatively cited with section 57.19-103, because that standard deals with spillage out of the pocket and into the shaft, and the facts presented simply do not fit that situation (Tr. 192-193).

Respondent agrees that the critical question rests on whether loading pockets are properly defined as shaft landings. Respondent asserts that the testimony presented demonstrates that in terms of normal usage in the mining industry and a reasonable interpretation of the usage of the language of the standard among knowledgeable people, that when the terms "shaft" and "landing" are used, it is intended to mean shaft stations or levels and not loading stations or loading pockets. Respondent avers that the cited standard simply does not apply to the locations cited and that respondent was in the process of devising and installing a protective device that MSHA was later willing to accept as "gates," and that the abatements accepted by MSHA as "gates" are in fact not "gates" within the meaning of the standard in issue. As for the use of safety belts and lines, respondent takes the position that there is no evidence that those requirements have not been enforced by the respondent, notwithstanding the fact that miners are reluctant to use them because they believe they are hazardous when used in conjunction with a moving shaft skip. As for the application of the standard in question to men and materials, respondent asserts that while the standard speaks in terms of preventing materials from coming down the shaft, respondent recognizes that the standard is intended to protect men from being injured and that is the predominant concern of respondent as well as MSHA. Further, respondent reiterates its argument that in the interest of safety and concern for the miners, it voluntarily began to take corrective action to devise and install a protective device beyond that required by any applicable mandatory safety standard and that it should not be penalized or assessed civil penalties simply because it has demonstrated that such devices could be designed and installed but had not done it in time (Tr. 209-120).

The evidence adduced in this proceeding reflects that while ropes or chains were installed at the pocket locations in question, they were not in use, and although the inspector indicated that while he would accept the use of any such barriers at these locations in question to prevent men from falling or being pushed into the open shaft, since ropes or chains were not being used, he considered that the locations were unprotected. Further, although the inspector denied that he insisted on gates, and indicated that the gates were "volunteered" by the respondent since respondent had installed such a device at another similar pocket location and he simply accepted this device as adequate for compliance, the fact is that his citations specifically state that gates were not provided, and I am convinced and conclude that by citing section 57.19-100, which specifically requires a protective gate, he firmly believed that the standard cited required the installation of gates at the pocket locations in question. His belief in this regard was dictated by his judgment that the hazards presented by not having such gates installed involved the possibility of someone falling into the open shaft or being struck by materials which could inadvertently fall down the open shaft and striking a person who may be leaning out over the shaft or material falling down the shaft and somehow falling into the open pocket and striking someone who may be working inside the pocket. The parties stipulated that the protective gate which was installed on the 5200 level was installed at that location at least 2 days prior to the time the citations in question issued (Tr. 202), and the evidence indicates that the gates which were ultimately installed to abate the citations were modeled after the one installed at the 5200 level.

I take note of the fact that the parties, including the inspector who issued the citations, seem to be in agreement that the cited standard is not a model of clarity and that it lends itself to different interpretations. Taken at face value, the literal language of the standard requires that substantially-constructed gates be installed at shaft landings in order to prevent materials from going through or under them. It also requires that such gates be closed except when loading or unloading shaft conveyances. Quite frankly, I have no problem with the language of the standard per se. If MSHA can establish that the four locations which did not have gates installed are in fact shaft landings, then it should prevail. If they cannot, then the citations should be vacated. The problem, as I see it, is compounded by the fact that a well intentioned inspector did not cite a mandatory standard which specifically and directly fits the facts presented here; that is, there is no standard that specifically refers to skip of loading pockets, men falling into the shaft, or materials falling into a shaft. Petitioner would have me read and apply the standard as if it included skip or loading pockets, even though those terms are not used. In support of this argument, petitioner relies on the general language of section 57.19, and the fact that men and materials are loaded on and off at loading pockets.

Section 57.19 states as follows: "The hoisting standards in this section apply to those hoists and appurtenances used for hoisting men. However, where men may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied."

I see nothing in the language of section 57.19 that would support the petitioner's position that a skip or loading pocket is the same as a shaft landing. That section simply states that when men are endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied. If men are loaded on and off the skip at the shaft locations in question then it seems to me that section 57.19 would be inapplicable. In any event, I see nothing in the language of section 57.19 to support petitioner's position. Further, as for my transforming the term "shaft landings" as it appears in section 57.19-100 to read "loading pocket," I can only note that I take the standards as I find them. Interpreting a standard broadly to achieve the Congressional intent to insure safety in the mines is one thing, but rewriting safety standards is something else. Here, the terms "shaft landings" and "loading pockets" must have some distinct and separate meaning since the drafters of the standards use these and similar terms in different standards. For example, section 57.19-101 refers to "shaft collar or landing," 57.19-103 refers to "loading pockets," 57.19-105 refers to "shaft compartments," 57.19-106 makes reference to "shaft sets," and recently enacted mandatory standard 57.19-104 refers to "shaft stations." 44 Fed. Reg. 48534 (August 17, 1979). Since those terms are not further defined in Part 57, the interpretation and application of those terms in an enforcement setting are left to the imagination and ingenuity of the inspectors issuing citations, the attorneys representing the parties, and I might add, the judge who ultimately must decide the question.

The petitioner has the burden of proof. In summary, its position is that section 57.19-100 requires the installation of protective gates at shaft landings in order to preclude materials from coming into the loading pocket. Since the definition of "shaft landing" rests in part on the fact that men and materials are loaded on and off at such landings, and since men and materials are also loaded on and off at loading or skip pocket locations, petitioner reasons that the two terms are synonymous and that for purposes of the application of section 57.19-100, shaft landings and skip or loading pocket "landings" are the same. In support of its position, petitioner relies on the testimony of the inspector, dictionary definitions, and a broad reading of section 57.19-100.

With regard to the inspector's testimony, it seems clear from the record that it is somewhat contradictory and equivocal on the question of interpretation and application of section 57.19-100.

This stems from the fact that the inspector was trying to do the best he could under the circumstances by citing a standard which obviously does not specifically and directly fit the factual situation presented in this case. For example, the inspector stated that he considers a skip pocket to be a shaft landing because "I feel that any landing where men have to get off and on that conveyance is a landing." When asked whether machinery is taken on and on and off the conveyance, he answered, "on the normal landing they do." When asked about a "skip pocket", he answered, "if repair is done on the pocket or in the area of the shaft--is in the area of the pocket, I imagine equipment is." And, when asked how men would get to the pocket, he answered, "they ride the skip down." Thus, the inspector seems to distinguish between a "normal" landing and a skip pocket (Tr. 91-92).

A second example of a somewhat confused interpretation of the language of the standard lies in the fact that one of the hazards and dangers relied on by the inspector in citing section 57.19-100, was the possibility of a miner falling into or being pushed into the shaft. However, the standard does not address itself to the protection of men falling into the shaft. It requires substantially constructed gates to prevent materials from going through or under the gates. The language "through or under" generated some debate during the hearing as to whether it meant from the shaft side into the pocket or from the pocket into the shaft, and is again indicative of the somewhat loose language of the standard.

A third example of confusion lies in the fact that the term "gate" is not defined. Pictorial Exhibits R-2 and R-3 depict some chain-link fencing fixed to a pipe or bar by rings to facilitate the lateral opening and closing of the device, and I assume that the term "curtain" stems from the fact that the device is similar to an ordinary household curtain, and the device depicted in the exhibits is the one previously installed at the 5200 level and which served as the prototype for the ones installed at the cited skip pocket locations to abate the citations.

Finally, another example of the somewhat confused interpretation of section 57.19-100 lies in the fact that the inspector would not have issued the citations if barriers such as ropes or chains, or devices such as safety belts or lines would have been installed and used at the cited locations. However, if the purpose of issuing the citations was to protect against materials coming out of the skip pockets and falling into the shaft, I fail to understand how such personal protective devices would prevent this from happening. It seems to me that section 57.19-103, which states in part that "loading pockets shall be constructed so as to minimize spillage into the shaft," would be an appropriate standard to cover that situation. As for the use of life lines or safety belts, section 57.15-5, which requires the use of belts and lines where there is a danger of falling, would be an appropriate standard to prevent a man from falling into the shaft, notwithstanding the fact that the men are not particularly enchanted with such devices.

The inspector asserted that the reference to "gates" in his citations and abatelements was only intended to reflect what the respondent had already installed at the 5200 pocket location, and that since he approved of that gate, and since respondent was willing to go ahead and install similar ones at the other locations, he accepted the installation of the gates as sufficient to meet the requirements of the standard. However, I take note of the fact that the initial inspection of the skip pocket locations which did not have gates installed was prompted by complaints made to MSHA. As a result of those complaints, an MSHA official from Arlington, Virginia, by the name of Pitts made the following notation on a piece of paper and gave it to the inspector: "57.19-100 (m) Need safety gates between pockets and shaft at 4800, 4500, 5000, 5400 the same as is on 5200 pocket," (Tr. 110; Exh. ALJ-1).

Although the inspector denied he was influenced in any way by the note given him and indicated that he made an independent evaluation of the conditions at each of the locations cited, it seems clear to me that the inspection was clearly the result of the complaint and that Mr. Pitts' note did influence the inspector. The note is dated 2 days before the inspection, and I simply cannot believe that an inspector is not influenced when an MSHA official from headquarters brings something to his attention. Here, since the note makes specific reference to section 57.19-100, and cites the identical four pocket locations cited by the inspector in his citations as being in need of gates, it seems obvious that the inspector was influenced by the note and the complaint when he issued the citations.

During the hearing, respondent made much of the fact that the inspection had been prompted by a written complaint which had not been furnished to the operator. Counsel argued that the statute requires that copies of written complaints be furnished to an operator (Tr. 105-116). After considering the testimony presented, I am persuaded that a written complaint was not in fact filed with MSHA and that the operator's rights have not been violated in this regard. As for the complaint, the note, and the influence they may have had on the inspector, I cannot conclude that this renders the citations invalid. The fact of violation must be determined on the basis of the evidence adduced to support the conditions cited and not on what prompted the inspector to conduct the inspection in the first place. The inspector was simply doing his job by following up on certain allegations of a purported unsafe condition in the mine. However, the prior notation given to the inspector is relevant to the extent that it indicates to me that he at least relied on it to some extent in citing section 57.19-100.

In the final analysis, it seems clear to me that this case is a classic example of a safety standard being applied by MSHA to a factual situation which simply does not fit. Although the parties seem

to be in agreement that some protection is needed to prevent miners from being injured, they are in total disagreement as to whether the cited standard applies, and in support of their respective after-the-fact arguments, have relied primarily on arguments concerning distinctions between the meaning of the terms "shaft landing" and "loading" or "skip pockets." In this regard, I deem it appropriate at this point to include certain pertinent dictionary definitions of several terms used in this proceeding as they appear in the Dictionary of Mining, Mineral, and Related Terms, published by the U.S. Department of the Interior, 1968 Edition, and they are as follows:

Shaft. An excavation of limited area compared with its depth, made for finding or mining ore or coal, raising water, ore, rock, or coal, hoisting and lowering men and material, or ventilating underground workings. The term is often specifically applied to approximately vertical shafts, as distinguished from an incline or inclined shaft.

Landing. a. Level stage in a shaft, at which cages are loaded and discharged. Pryor, 3. b. The top or bottom of a slope, shaft, or inclined plane. Fay. c. The mouth of a shaft where the cages are loaded; any point in the shaft at which the cage can be loaded with men or materials. Nelson. d. The brow or level section at the top of an inclined haulage plane where the loaded tubs are exchanged for empty tubs or vice versa. Nelson.

Shaft pocket. a. Ore storage, excavated at depth, which receives trammed ore pending removal by skip. Pryor, 3. b. Loading pockets of one or more compartments for different classes of ore and for waste built at the shaft stations. They are cut into the walls on one or both sides of a vertical shaft or in the hanging wall of an inclined shaft. Lewis, p. 257. c. See measuring chute. Nelson.

Shaft set. a. Supporting frame of timber, masonry, or steel which supports sides of shaft and the gear. Composed of two wallplates, two end plates, and dividers which form shaft into compartments. Pryor, 3. b. A system of mine timbering similar to square sets. The shaft sets are placed from the surface downward, each new set supported from the set above until it is blocked in place. New wallplates are suspended from those of the set above by hanging bolts. Blocking, wedging, and lagging complete the work of timbering. At stations the shaft posts are made much longer than usual to give ample head room for unloading timber and other supplies. Lewis, pp. 45-47.

Shaft station. a. An enlargement of a level near a shaft from which ore, coal, or rock may be hoisted and supplies unloaded. Fay. b. Enlarged space made to accommodate pump crusher, ore pockets, shunting, truck tripples, etc. Pryor, 3.

Skip. A guided steel hopper usually rectangular with a capacity from 4 to 10 tons and used in vertical or inclined shafts for hoisting coal or mineral. It can also be adapted for man riding. The skip is mounted within a carrying framework, having an aperture at the upper end to permit loading and a hinged or sliding door at the lower end to permit discharge of the load. The cars at the pit bottom deliver their load either direct into two measuring chutes located at the side of the shaft or into a storage bunker from which the material is fed to the measuring chutes.

Skip loader I. In metal mining, one who loads ore into skip (large can-shaped container) from skip pockets (underground storage bins) at different shaft stations in mine, operating a mechanical device to open and close the gates of the loading chutes. Also called skipman; skipper. [Emphasis added.]

Skip loader II. In metal mining, one who dumps ore from mine cars directly into skip in mines not equipped with skip pockets.

A review of the dictionary terms set forth above reflects that the terms "skip loading station" and "shaft landings" have separate and distinct meanings. As indicated by the definition of the term "skip loader," a skip loading station or pocket is a location where minerals are stored or loaded into a skip for transportation to the surface. In addition, the different mandatory standards previously discussed where those and similar terms are used, supports a conclusion that those terms have different and distinct meanings. Logic dictates that if the intent was not to give them different meanings, the standards would not have referred to them. In addition, the testimony reflecting the activities which normally take place during the mining cycle, including the loading of ore at skip stations, persuades me that the terms have different meanings in the real world of mining underground. While it may be true that materials and men may be loaded on and off a skip from time to time at a loading or skip pocket, I cannot conclude that this fact, per se, transforms a skip or loading pocket into a shaft landing for purposes of the application of section 57.19-100. I construe the standard to apply to shaft landings, and I conclude that it requires the installation of gates, without exception, so as to preclude materials from falling from the skip or loading pocket into the shaft. However, I am not persuaded by the fact that simply taking men and materials on and off any mine

shaft landing necessarily means that gates have to be installed at those locations. It seems to me that if MSHA desires to protect miners from falling into a shaft at any such mine locations, it should vigorously enforce the existing safety belt and line standard. If MSHA desires to protect men from the hazard of materials falling into a shaft from a loading or skip pocket landing location in a mine, it should vigorously enforce the standard requiring the installation of protective devices at those locations. And, if MSHA desires to prevent both men and materials at skip and loading stations or pockets from falling into mine shafts, it should promulgate a clear and concise safety standard covering precisely that situation. The practice of rewriting safety standards through the adjudicatory and hearing process in a civil penalty setting is simply not an appropriate or desirable way to promulgate such standards, particularly when both the operator and the enforcing agency seemingly are in agreement that such a standard is in order.

In addition to the aforesaid enforcement problems dealing with a standard which does not precisely fit the factual situation presented, I believe it is basically unfair to penalize a mine operator by imposing civil penalty assessments in a situation where the mine operator recognizes the safety problems presented and is making an effort at compliance. In this case, I am convinced from the evidence presented, that the respondent did not reasonably believe that any mandatory standard required the installation of protective gates at loading stations, installed a prototype of such a device at one such location, and was in the process of devising and installing similar devices at other such locations. The citations were issued because a complaint had been filed, and the inspector issued the citations because he believed the operator was "dragging his feet" and he candidly admitted this was the case. In my view, the intent of civil penalties is to deter future violations. Here the citations were used to nudge the operator into complying with a standard whose application was questionable in the first instance. It seems to me that something short of subjecting an operator to monetary civil penalties up to \$10,000 and possible mine closure if he does not ultimately come into "compliance" would have achieved the intended purpose of insuring a safe working environment for the miner working at the skip loading areas cited. Further, I firmly believe that the promulgation of a precise and clear safety standard to prevent the types of hazards alluded to in this proceeding would advance the interests of safety simply because the operator would be put on notice as to what was expected of him in terms of compliance and MSHA inspectors would not be put in the tenuous position of not knowing which mandatory standard to cite in a given situation, and they would not be placed in the position of attempting to justify their judgment calls after the citations are issued through a laborious and somewhat semantical exercise and application of some other safety standard, which may, in his view, be "close" but not quite on point. In the circumstances

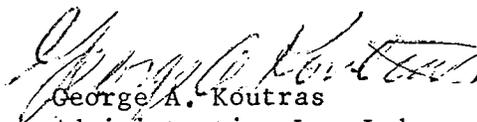
and facts presented here, and after careful consideration of all of the facts and circumstances surrounding the issuance of the citations in question, I conclude and find that they should be vacated and that the civil penalty proposals seeking assessments for the alleged violations should be dismissed. My findings and conclusions are based chiefly on the fact that the cited standard applies to a shaft landing and MSHA has not convinced me by any credible evidence that the skip or loading pockets in question are in fact shaft landings, or that the standard cited requires the installation of protective gates at skip or loading pockets. The citations are VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED that the following citations be vacated and the proposals for assessment of civil penalties for those citations be DISMISSED.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>
346811	5/11/78	57.19-100
346812	5/11/78	57.19-100
349610	5/11/78	57.19-100
349611	5/11/78	57.19-100

In view of the foregoing findings and conclusions affirming Citation No. 347006, and taking into account the six statutory criteria in section 110(i) of the Act, a civil penalty in the amount of \$350 is assessed for this citation and respondent IS ORDERED to pay that amount within thirty (30) days of the date of this decision.


George A. Koutras
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 4, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. MORG 79-77-P
Petitioner : A.O. No. 46-01440-02013
v. :
: Alexander Underground Mine
THE VALLEY CAMP COAL COMPANY, :
Respondent :

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Ronald Johnson, Esq., Schrader, Stanp and Recht,
Wheeling, West Virginia, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above case arose on the filing of a petition for the assessment of civil penalties alleging three violations of mandatory safety standards occurring in August, September and November 1977. The case therefore arose under the provisions of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. Pursuant to notice, the case was called for hearing on the merits in Wheeling, West Virginia, on September 5, 1979. George Messner, James E. Mackey and John Radosevic testified on behalf of Petitioner, Tommy Tucker and Arnold Miszaros, on behalf of Respondent. At the conclusion of the hearing, the parties waived the filing of proposed findings and conclusions and I issued a bench decision as follows:

JUDGE BRODERICK: All right. With respect to the violations alleged in this proceeding, I find, first, that the Respondent at the time of the alleged violations was a large operator. I further find that the Respondent's history of prior violations was not significant, and the penalties assessed will not be increased because of that history.

With respect to the violation charged in Government's Exhibit 2, which is Notice 3-GM issued August 23, 1977, I find and conclude that the violation alleged was not established by the evidence, and therefore no penalty is imposed.

With respect to the violation charged in Government's Exhibit Number 6, Notice 2-GM, September 21, 1977, I find that a violation of 30 CFR 70.201 was established by the evidence showing that an inaccurate sampling was being taken of the respirable dust in the mine atmosphere of the 004 occupation in the subject mine. I find that the violation was not serious. I find that it was not caused by Respondent's negligence. I find that the condition was abated promptly and in good faith. I assess a penalty of \$50 for this violation.

With respect to the violation charged in Notice Number 1-JR, November 1, 1977, the Government's Exhibit 9, I find that there was established a violation of 30 CFR 75.1403 because of the failure of Respondent to provide a lifting jack and bar for the Number 7 and 9 self-propelled personnel carriers in the subject mine.

This equipment was required by Safeguard Notice 1-CBS, issued July 26, 1973. I find that the condition was not serious, that there is no evidence that it was caused by Respondent's negligence. I find that it was abated promptly and in good faith. I assess a penalty of \$75 for this violation.

A written decision affirming these findings will be issued, and an appeal time will run from the date of the issuance of the written decision.

That concludes the record of this proceeding. I thank you very much, gentlemen.

I hereby affirm the bench decision and make the additional findings and conclusions as follows:

1. Government's Exhibit G2, Notice No. 3 GM, August 23, 1977, alleges a violation of 30 CFR 70.100(b) in that the average respirable dust concentration exceeded the allowable limit for a particular occupation in Respondent's mine. This was based upon 10 samples submitted by Respondent between June 15 and August 8, 1977. The evidence showed that two of the samples were submitted in error, in that they were taken from employees in another section of the mine. Absent the two samples, the average concentration was within the applicable limits. Respondent was charged with exceeding the respirable dust concentration, not with failing to submit accurate samples. The violation charged was not shown to have occurred.

2. Government's Exhibit G6, Notice No. 2 GM, September 21, 1977, alleges a violation of 30 CFR 75.201 in that a respirable dust sampler belonging to a section mechanic was found to be operating on the table in the dinner hole. The standard requires that accurate samples be taken and the evidence clearly shows that a patently inaccurate sample was being taken. There is no evidence that Respondent was aware of the facts prior to the notice being issued.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ordered to pay, within 30 days of this decision, the following civil penalties for the violations found herein to have occurred:

<u>Notice</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
2 GM 9/21/77	70.201	\$ 50
1 JR 11/1/77	75.1403	75
		Total \$125


 James A. Broderick
 Chief Administrative Law Judge

Distribution:

By certified mail.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 5 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-288-PM
Petitioner : A.C. No. 10-00634-05001
v. :
 : Docket No. DENV 79-323-PM
WASHINGTON CONSTRUCTION COMPANY, : A.C. No. 10-00634-05002
Respondent :
 : Monsanto Quartzite Quarry

DECISION

Appearances: Mildred Lou Wheeler, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; James A. Brouelette, E.E.O./Safety Officer, Washington Construction Company, Missoula, Montana, for Respondent.

Before: Administrative Law Judge Michels

These 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 Act). The petitions for assessment of civil penalties were filed by the Mine Safety and Health Administration on January 30, 1979, and February 9, 1979, respectively, and timely answers were filed thereafter. A hearing was held on July 26, 1979, in Missoula, Montana, at which both parties were represented.

The parties agreed that the Washington Construction Company's operations affect commerce within the meaning of section 4 of the Act (Tr. 5). The parties also agreed to settle in Docket No. DENV 79-288-PM, Citation Nos. 345011, 345017 and 345019 for the full amounts assessed by the Mine Safety and Health Administration which are respectively \$30, \$30 and \$22. This settlement was approved (Tr. 5-6).

Docket No. DENV 79-288-PM

Citation Nos. 345010, 345013 and 345018

Evidence was received in a consolidated fashion on the above-listed citations and the decision and assessments were made from

the bench. The decision from pages 54-59 with some necessary corrections and deletions follows:

THE COURT: May I see the exhibit, please? The decision from the bench on three of these citations is as follows: The citations are Nos. 345010, 345013, and 345018. Each of these citations alleges the violation of mandatory standard 30 CFR 56.12-32. This standard is mandatory, and it requires that "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The evidence received indicates clearly that the cover boxes were off, so it is a violation in each instance of that particular mandatory standard. It was the position of Mr. Brouelette that these were housekeeping types of violations; but nevertheless, they do go contrary to the Act. So, I have really no option except to find the violation; and of course the other elements go to the amount of the penalty or the assessment.

Now, I should make clear that as the Administrative Law Judge, I am not bound by the point system used by the Assessment Office. However, I try to make the assessment on as rational a basis as I can taking into account all of the evidence as well as the statutory criterion. If it was not clear, I will now make it clear, and I hereby find a violation of 30 CFR 56.12-32 for each of those three citations. I will now take into account or make findings of each of the statutory criteria.

So far as past history is concerned, the evidence shows 14 citations, apparently all of which were issued on the same occasion of this inspection. I find that this is not an appreciable history. The evidence was received as to the size of the operator. It appears that its production is in the neighborhood of 200,000 tons per year, and employees, 500 to 1,500 [company wide].

* * * * *

It seems to me that company wide we have a medium size company; but possibly for the site itself, it would be maybe small to medium; and I so find. It was stipulated that the fines to be assessed here would have no effect on the operator's ability to continue to do business. It was further stipulated that the operator abated the violations in good faith within the time allowed by the inspector.

So, as far as the gravity and negligence is concerned, it would be my view that with some variations, which I don't

think are necessarily too important, that the seriousness or gravity and the degree of negligence are about the same for the three. So, I will proceed to make findings for each of the three violations on those further criteria. I will take first the gravity.

I think I could accept in part that in these three situations, the probability of serious harm or injury was slight; and it is my impression from the inspector's testimony that he virtually agreed to that. I think that was in part because of the location of the boxes, and the fact that there was very little traffic near the boxes. On the other hand, I don't want to underestimate the general seriousness of any electrical violation. The standard where the regulation was promulgated was for a good reason; and that is, while most of the time possibly a person could put his hand in that box and not be affected, there is also the risk or the chance that because of some faulty connection or a bare wire, a person could seriously be burned or electrocuted. Of course, while it is true that maybe this wouldn't happen very often, it could happen where you have poor visibility, people groping around, and accidentally reaching into the box. So, there is that possibility.

Now, we can say that maybe in these instances it was remote, but when you look at the overall history of mine accidents, you see that you do have an accumulation of such things. You have maybe not too many of them, but you will have one or two here and one or two elsewhere for some other thing, and that again is quite remote; but the net effect is to cause overall, a history of injuries and perhaps even deaths, that the whole purpose of the Act is to eliminate. So, I can't discount that that is serious in that sense. I will find it serious with the qualifications that I mentioned.

Now, so far as the negligence is concerned, in this instance the lack of the covers was clearly visible, so it is the kind of thing that I think that safety people would normally expect the mine management and miners themselves to note and to do something about it. I do appreciate, and I will take into account the fact that in this case it is apparently due to one particular person, and that person is no longer working the mine. At first I was somewhat impressed by the fact that there were, in these particular cases, four of these violations which seemed to be sort of a pattern and which suggested that maybe it was a very serious case of negligence; but because of the circumstances I just related I understand this is now taken care of and will not happen in the future. So, taking that into

account, I would just say it is a low degree of ordinary negligence. I believe, then, that I covered all of the criteria which brings me to the assessment.

In my experience, I would say that the amounts assessed are not really excessive. I would think that ordinarily those would be appropriate assessments. However, I am going to take into account some of the factors that I just mentioned for these particular cases. It is my understanding that the first assessment was somewhat larger because of perhaps more access to that particular box. Considering all of these circumstances, I am going to make an assessment of one-half of the amounts originally asked, namely, that would be for Citation No. 10, \$16, for Citation No. 13 it would be \$12, and for Citation No. 18 it would be \$12.

That completes my decision on these first three assessments. We may go to the next.

* * * * *

Citation No. 345012

Evidence was received on this citation and the decision and assessment were made orally from the bench. It is recorded at pages 72-74 of the transcript and with necessary corrections and deletions is as follows:

THE COURT: I will now proceed to make the decision on Citation No. 345012. The first consideration was whether or not the Act or the regulation has been violated as charged. The charge in this instance is that the conduit elbow had broken causing some at least slight damage to the cables to the Telesmith Cone Crusher Motor. Mr. Brouelette has argued here that this should not be a violation because of the lack of any hazard, in his view. Mr. Brouelette [also argued there was no] violation in this particular instance in that the condition, which existed, was [not] contrary to the regulation.

Now, the regulation, that portion that the inspector had in mind, requires that, "Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings." The results of the broken elbow and the cable then hanging loose meant that it was not entering the box through proper fittings. It is not the purpose of these regulations to decide in each case whether or not there is a specific hazard before the violation occurs. Maybe some of the regulations are written that way,

but most of them just assume that if that condition existed, it has the potentiality for a hazard under some conditions. So, that is why a good electrical practice, I assume, requires that those kinds of conditions not be allowed to exist. Therefore, regardless of the degree of the hazard or the possibility of harm, it is really not relevant as to the question of whether or not there was a violation. If the condition exists, there is a violation.

Now, maybe as a layman it is difficult for you to understand that, but that is the way most of these regulations are written, and that is the way they are enforced. So, with that in mind, I would find that because of these broken connections and the condition that has been described and it is not disputed, as I understand it, that there then was, and I do find a violation of 30 CFR 56.12-8. I should say the findings have already been made as to all of the criteria except as to gravity and negligence of the citation. so, I would just confine myself to those two criteria.

As far as the seriousness is concerned, I just have to believe that when a cable such as this is broken, and that there is a vibration existing and the possibility, at least, even though it may not be at all that great of contact, electrical contact, that it is, what I would classify it as, serious, and I so find. On the negligence factor, I think it is clear. I don't believe it is really disputed that this happened at the time that repair was done on the machinery; so it was known and that should not have been permitted to exist.

I will, however, take into account, even though there is no evidence on the subject in the strict sense of the word, the fact that the company had ordered parts for this. I do that because Mr. Brouelette is not familiar with legal procedures, and he did not have the evidence at hand; but I will take his word for it under these circumstances that it was on order. Thus, it seems to me that the company did recognize the problem and was prepared to do something about it. I don't think that that means that they are relieved of all responsibility here. In some of these situations it may be that the machine simply cannot be operated if a danger exists. However, I will take that factor into account and I will do exactly, because of that factor, the same as I did for the other assessments, and I will reduce it by one-half. So, accordingly, I hereby assess for Citation No. 345012 the sum of \$15. That completes the decision in this citation. You may go to the next citation.

* * * * *

Citation No. 345020

Upon the receipt of evidence on this citation, a decision and assessment were made orally from the bench. It is recorded at pages 101-105 of the transcript and with certain necessary corrections and deletions reads as follows:

This is a decision in DENV 79-323-PM, which contains a single citation. That citation is that the jaw discharge conveyor belt was used as a walkway to the drive motor and was not provided with handrailing. The standard cited as being violated is 30 CFR 56.11-2. This citation reads, "Cross-overs, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." That is a quotation, and that is the end of the relevant part.

The only evidence on the fact of the violation is that of the testimony of the inspector and also the document which is a picture. I don't understand that there is any contest as to the facts. The conveyor belt was used by men, by miners, including a supervisor, as a means of access to the motor. The conveyor belt is, if I have it correctly, some 160 feet and rises to an elevation of as much as 30 feet at the very tip. The specific issue, it seems, is [the operator's] contention that such a conveyor belt is not a walkway. The regulation that I read does not specifically mention the conveyor belt. At this point I should state that with these regulations, these mandatory standards, that it is not infrequent that they do not mention specific pieces of machinery and specific conditions; but they are written in a way, in a general way to cover situations that come within their scope even though they are not specifically listed.

Now, it would be very helpful here, of course, if this was a matter that somebody had previously considered and ruled on, and we would perhaps have authority then for whether or not a conveyor belt used in this matter is a walkway.

The argument of MSHA is simply, since it in fact was used as a walkway, that therefore it is a walkway and therefore it is subject to the provisions of that particular regulation. So, it would be up to me to make that decision, and since I have decided to do it from the bench, I will attempt to do so, keeping in mind, however, that I may be ruling on something [for] which there may be legal precedent

or other information which would bear on this and [of] which I am unfamiliar.

So, my ruling, then, I think you should understand is based on the confines of this case and the testimony and evidence that we have taken here today. Now, I appreciate the view that you have mentioned that [such] construction of this particular standard could mean a lot of areas not otherwise thought to be walkways [would be covered]; but I am going to confine this to this particular condition and piece of machinery which was a relatively long area, namely, 160 feet. It was elevated up to 30 feet, which is a long way off the ground, and certainly would suggest a clear hazard to miners using that. It, according to the statements made, is a relatively stationary piece of machinery. It is not moved daily or monthly or even yearly. It stays there more or less permanently, as these things go. It would not be similar, at least I would not view it, to the analogy made of a steel worker on a beam. These beams have to be moved around to be put into place, and even there, I am not confident that they don't require some kind of protection for those steel workers; but in any event, that is a temporary, impermanent walkway kind of situation, and that is not what we are dealing with here, as I see it, at least. I see it as a more permanent situation, and I would accept the position of the Government on this, that since it was used in this manner, that therefore it does become a walkway.

I will take into account, I think, a little bit, at least in the assessment, the fact that this does come as something new. Even the inspector was not completely sure about it. He had to consult his supervisor, and in that kind of situation, I suppose that we can't expect the companies subject to these regulations, then, to know either. So, therefore I think that that ought to be a big consideration in the assessment of a penalty, namely, this is more like a warning rather than a severe penalty for something that should clearly be done; but having said that, then, and I hope having made myself fairly clear, if not completely satisfactory to everybody concerned, I will find, then, that based on the use of this conveyor belt as a walkway and the fact that it had no guard rail, that it was a violation as charged of 30 CFR 56.11-2.

Findings have already been made on all the criteria except as to gravity and negligence. So as far as the gravity is concerned, I think there is no question that it is a serious matter. Even though these men are experienced

and are aware of the hazard that is there, and almost anything could happen to cause a severe injury to a miner, so I would find that the violation is serious. Now, as to the negligence, I have already covered that in part. Surely the company did know there were no handrailings, and even the supervisor used it; but what they did not know and could not apparently know, there being no history of this being cited as a violation, that that would be construed to be a walkway. So, therefore, the negligence in this instance would be minimal. It would be slight negligence in my view, and for that reason, then, I would reduce the penalty to what I would consider just a nominal penalty in this circumstance. In that I consider this in the nature of a warning, and so therefore it should not be a severe penalty. With that in mind, I would assess a penalty for this alleged violation of \$5.

* * * * *

The following is a summary of the assessments made or agreed upon herein:

Docket No. DENV 79-288-PM

<u>Citation No.</u>	<u>Penalty Assessed or Agreed Upon</u>
345010	\$ 16
345011	30
345012	15
345013	12
345017	30
345018	12
345019	22
Total	<u>\$137</u>

Docket No. DENV 79-323-PM

<u>Citation No.</u>	<u>Penalty Assessed</u>
345020	\$ 5
Grand Total	\$142

ORDER

It is ORDERED that the Respondent pay the total penalties of \$142 within 30 days of the date of this decision.

Franklin P. Michels
 Franklin P. Michels
 Administrative Law Judge

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

OCT 5 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-260-P
Petitioner : A.C. No. 15-05345-03001
v. :
: Siler Tipple
KENTUCKY BLUE COAL COMPANY, :
Respondent :

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Tommy Ray Lanham, for Respondent.

Before: Judge Lasher

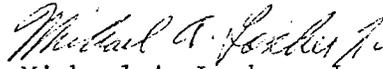
This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977.

A hearing on the merits was held in Lexington, Kentucky, on September 12, 1979. After considering evidence submitted by both parties, and argument, I entered an oral opinion on the record at the close of the hearing. It was found that the five violations charged did occur. I also found that the violations were serious, that they resulted from ordinary negligence on the part of Respondent, that Respondent was small in size, had but one previous violation, and had abated the violations in good faith. It was also determined that a penalty otherwise warranted by consideration of the other penalty assessment criteria provided by statute would have no adverse affect on Respondent's ability to continue in business. Consideration of these various criteria mandated levying penalties for the five violations. Accordingly, Respondent was assessed the following penalties:

<u>Citation No.</u>	<u>Penalty</u>
126479	\$150
126480	50
126485	25
126486	20
126487	75

ORDER

Wherefore, it is ORDERED that Respondent pay MSHA the penalties herein assessed totaling \$320 within 30 days from the date of this decision.



Michael A. Lasher, Jr., Judge

Distribution:

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

William H. Wilder, Vice President, Tommy Ray Lanham, Kentucky Blue Coal Company, P.O. Box 750, Corbin, KY 40701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 5 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-160-PM
Petitioner : A/O No. 06-00012-05002V
v. :
: North Branford Plant #7
NEW HAVEN TRAP ROCK-TOMASSO, :
Respondent :

DECISION APPROVING SETTLEMENTS

ORDER TO PAY

The Solicitor advises that he and the attorney for the operator have discussed the alleged violations in the above-captioned proceeding. Pursuant to such discussion, the Solicitor has filed a motion to approve settlements agreed to by the parties.

This petition contains five 104(d)(1) orders. Three of these orders were issued for failure to provide tail pulleys with guards. These violations of 30 CFR 56.14-1 were originally assessed at \$600 each. The other two orders were issued for failure to provide berms on the outer banks of elevated roadways. These two violations of 30 CFR 56.9-22 were also originally assessed at \$600 each.

In his motion, the Solicitor recommends a settlement of \$500 for each violation. In support of these reductions, the Solicitor advises that the originally assessed amounts were too high in light of the fact that the inspection occurred within twenty days of the effective date of the Act, giving the operator little time to uncover and abate violations prior to that inspection. In addition, the Solicitor attached to his motion a copy of the assessment sheet which he advised contained findings regarding the six statutory criteria. However, the assessment sheet contains no such findings. Only the assessed amounts are listed. This kind of submission is inadequate and will not be acceptable in the future. The Solicitor must set out his views on the statutory criteria whenever he seeks approval of settlements.

Rather than disapprove the recommended settlements, I have personally reviewed these orders. Based upon this review, I conclude the violations are serious and that the operator was negligent. However, I also accept the Solicitor's representation that the inspection only occurred within twenty days of the effective date

of the Act. The date of the inspection justifies the recommended reduction especially since the settlements remain sufficiently substantial to effectuate the purposes of the Act. The recommended settlements are therefore, approved.

ORDER

The operator is ORDERED to pay \$2,500 within 30 days from the date of this decision.

A handwritten signature in cursive script, appearing to read "Paul Merlin".

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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Thomas J. Pooley, Esq., Ashland-Warren, Inc., 675 Massachusetts Ave., Cambridge, MA 02139 (Certified Mail)

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

OCT 16 1979

ITMANN COAL COMPANY,	:	Application for Review
Applicant	:	
v.	:	Docket No. WEVA 79-119-R
	:	Withdrawal Order No.
	:	0660641
SECRETARY OF LABOR,	:	Issued: April 26, 1979
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Itmann No. 3 Mine
Respondent	:	

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Applicant; David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent; Mary Lu Jordan, Esq., for the United Mine Workers of America, Washington, D.C.

Before: Judge Kennedy

DECISION AND ORDER

On April 26, 1979 at 2:45 a.m., a haulage accident occurred at applicant's Itmann No. 3 Mine. At 7:45 a.m. an accident control and withdrawal order issued pursuant to section 103(k), 30 U.S.C. 813(k), 1/ of the Mine Act "to ensure the safety of the miners until an investigation can determine the cause or causes" of the accident. The equipment

1/ Section 103(k), 30 U.S.C. 813(k), of the Act provides:

In the event of any accident occurring in a coal or other 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 or other 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 such mine or to recover the coal or other mine or return affected areas of such mine to normal.

and area covered by this order were "locomotive No. 784 and the trolley system between No. 5 rectifier and No. 6 rectifier." The Order was modified at 9:00 a.m. to permit the equipment involved to be moved out of the area.

At 3:15 p.m. on the same day order of withdrawal No. 0660641 issued pursuant to section 107(a), 30 U.S. 817(a), 2/ of the Act on the finding that an imminent danger existed "due to [a] kink in the trolley wire which caused the trolley pole of the locomotive No. 784 to become disengaged from such wire and the pole became free swinging along an area of trolley wire supports and striking such supports forcing the pole to swing across the locomotive striking and injuring two employees." The equipment and area which were covered by this order were "[a]ll track haulage locomotives that are designed [to] permit the pole to free swing if disengaged from the wire and trolley system from No. 5 to No. 6 rectifier stations." The Order was modified at 10:00 p.m." to allow the use of haulage motors that do not have free swinging trolley poles."

On April 29, 1979 at 11:45 a.m., the section 107(a) imminent danger order was terminated because "[t]he track haulage equipment at the Itmann #3 mine that have [sic] free swinging trolley poles have been modified to prevent the poles from swinging across the motor decks when they become disengaged from the trolley wire."

2/ Section 107(a), 30 U.S.C. 817(a), of the Act provides:

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.

At 12:00 noon on the same day, the section 103(k) control order was terminated because "[t]he investigation of the serious haulage accident has been completed and the trolley wire and the modifications to the haulage equipment appeared to be adequate for the resumption of use."

The captioned Application for Review was filed on May 11, 1979, alleging that the condition described did not constitute an imminent danger and that the order was invalidly issued. On September 6, 1979, applicant filed a motion for summary decision pursuant to 29 C.F.R. 2700.64, by which it seeks a finding that a section 107(a) imminent danger closure order may not properly be issued in an area and on equipment already covered by a section 103(k) control order. On September 24, 1979, the United Mine Workers of America filed their opposition to applicant's motion, and on September 26, 1979, the Secretary filed his opposition. There being no genuine issue as to the material facts, 3/ the matter stands ready for summary decision of the question of law presented.

Applicant admits that the section 103(k) order was properly issued to control the scene of the accident so that a thorough investigation could be conducted. Applicant further concedes that the Secretary may cite an operator for any violations of the Act or of the mandatory standards which are disclosed by the investigation. 4/ Applicant contends, however, that as a matter of law "it is impossible for MSHA to make the necessary section 107(a) imminent danger finding when miners have been withdrawn from the area by the section 103(k) Order." (Motion p. 5) It is further

3/ The United Mine Workers takes issue with applicant's characterization of the 107(a) order as covering "essentially the same" area and equipment as the 103(k) order. This contention is, however, not material to the determination of the question of law presented.

4/ Since the condition which caused the accident, namely the kink in the trolley wire, was not a violation of a mandatory safety standard, a penalty will not be assessed. At this stage of the proceeding, it is unnecessary to express any opinion or finding with respect to the claim that the condition constituted an imminent danger. Whether the condition merits the issuance of an improved standard that might require inspection of trolley wires for conditions that may result in fatalities or injuries is not before us.

suggested that since section 103(k) grants the Secretary broad authority to make recommendations as to corrective action to be taken before the Order was terminated, and since the miners had already been withdrawn, the issuance of a section 107(a) imminent danger order during the accident investigation was unauthorized. (Id.)

The only authority cited by applicant in support of its position is my decision in Eastern Associated Coal Corp., HOPE 73-663 (February 12, 1974), affirmed as modified 4 IBMA 298 (June 25, 1975). This reliance, however, is clearly misplaced since I held merely that in the absence of a condition or practice constituting an imminent danger an imminent danger closure order may not be used for control purposes. In that case I vacated the imminent danger order because the inspector had no reason to believe that the fatal haulage accident was the result of an imminent danger, no inspection or investigation had disclosed the existence of such a danger, and the order was issued solely for control purposes. I pointed out that section 103(f) of the 1969 Act, the parallel provision of section 103(k) of the 1977 Act, is an independent grant of authority that permits federal mine inspectors to take control of the scene of an accident and to issue any type of order, including imminent danger orders, appropriate to insure the safety of persons in the mine. Anticipating the very issue which applicant raises here I clearly stated:

So that there be no misunderstanding as to the scope of our ruling, we wish to emphasize that the operator does not contend, nor do we hold, that a section 104(a) order of withdrawal may not be appropriate and warranted within the meaning of section 103(f) where a proper surface or underground inspection at the scene of a mine accident discloses the existence of an imminent danger. Id. at p. 17.

Indeed, this decision is in accord with a line of cases which have rejected applicant's position. In Valley Camp Coal Co., 1 IBMA 243 (December 29, 1972), the operator argued that an imminent danger order could not properly issue when all personnel had voluntarily withdrawn from the mine prior to the inspection. Rejecting this contention the Board stated:

Valley Camp bases its argument on an erroneous belief that an order of withdrawal cannot properly be issued if no miners are in the mine when the order is issued. We previously rejected this argument in

UMWA District #31 v. Clinchfield Coal Co., 1 IBMA 31, 41 (1970), wherein it was held that because an order of withdrawal not only takes the miners out of the mine, but also keeps them out until the danger has been eliminated, an order of withdrawal may be issued when no miners are in the mine. 1 IBMA at 248.

Thus, the mere fact that miners have been withdrawn prior to the issuance of an imminent danger order does not invalidate that order. In Eastern Associated Coal Corp. v. IBMA, 491 F.2d 277 (4th Cir. 1974), it was held that an imminent danger order is valid even though prior to issuance the operator had voluntarily withdrawn the miners and was in the process of abating the condition. The validity of an imminent danger order depends solely upon whether the condition or practice could reasonably be expected to cause death or serious physical harm "if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 491 F.2d at 278. The purpose of the imminent danger order is not only to withdraw the miners, but also to keep them withdrawn until the condition is corrected.

The question of the effect of simultaneous closure orders was first considered in Roscoe Page, et al. v. Valley Camp Coal Co., 6 IBMA 1 (January 28, 1976). The miners who were idled by an unwarrantable failure withdrawal order filed for compensation. The operator defended on the ground that no miners were idled by the order because they had previously been withdrawn by an accident control order pursuant to section 103(f) of the 1969 Act. The Board rejected the contention that the control order invalidated the overlapping unwarrantable failure order. 6 IBMA at 6.

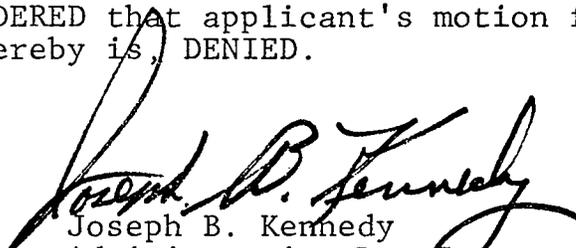
Finally, in a decision directly on point, Peabody Coal Co., VINC 77-40, 77-50 (March 1, 1978), affirmed (Sept. 7, 1979), it was held that miners were entitled to compensation as a result of the valid issuance of an imminent danger order even though a control order was already in effect. This follows because, "the purpose of [an imminent danger] withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the imminent danger has been eliminated." Id. at p. 7.

Thus, it is apparent that in the case at hand the section 103(k) control order was issued for the purpose of facilitating the investigation of the haulage accident. When the inspector determined that the cause of the accident which killed one miner and seriously injured another was an

imminently dangerous condition which could reasonably be expected to cause death or serious physical harm if normal operations were permitted to proceed, he issued a section 107(a) order which required that all haulage locomotives which had booms that could swing free if disengaged from the trolley wire must be appropriately modified. When this was accomplished the imminent danger order was terminated, and when the investigation was concluded the control order was terminated.

The premises considered, I must conclude that the section 107(a) order No. 0660641 was not defective merely because it was issued in an area and on equipment already covered by a section 103(k) control order.

Accordingly, it is ORDERED that applicant's motion for summary decision be, and hereby is, DENIED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

- David E. Street, Esq., U.S. Department of Labor, Office of the Solicitor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)
- Harrison B. Combs, Jr., Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)
- Karl T. Skrypak, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 11 1979

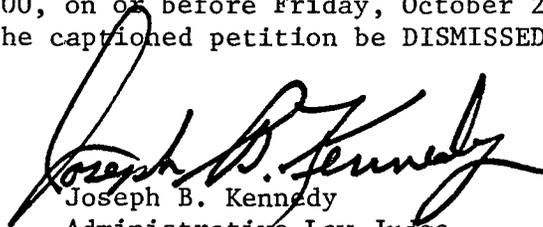
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. HOPE 79-306-P
Petitioner : A.O. No. 46-01514-03002
 :
v. : Eccles No. 6 Mine
 :
WESTMORELAND COAL COMPANY, :
Respondent :

DECISION AND ORDER APPROVING SETTLEMENT

The parties move for approval of a settlement of the four respirable dust violations charged at a 35% reduction in the amount initially assessed, i.e., from \$850.00 to \$540.00.

For the reasons advanced by the parties and based on an independent evaluation and de novo review of the circumstances including the challenge to the validity of the standard raised by the operator (See, Judge Moore's decision in Olga Coal Company, Docket No. HOPE 79-113-P, June 28, 1978 appeal pending), I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is further ORDERED that the operator pay the penalty agreed upon, \$540.00, on or before Friday, October 26, 1979 and that subject to payment the captioned petition be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Marshall H. Harris, Regional Solicitor, James H. Swain, Esq., U.S.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 11 1979

OLGA COAL COMPANY,	:	Application for Review
Applicant	:	
v.	:	Docket No. HOPE 79-111
	:	
SECRETARY OF LABOR,	:	Order No. 253669
MINE SAFETY AND HEALTH	:	October 24, 1978
ADMINISTRATION (MSHA),	:	
Respondent	:	Olga Mine No. 2
and	:	
	:	
UNITED MINE WORKERS OF AMERICA,	:	
Respondent	:	

DECISION

Appearances: Michael T. Heenan, Esq., and M. Susan Carlson, Esq.,
Kilcullen, Smith & Heenan, Washington, D.C., for
Applicant;
James H. Swain, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
Pennsylvania, for Respondent;
Mary Lu Jordan, Esq., United Mine Workers of
America, Washington, D.C., for Respondent.

Before: Judge Forrest E. Stewart

Findings of Fact and Conclusions of Law

Olga Coal Company (Applicant) filed a timely application pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act), 30 U.S.C. § 801 et seq., requesting review of Order No. 253669, issued October 24, 1978. Applicant also challenged the validity of the underlying citation which was issued under section 104(d)(1) of the Act.

A hearing was held on June 7 and 8, 1979, in Charleston, West Virginia. Applicant called three witnesses and introduced five exhibits. MSHA called three witnesses and introduced six exhibits. The UMWA called one witness. Each of the parties filed a posthearing brief.

Underlying Citation

Citation No. 253350 was jointly issued by Federal coal mine inspectors Robert Huffman and Lawrence Snyder on October 11, 1978, pursuant to section 104(d) of the Act. The inspectors alleged a violation of 30 CFR 75.326, and described the condition or practice at issue as follows: "The air passing over 10 Left section belt conveyor was being used to ventilate the active working section."

The inspectors also alleged that the condition was of such a nature as could significantly and substantially contribute to a mine safety hazard.

The event which led to the issuance of Citation No. 253350 occurred on October 9, 1978. The parties offered the following stipulation concerning that event:

On October 9, 1978, there was a slippage of the fire resistant belt near the belt drive. This slippage caused intense smoke to permeate the 9 Left and 10 Left section entryways. These areas are marked by blue to indicate that they are in intake air. Smoke also permeated the face area. Seven men were working in this area on that day, five of whom used self rescuers to abandon this area.

On the following morning, Inspector Snyder was informed of this incident and, thereafter, he conducted an inspection of the 9 and 10 Left sections. The inspector examined the belt and ventilation on the 9 Left section but he did not have the time to check ventilation on the 10 Left section that day.

Inspector Snyder returned to this area on October 11 in the company of Inspector Robert Huffman. While Inspector Snyder continued his examination of the 9 Left section, Inspector Huffman proceeded to check ventilation on the 10 Left section.

As Inspector Huffman proceeded along the belt entry, he observed two stoppings which were leaking excessively. The inspector conducted smoke tests at these locations and observed that the air was traveling from the belt entry into the intake entry. He explained that a hole had been knocked out in one stopping to allow passage of a plastic pipe from one entry into the next. Leonard Sparks, the UMWA safety committeeman who accompanied Inspector Huffman, testified that this pipe had been installed "for quite sometime." He was aware of its presence because he had pumped water from the track through that particular pipe. The unsealed area around the pipe was clearly visible and was large enough to allow Mr. Sparks to place his fingers in the hole around the pipe. A hole had been placed in the second stopping to permit the passage of a rock dust hose.

Inspector Huffman also performed smoke tests at a diagonal door which separated the belt entry from the intake entry. He observed that the air migrated very rapidly into the intake escapeway. The inspector testified that the door was damaged and had been installed on the wrong side of the stopping. It remained open approximately 12 inches when he tried to close it.

After Inspector Huffman examined the diagonal door, he met Inspector Snyder, who also examined this area. Inspector Snyder agreed to sign the citation because his examination of the diagonal door convinced him that a violation existed. Mr. Sparks' testimony corroborated that of the inspectors.

To determine whether Citation No. 253350 was properly issued pursuant to section 104(d) of the Act, it must be determined (a) whether a violation of 30 CFR 75.326 existed as alleged and, if so, (b) whether the violation was such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, and (c) whether the violation was caused by an unwarrantable failure of the operator to comply with section 75.326.

The applicable portion of section 75.326 reads as follows:

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

The parties stipulated at the hearing that the Olga Mine was opened prior to March 30, 1970, but that the particular working section opened after that date. This working section had been developed on four entries, one of which was the belt entry. It is clear that the belt haulage entry was not necessary to ventilate the active working places.

To establish a violation of section 75.326, the Secretary must also show:

(1) that an authorized representative of the Secretary had found that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, and,

(2) that the belt haulage entries were being used to ventilate active workings.

With respect to the requirement that a finding be made, Applicant asserted the following:

As a condition precedent to a showing of a violation of 30 CFR §75.326 with respect to any mine opened before March 30, 1970, it must be shown that a specific finding was made by the Secretary and communicated to the mine involved that "conditions in the entries other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries." The Secretary has failed to establish by a preponderance of the evidence in the present case that any such finding was ever specifically made and communicated to the Applicant so as to make this section applicable to Olga Coal Company.

The Secretary contended that an adequate finding had been made, asserting the following:

Here, there is approval of a ventilation plan which does not call for the use of beltway air to ventilate the working areas of the 9 and 10 left sections of the mine. There is also the stipulation that the ventilation in this specific area was modified and determined to be adequate without the need for belt haulageway air. This constitutes adequate notice to the operator. The operator actively participated in the modification process, and submitted the ventilation plan for approval.

The citation did not contain the specific statement that the authorized representative had found conditions in the entries to be such as to permit adequately the coursing of intake or return air. The regulation, however, requires only that such a finding be made. There is no requirement therein that this finding be communicated to the operator. Certainly the regulation does not require that a formal finding be made pursuant to section 75.326 and then communicated to an operator before the section may be applied.

Applicant's argument is particularly weak in the case at hand because Applicant had actual knowledge that the entries on the affected sections were such as to permit adequately the coursing of intake or return air. The ventilation plan, to which Applicant had acquiesced, already called for the ventilation of working areas on these sections with air other than that of the belt entry. The effort to separate belt air from that of the other entries had been made by the Applicant prior to Mr. Caffrey's inspection. This effort was unsuccessful because of improperly maintained stoppings, not because of the condition of the entries on the section.

The conditions in these entries were such as to permit adequately the coursing of intake or return air. It is true that a preliminary finding to that effect had to be made before the inspector

could conclude that a violation of section 75.326 existed. This preliminary finding was made by the inspectors before they issued the subject citation. Two days had been spent inspecting the ventilation on sections 9 and 10. With regards to the requisite finding, the conditions in the entries were obvious enough that the inspectors did not have to enunciate that finding in the citation.

The belt entry was being used to ventilate the active working within the meaning of section 75.326. That belt haulage air entered working areas is uncontradicted. The smoke tests performed by Inspector Huffman indicated that air was traveling very rapidly from the belt entry into an intake entry, and from there to the active working places. This was not an instance of isolated, unsubstantial leakage, nor one in which the failure to separate the belt entry made it possible that leakage might occur. The October 9th contamination of the working places with smoke generated in the belt entry provides dramatic evidence that air from that entry had been used to ventilate the active workings.

Applicant asserted that the leakage of air from the belt entry was unintentional and that unintentional leakage does not constitute a use of belt air to ventilate active workings in violation of section 75.326. This contention is rejected. There is nothing in section 75.326 which requires that the use of belt entry air for such ventilation be intentional.

The condition which gave rise to Citation No. 253350 was a violation of 30 CFR 75.326 as alleged.

The condition described by the inspectors and the UMWA witness as existing on October 11 was more than a technical violation. That it had the potential to contribute to the creation of a serious mine hazard had been all too graphically demonstrated by the contamination of the section that had occurred 2 days earlier. Both inspectors testified that the leakage they observed between the belt and the intake entries could significantly contribute to a mine hazard. Each believed that, given the leaks that were present on October 11, another belt fire would have produced the same situation that had occurred on October 9, 1978. Had another fire occurred, the miners on the longwall face would have been enveloped once again in smoke. Neither inspector felt that the possibility of another fire was remote and Inspector Huffman described the conditions he observed on the 11th as "very near an imminent danger." The violation was clearly of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

A finding that a violation was caused by the unwarrantable failure on the part of the operator is proper if the inspector determines that: "The operator involved has failed to abate the 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 lack of reasonable care." Ziegler Coal Company, 7 IBMA 280, 296 (1977).

This violation was caused by the unwarrantable failure of the operator. The operator demonstrated a lack of due diligence in its failure to discover and abate the conditions which caused the active working section to be ventilated with belt entry air. The October 9th contamination of the longwall face put the Applicant on notice that a hazard existed on the section. The doorway and holes in the stopping provided an obvious avenue for smoke from the belt to reach the working section. In view of the seriousness of the hazard, these apertures should have been detected and repair efforts undertaken.

The condition which existed along the belt entry on October 11, 1978, was in violation of section 75.326, was of such a nature as could significantly and substantially contribute to the cause and effect of a mine hazard, and was caused by unwarrantable failure on the part of the operator. It was, therefore, properly issued under section 104(d) of the Act.

Order No. 253669

Order No. 253669 was issued by inspector William Uhl on October 24, 1978, in the course of a regular inspection of Olga Mine. The inspector cited a violation of 30 CFR 75.400 and described the condition or practice at issue as follows:

Loose coal, coal dust and float coal dust were permitted to accumulate along the active shuttle car haulage-way, No. 3 entry, 3 North section, I.D. 031. These accumulations ranged in depths from 0-20 inches beginning at the section dumping point and extending inby to the Nos. 1 & 2 pillar blocks. A distance of approximately 600 feet.

To determine whether Order No. 253669 was properly issued, it must be determined (a) whether the violation of section 75.400 existed as alleged, and, if so, (b) whether the violation was caused by an unwarrantable failure on the part of the operator.

The elements of MSHA's prima facie case, as set forth in Old Ben Coal Company 8 IBMA 98 (1977), are as follows:

(1) that an accumulation of coal dust, float coal dust deposited on rock dusted surfaces, loose coal, or other combustible materials existed in the active workings of a coal mine; (2) that the coal mine operator was aware, or, by the exercise of due diligence, should have been

aware of the existence of such accumulation; and (3) that the operator failed to clean up such accumulation, or undertake cleanup, within a reasonable time after discovery, or after discovery should have been made.

Evidence of record clearly establishes that accumulations of coal, coal dust and float coal dust existed along the shuttle car haulageway in the 3 North section on October 24, 1978. The witnesses for Applicant and Respondent differed as to the extent of these accumulations. Inspector Uhl testified that a reasonable man would have considered the accumulations excessive.

From the size of the accumulation, Mr. Uhl estimated that it had probably developed over a period of several shifts. The testimony of section foreman, Hubert Patterson, established that the accumulations had occurred during the three full mining shifts between October 19 and 24.

Mr. Uhl measured the accumulations he observed and determined that the accumulations ranged in depths from 0 to 20 inches. He testified that for the most part the accumulations were 8 to 10 inches deep for the entire 600-foot length of the active shuttle car haulage road, and extended for 14 feet across the width of the entry.

Since the company officials apparently disagreed with his conclusion that a violation existed, Mr. Uhl decided to take dust samples to substantiate his order. Although this area is required to be maintained at a 65 percent incombustible level, the analysis of Mr. Uhl's samples indicated that the accumulation present in the 3 North section ranged from 10 to 25 percent incombustibility.

Applicant's witnesses testified that the accumulations were far less extensive than the inspector claimed. They agreed that there had been some spillage of coal at points along the entry, but that the only large accumulation existed at one particular corner. Mr. Smallwood, Applicant's safety director, testified that coal had accumulated at this corner to a depth of 8 to 10 inches for the entire width of the entry and a distance of 15 to 20 feet.

The conclusions of Inspector Uhl are accepted here. He based his finding that the accumulations existed and were excessive on measurements, dust samples and visual observation. Of Applicant's witnesses, only Hubert L. Patterson, a foreman on the 3 North section, took depth measurements. The three measurements taken by Mr. Patterson complemented, rather than contradicted, Inspector Uhl's findings.

The operator, through Section Foreman Patterson, was aware of the existence of the accumulation. Inspector Uhl testified that Mr. Patterson had stated that the foreman on the preceding shift had

mentioned the need for a cleanup. Mr. Patterson denied having spoken with the foreman from the previous shift and did not remember making any such statement to the inspector. However, he testified that he had observed the accumulations during an early shift inspection of the section and that he wanted to clean them up.

Moreover, the operator should have been aware of these accumulations of coal. They were visually obvious and had been building up for three production shifts.

Finally, the operator failed to undertake cleanup within a reasonable time after the accumulations were discovered or should have been discovered. The accumulations were extensive and had a high content of combustible material. In the opinion of the inspector, the condition was close to being an imminent danger. The accumulations presented a serious hazard and warranted immediate action. No such action was taken.

In addition, Applicant's cleanup program called for cleanup of the haulageway "as required." When the inspector arrived, shuttle car operators were cleaning their equipment in compliance with one of the provisions of the cleanup program. No effort had been undertaken, however, to clean the haulageway despite the fact that coal had been building up for three production shifts. Oden Strong, superintendent of the Olga Mine, testified that it was not the practice at the mine to fail to clean up a section for three working shifts.

The conclusion that the operator failed to undertake cleanup within a reasonable time is warranted in view of the seriousness of the hazard present, as well as its failure to comply with its own cleanup program.

MSHA has established that a violation of section 75.326 existed as alleged.

A finding that a violation was caused by the unwarrantable failure on the part of the operator is proper if the inspector determines that the operator failed to abate the conditions or practices constituting the violation, which it knew or should have known existed or which it failed to abate because of a lack of due diligence, indifference or reasonable care. As noted above, the operator had knowledge, or should have had knowledge of the excessive accumulations.

Applicant asserted that the key issue presented herein is "what was the proper way for the section to be mined considering all applicable safety concerns?" The Applicant contended that its foreman recognized the existence of two safety hazards on the section and attended to the more serious of the two. Because the section has a very hard top and is subject to substantial pressure, the ribs of

the pillars on the section are prone to bumping and its floors tend to heave or buckle upward. The foreman attempted to complete the mining of two pushouts, one on each of two pillars, in order to reduce pressure on the section and decrease the likelihood that heaving or bumping would occur. It was asserted that the mining of the pillar and a cleanup were mutually exclusive because it was difficult to clean the accumulations without recutting the buckled floors, and the continuous miner was the only piece of equipment available on the section which could perform both tasks.

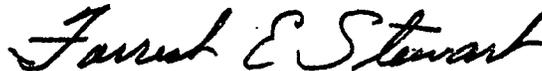
Mr. Patterson offered somewhat contradictory testimony as to the length of time taken to remove the two pillars which were being mined at the time. At one point, he stated that it took 2-1/2 days. He also testified that the mining of those pillars began after the last cleanup had occurred on the section, three production shifts earlier. It is accepted that once mining of a pillar has begun, it should be mined to completion so as to minimize the occurrence of bumping or heaving. Yet, in the course of these three critical production shifts, coal had accumulated in hazardous amounts.

Applicant's "greater hazard" argument is rejected. Both conditions posed a hazard to those working on the section. The accumulation of coal was the result of a breakdown in Applicant's cleanup program which called for section cleanup "as required." As noted above, Oden Strong testified that it was not the practice at the Olga Mine to fail to clean up a section for three shifts. When cleanup was required on this section, mine personnel were either unwilling or unable to effect it. The operator failed to act when presented with a serious safety hazard, and failed to maintain its established cleanup procedure. The violation was, therefore, the result of an unwarrantable failure on the part of Applicant.

Accordingly, Order No. 353669 was properly issued.

ORDER

The above-captioned application for review is hereby DISMISSED.



Forrest E. Stewart
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 12 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-246-PM
Petitioner : A.C. No. 02-00826-05001
v. :
: Hayden Concentrator Mine
KENNECOTT COPPER CORPORATION, :
RAY MINES DIVISION, :
Respondent :

DECISION AND ORDER APPROVING SETTLEMENT
OF CIVIL PENALTY PROCEEDINGS

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
Patrick W. Paterson, Esq., Fennemore, Craig,
von Ammon & Udall, Phoenix, Arizona, for Respondent.

Before: Administrative Law Judge Michels

This is a civil penalty proceeding brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), by the Mine Safety and Health Administration (MSHA) against Respondent, Kennecott Copper Corporation. On September 12, 1979, a hearing was held in Phoenix, Arizona, at which both parties were represented by counsel.

When the hearing commenced, counsel for Petitioner proposed the following disposition for this docket:

Mr. Salzman: Your Honor, these proceedings involve five (5) citations. Regarding, four (4) of these citations, the Secretary, as a result of additional and careful investigation, moves to dismiss four (4) of the proposed penalties resulting from these citations.

These are citations numbers 371165, 371167, 371170 and 371174. The reason is that we do not believe that we have the evidence to sustain the alleged violations.

With respect to the remaining citation, 371166, the Respondent has agreed to pay the full assessed amount.

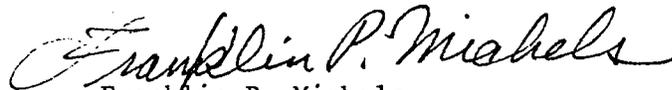
We therefore move to settle this citation based upon the payment of the full assessed amount and we believe that the assessed amount was reasonable.

(Tr. 4-5)

Respondent advised the court that it concurred in this motion (Tr. 6).

Since Petitioner had advised that it did not have sufficient evidence to sustain its burden on four of the citations and the proposed settlement of Citation No. 371166 for \$60, which is the full amount of the original assessment, appeared to be sufficient, a decision was issued from the bench approving the proposed disposition (Tr. 6). This bench decision is hereby AFFIRMED. Accordingly,

The Citation Nos. 371165, 371167, 371170, and 371174 are vacated and the petition is dismissed as to these citations. Respondent is ordered to pay the sum of \$60 for the violation in Citation No. 371166 within 30 days of the date of this decision.



Franklin P. Michels
Administrative Law Judge

Distribution:

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

OCT 12 1979

ITMANN COAL COMPANY, : Application for Review
Applicant :
v. : Docket No. HOPE 78-347
: :
SECRETARY OF LABOR, : Itmann No. 1 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Michel Nardi, Consolidation Coal Company,
Consol Plaza, Pittsburgh, Pennsylvania, 15241;
David L. Baskin, Trial Attorney, Office of the
Solicitor, U.S. Department of Labor, Division
of Mine Safety and Health, 4015 Wilson Boulevard,
Arlington, Virginia 22203

Before: Judge Fauver

This proceeding was brought by Itmann Coal Company under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., to review the validity of a citation and an order of withdrawal issued by a federal mine inspector pursuant to section 104(d) of the Act.

The parties submitted prehearing statements pursuant to a notice of hearing, and a hearing was held on November 14, 1978, in Arlington, Virginia. Both sides were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

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

FINDINGS OF FACT

Citation No. 248571

1. At all pertinent times, Applicant, Itmann Coal Company, operated an underground coal mine known as the Itmann No. 1 Mine, in

Wyoming County, West Virginia, which produced coal for sales in or affecting interstate commerce.

2. At about 8:20 on the morning of April 6, 1978, Jack Bailey, a miner's helper, arrived at his working section, the Guyan No. 2 panel section. During his preshift examination, he observed a crack in the roof which he immediately reported to the section foreman, Levi Holly. He also noticed that the roadway into the face was abnormally wide and required additional supports.

3. Foreman Holly and another miner's helper, Dean Simmons, walked up to the face and Mr. Holly sounded the roof for vibrations by means of a hammer check on both sides of the crack. A hammer check is considered to be a reasonable method, although not fool-proof, for detecting cracks within 5 or 6 feet of the roof's surface. The approved roof-control plan for the Itmann No. 1 Mine states that roof examinations shall consist of visual examinations as well as the sound and vibration (hammer) method.

4. The foreman ordered additional timbers, and Simmons set about 20-25 posts to narrow the width where the roof was cracked, but leaving enough room to operate the mining machine. Production was started, but after two shuttle cars were loaded, the roof began to creak and warp.

5. Federal mine inspector Steven Kowalski arrived at the Guyan No. 2 panel section at about 9:30 that morning, accompanied by the shift foreman, Mr. Green, and the miners' representative, Mr. Naylor. Inspector Kowalski observed two fractures in the roof that extended about 40 feet from the face and were about one-eighth to one-quarter inch in width. Inspector Kowalski pointed out both cracks to the shift foreman, Mr. Green.

6. I find that when Inspector Kowalski checked the roof, there were two cracks, as he described. In reaching this finding I have considered the fact that after the additional posts were installed, the miner operator did not observe the roof; that the superintendent's testimony with respect to the number of cracks was not first-hand; that the foreman, Mr. Holly, who observed the roof during the preshift did not testify (he is deceased); and that the inspector both kept notes of his observations and was able to identify two cracks in reasonable detail.

7. No one was directly under the cracks, but the machine operator's position was near the right side of the cracks (facing inby), and the cracks extended outby his position.

8. At the instruction of Mr. Green, the continuous miner was pulled back, at which point the roof began to warp--it started cracking and popping, and fine particles began to fall--which I find indicated further deterioration in the condition of the roof.

9. Inspector Kowalski issued a section 104(d) citation charging a violation of 30 CFR 75.200 (roof-control plan), indicating that approved Roof-Control Plan No. 4-RC-12-70-1154-4 was not being followed in the Guyan No. 2 panel section in the No. 1 pillar split on the final lift near spad No. 6996, No. 2 entry because additional support, such as cross-sections or roof bolts, should have been used. Under section 104(d)(1) of the Act, Inspector Kowalski included in the citation findings that: (1) the violation could significantly and substantially contribute to the cause and effect of a mine safety hazard, and (2) it was caused by an unwarrantable failure of the operator to comply with the cited standard.

10. The roof-control plan then in effect was formulated by the superintendent, Richard Harris, and submitted to both MSHA and the State Department of Mines for their approval. The approved plan states at page 6:

1. This plan stipulates the minimum requirements for roof supports and where conditions indicate, additional supports are to be installed.

* * * * *

4. Where miners are exposed to danger of falls of roof, face, and ribs, the workman shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety * * *. Roof and rib examinations shall consist of visual examination and the sound-and-vibration method.

11. At the site involved, pillar lift No. 11, Applicant was engaged in retreat mining, which called for compliance with drawing No. 9 of the plan. This drawing, entitled "Pillar Recovery Continuous Mining," reads:

1. This plan is to be used when conditions make it necessary to advance through the pillars and mine the wings on the retreat from the same opening.

* * * * *

5. Pillar split is supported, as shown in Drawings Nos. 1, 2, 4, or 5.

12. At the option of the Applicant, drawing No. 5 was selected. It provided:

Entries, Rooms, Crosscuts, Barriers, Pillar Splits, and Places Being Reactivated for Roadways.

1. Plan shown is minimum support for normal conditions. Additional posts, crossbars, or cribs shall be installed where needed.

13. In retreat mining, cracks in the roof are not an unusual occurrence. Roof falls are planned after the final pushout of a pillar split. A hole is first cut through the middle of a block of coal, which is about 6 or 7 feet high and about 20 feet wide. After the initial cut, which is called a split, two wings remain on either side. When the final lift is mined, very little of the split remains, and there is no reason for the miner, equipment, or anyone to remain in the split area. The term "lift" refers to the process of cutting off the ends of the block. In this type of mining, roof support is no longer needed after the coal is removed.

14. The cited roof condition was abated the same day, about 2-1/2 hours later, by inserting 15 to 20 4-foot roof bolts at 4-foot centers. The miner was removed and a roof-bolting machine was brought in. Temporary supports were installed while the bolts were put in the roof. As the roof bolts were being installed, two wide roof cracks were discovered, about 18 and 24 inches wide, even though the section foreman had earlier sounded the roof for vibrations.

15. I find that the roof condition could have significantly and substantially contributed to the cause and effect of a mine safety hazard. Falls of the roof, face, and ribs are the No. 1 killer in coal mining, and can happen in any mine. In geological terms, the roof was shale and is considered to be unpredictable. By the time the inspector arrived, the roof was worsening, indicating that the additional posts were not providing adequate support. In the event of a roof fall, the left side of the mining machine probably would have been covered, and the machine operator may have been struck. Headlight cables were located on the left side of the miner, so that a roof fall might have caused a mine fire or electrical hazard. Additional findings as to the roof condition are included in the Discussion.

Order No. 248578

16. On April 11, 1978, Inspector Kowalski returned to the Itmann No. 1 Mine and inspected the Nos. 1 and 2 conveyor entries in the pinnacle section, which was an active working section. He was accompanied by the shift foreman, Mr. Green.

17. Before going underground, Inspector Kowalski checked the belt examiner's books, which are kept in the office on a table where the section foreman makes out the reports. All management personnel are supposed to read these books.

18. The conveyor belts, which are used for carrying coal, are supposed to be examined after each production shift has begun, but not necessarily at the beginning of the shift.

19. Inspector Kowalski and Mr. Green came into the area where the belt and track meet. The No. 1 and No. 2 belts converge at right angles. As they walked toward the crossbelt area, the inspector observed behind the door an accumulation of float coal dust.

20. At the time of the inspection, the belts were running and float coal dust was apparent in the air. Float coal dust did not remain suspended in the air when the belts were not running.

21. The belt system was shut off and they crossed over to the other side. The inspector pointed out a pile of float coal dust which appeared to be about 9 inches deep. He found different measurements of dust at different locations, ranging from one-sixteenth of an inch to 9 inches deep. At some points, there was rock dust underneath the float coal dust, and at others, there were just accumulations of coal dust. The largest accumulations were near the No. 2 head area, or at the crossbelt. Dust ran back down the No. 1 belt about 80 feet, toward the mine cars at the No. 1 head. The belt head is the beginning of the belt, where the belt drive, the motor, and belt pulleys are located. The tail pulley is the end of the belt where the back roller is located. Coal is loaded on the tailpiece.

22. On April 11, 1978, Inspector Kowalski issued a withdrawal order under section 104(d)(1) charging an unwarrantable violation of the dust safety standard in 30 CFR 75.400. He recorded that float coal dust deposited on rock-dusted surfaces was permitted to accumulate on the entry and connecting crosscuts of pinnacle Nos. 1 and 2 belt conveyor, beginning about 100 feet outby the pinnacle No. 1 belt conveyor tail roller, and extending about 350 feet inby the permanent stoppings of the No. 4 entry, a distance of about 70 feet to another permanent stopping, also beginning at the No. 2 pinnacle belt conveyor head and extending inby to a stopping about 250 feet. Float coal dust ranged in depth from about one-sixteenth of an inch to 9 inches.

23. The accumulation problem was reported on the belt examiner's books for five different shifts. The only corrective action taken was on April 10, when the belt examiner's book indicated that the area was partly rock dusted. The inspector estimated that the accumulations had been there for at least 1 week.

24. The shift foreman had indicated to the inspector that he was not pleased with the condition, and had he known of the accumulations, it would have been cleaned up.

25. Reports made in the belt examiner's books were summary comments and not explicitly detailed.

26. The Itmann No. 1 Mine is not a particularly gassy mine. In the 12 years that Mr. Green had been there, there had never been a gas ignition.

27. There is always a potential ignition hazard around electrical equipment near float coal dust. Float coal dust will burn, and it will explode. At the time of the inspection, both belts were running. They have electric motors and there is other electrical equipment in the area, including belt control lines, power cables to the belt boxes, and belt motors. These were all covered with float coal dust.

28. Samples of dust taken in the belt conveyor entries were sent to the laboratory for combustible content analysis. The No. 1 sample, taken off the floor of the belt conveyor entry pinnacle section, about 5 feet in the pinnacle No. 1 belt tail, came back 29 percent incombustible content. The No. 2 sample, from about 10 feet inside the No. 1 belt, came back 17 percent incombustible. Section 75.403 requires that the incombustible content of the intake entries be maintained at at least 65 percent. The samples indicated that the float coal dust was almost pure coal. It was powdery and dry.

29. In the No. 2 belt entry, air was coursing from the stopping on the No. 2 tail, so in the event of a fire at any place along that section of the belt, it would tend to move toward the tailpiece.

30. The condition was abated in about 8 hours.

31. I find that the dust conditions reported in the withdrawal order were proved by a preponderance of the evidence and that such conditions were the result of an unwarrantable failure by the operator to comply with the safety standard in 30 CFR 75.400.

DISCUSSION

This case concerns the validity of a citation and a subsequent order issued to Applicant under section 104(d)(1) of the Act. With respect to the citation, the inspector found that Applicant had unwarrantably violated 30 CFR 75.200 and that the violation could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. Subsequently, within 90 days of the issuance of the citation, the inspector found that Applicant had unwarrantably violated 30 CFR 75.400 (accumulation of float coal dust) and, therefore, issued a withdrawal order under section 104(d)(1) of the Act.

Under section 104(d)(1) of the Act, if an inspector issues a citation finding (1) a violation of a mandatory health or safety standard that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard and (2) that the violation was caused by an unwarrantable failure to comply with such standard, the operator is subject to a withdrawal order if:

* * * during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such

citation [an inspector] finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply * * *.

With respect to the citation (roof-control violation), I conclude that the Applicant violated a mandatory safety standard and that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

The roof-control plan in effect was formulated in accordance with 30 CFR 75.200, which provides in pertinent part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary * * *.

The applicable part of Applicant's approved plan reads: "Plan shown is minimum support for normal conditions. Additional posts, crossbars, or cribs shall be installed where needed." In normal conditions, two parallel rows of posts can be used as minimum support in pillar splits.

The controlling issue with respect to the validity of the citation depends on whether or not the cracked roof condition in the No. 1 pillar split area of the Guyan No. 2 panel section was an abnormal condition. If this condition were "abnormal," the validity of the citation would then depend on whether the roof control plan required the use of additional supports, such as crossbars or roof bolts, rather than the posts added by the foreman.

The federal mine inspector was of the opinion that: (1) the cracks in the roof indicated an abnormal condition requiring the company to exceed the minimum standards of its roof-control plan, and (2) that prior to mining, cross-sectional supports or roof bolts should have been installed. He stated that the posts added by the foreman were insufficient.

In the inspector's opinion, a normal roof is one that is firm and unbroken. He stated that cracks in a roof typically indicate an abnormal condition, but went on to say that when mining a pillar split

cracks are not an unusual occurrence. He believed that under the circumstances present at the Guyan No. 2 panel section, however, the roof was unpredictable, and could have fallen at any time after the miner was removed from the face. When the foreman ordered the miner to back out, material started falling from the cracks, which indicated that additional support was needed.

Applicant argues that cracks in a roof during retreat mining are not unusual, and if checked by an approved method, there is nothing inherently dangerous about them. Because the roof ultimately is designed to collapse during this method, Applicant contends that the roof condition indicated in the citation was normal.

Applicant argues that even if the condition were considered abnormal, the plan was followed because it gave the operator the option of using additional posts, crossbars, or cribs where needed, and Applicant chose to use additional posts. Applicant inspected the roof during the preshift before sending the mining machine into the face area, and recognized that additional support was needed. The foreman chose to set an additional 20-25 timbers rather than use the other options under the plan.

A decision as to whether or not there was a violation of the roof-control plan depends on whether the inspector's on-the-site determination should prevail over the judgment of the mine foreman that additional posts complied with the plan's requirements. I conclude that MSHA proved by a preponderance of the evidence that abnormal conditions prevailed and the roof was in need of additional support. The evidence adduced at the hearing leads me to conclude that the failure to use cross-sectional support (or roof bolts) under the circumstances was a violation of the plan. First, the roadway was initially in need of additional support because it was too wide. Second, the additional post plan was evidently inadequate because it was limited by a determination to leave room to mine coal, which meant there was no more room to add posts (after the additional 20-25) and still have room for the mining machine to operate. The fact that the roof exhibited signs of instability after the posts were installed indicated that satisfactory support was not provided, and that the option chosen by Applicant proved ineffective. On the other hand, cross-sectional support, or roof bolts, would have provided adequate support and still permit room for mining.

Having found that Applicant violated a mandatory health or safety standard, I also conclude that the violation could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. A violation may significantly and substantially contribute to the cause of a hazard regardless of whether or not it creates a risk of serious harm or death. Alabama By-Products Corporation, 7 IBMA 85, 94 (1977), approved in S. Rpt. No. 95-181, 95th Cong., 1st. Sess. 31 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 619 (1978). On the

other hand, no citation would be warranted if there were no risk of injury at all, i.e., where the violation is technical in nature, or if the risk of injury were very remote or minimal. Id.

The roof was shale and unpredictable in nature. In the opinion of the inspector, it was difficult to tell what type of fall might occur from just looking at the cracks, and whether or not it would strike the machine operator. The edge or left side of the miner probably would have been covered. During the abatement of the citation, two cracks were discovered in the roof strata indicating that the conditions were even more dangerous than they may have originally appeared. The additional cracks were discovered in spite of the roof test conducted by the foreman during the preshift examination. A roof fall could have injured or killed a miner or have caused a mine fire or electrical hazard.

The controlling issue with respect to "unwarrantable failure" as used in section 104(d)(1) is whether the operator failed to abate a violation which it knew or should have known existed, or failed to abate a violation due to indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280-296 (1977) (interpreting section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969), approved in S. Rpt. No. 85-181, supra at 31-32.

I conclude that the Secretary proved that the roof-control violation was unwarrantable. The operator knew about the cracked roof condition before mining commenced. Instead of choosing cross-sectional support, or roof bolts, it chose to add posts, but this approach was self-limiting because the operator chose to leave room for the mining machine, so that posts would not directly support the area of the cracked roof. On the other hand, cross-sectional supports or roof bolts could have supported the area of the cracked roof while still allowing room for the mining machine to operate.

The evidence overwhelmingly shows the post-support method chosen by the operator was inadequate to give necessary support to the cracked area of the roof. I conclude that a reasonably prudent operator would have used cross-sectional support or roof bolts, and would not have relied solely upon additional posts while allowing room for passage of the continuous miner.

CONCLUSIONS OF LAW

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

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

3. The Secretary proved by a preponderance of the evidence that the additional 20-25 posts installed by Applicant provided inadequate support for the roof and that Applicant therefore violated the approved roof-control plan, and hence 30 CFR 75.200, as charged in the citation issued on April 6, 1978.

4. The Secretary proved by a preponderance of the evidence that the violation of the roof-control plan was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

5. The Secretary proved by a preponderance of the evidence that the roof-control violation was the result of an unwarrantable failure by the operator to comply with the roof-control plan, as required by the mandatory safety standards in 30 CFR 75.200.

6. The Secretary proved by a preponderance of the evidence that the operator violated the dust safety standard in 30 CFR 75.400 as charged in the withdrawal order issued on April 11, 1978, and that such violation resulted from an unwarrantable failure of the operator to comply with such standard.

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

ORDER

WHEREFORE IT IS ORDERED that the citation issued on April 6, 1978, and the order issued on April 11, 1978, are hereby AFFIRMED and the application for review thereof is DISMISSED.


WILLIAM FAUVER, JUDGE

Distribution:

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David L. Baskin, Trial Attorney, Office of the Solicitor, U.S.
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4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 12, 1979

CONSOLIDATION COAL COMPANY, : Contest of Order
Applicant :
v. : Docket No. WEVA 79-54-R
: :
SECRETARY OF LABOR, : Order No. 0810947
MINE SAFETY AND HEALTH : March 26, 1979
ADMINISTRATION (MSHA), :
Respondent : Shoemaker Mine
and :
: :
UNITED MINE WORKERS OF AMERICA :
(UMWA), :
Representative :
of Miners :

DECISION

Appearances: Michel Nardi, Esq., Pittsburgh, Pennsylvania, for Applicant;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent Secretary of Labor;
Richard L. Trumka, Esq., Washington, D.C., for the Representative of the Miners, the United Mine Workers of America.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The case arose upon the filing by Applicant of an application for review of an order (now called a notice of contest of an order in Commission Rule of Procedure, 29 CFR 2700.20) issued on March 26, 1979, under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(2). Applicant challenged the order on the grounds that the violation of the mandatory safety standard alleged in the order did not occur; that there was no unwarrantable failure to comply with the mandatory safety standard; and that no condition or practice existed which could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Respondents Secretary of Labor and United Mine Workers of America contended that the order was properly issued.

Pursuant to notice, the case was called for hearing on the merits in Wheeling, West Virginia, on September 4, 1979. Kenneth R. Williams, a Federal coal mine inspector, testified for Respondent Secretary of Labor; Rayburn Fraley, William Barack, Joseph Domenick, Dale Goudy, and Bruce Armstrong testified for Applicant. No witnesses were called by the Representative of the miners. At the close of the hearing, the parties waived the filing of written proposed findings and conclusions.

ISSUES

1. Whether there was on March 26, 1979, an accumulation of coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials in the No. 1 and No. 2 belt entries of the 2 left off 4 north section of the subject mine.

2. If issue No. 1 is answered in the affirmative, whether the condition or practice was caused by the Applicant's unwarrantable failure to comply with the mandatory safety standard in question.

3. If issue No. 1 is answered in the affirmative, whether the condition cited could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

FINDINGS OF FACT

1. On March 26, 1979, Applicant was the operator of a coal mine in West Virginia known as the Shoemaker Mine.

2. The preshift examiner's report book (the "fireboss book") covering the 3 left, 4 north section of the subject mine reported the following conditions between March 19, 1979 and March 26, 1979: loose coal on the No. 2 belt on the third shift, March 19, 1979; loose coal on the No. 2 belt line and the No. 2 tailpiece on the third shift, March 22, 1979; (the latter condition [No. 2 tailpiece] was shown as corrected), loose coal on the No. 2 belt line, the spotter and the transfer point on the first shift, March 23; the report indicated that the section was idle during that shift; loose coal on the No. 2 belt line on the second shift, March 23; loose coal was also reported at the transfer point, the spotter and the tailpiece which were corrected; loose coal on the belt line on the third shift, March 23; the report stated that it "has been worked on, but belt is still spilling off on right side;" loose coal on the No. 2 belt line was reported on the first shift, and again on the second and third shifts on March 24. The section was reported as idle that day. The same condition was reported on each shift on March 25 (a Sunday) when the section was idle. Loose coal was reported on the first shift, March 26 on the No. 2 belt line, "tailpiece to 7+32," partially corrected; the report for the second shift on March 26 indicated the loose coal condition on the left side of the No. 2 belt line was corrected (Tr. 156-21; Applicant's Exh. 3).

3. Federal mine inspector Kenneth R. Williams, a duly authorized representative of the Secretary of Labor, inspected the subject mine on March 26, 1979. He reviewed the fireboss book above referred to before going into the mine. Inspector Williams was accompanied during his inspection by Nick Renzella, company safety escort, and Mike Veronis, union representative.

4. At approximately 6 or 7 p.m. on March 26, Inspector Williams arrived at the 3 left off 4 north section and walked the No. 1 and No. 2 belt lines. At about 8:30 p.m., he issued a 104(d)(2) order of withdrawal.

VIOLATION

5. On March 26, 1979, there was an accumulation of coal dust and float coal dust on the floor, the belt, on equipment and power cables along the No. 1 belt entry and in crosscuts in the 3 left off 4 north section of the subject mine. The condition was general throughout the entry for a distance of approximately 950 feet. Coal dust accumulated under the rollers from 2 to 14 inches in depth. The area generally was dry but was damp at the tailpiece. Some of the rollers were stuck at or near the tailpiece. The belt was not running at the time.

DISCUSSION

The above finding substantially accepts the testimony of Inspector Williams which was disputed by Applicant's witnesses. William Barack, chief inspector for Applicant, entered the mine shortly after the order was issued. He testified that there was some float dust on the belt structures, the hardware, the ribs, the roof planks, the belt drives, the power junction boxes, and the power lines, but that there were no "unusual accumulations" and that the condition was not dangerous. Peter Domenick, supervisor of safety at the subject mine, did not go to the section until September 28. There is substantial dispute as to whether the condition was the same on the 28th as it had been on the 26th. Dale Goudy, section foreman, worked on the first shift (midnight to 8 a.m.) on September 26. He stated that the No. 1 belt was "very clean." He saw a small amount of float dust on the belt structure and the ribs. He did not know whether any float dust was on the electrical boxes or power drives. Bruce Armstrong, section foreman on the 8 a.m. to 4 p.m. shift testified that on March 26, his crew worked the entire shift on the belt line (No. 2). He testified that when he examined the belt on March 23, he did not see anything wrong with the No. 1 belt line. He did not walk the No. 1 belt line on the 26th and does not know its condition on that day.

Inspector Williams testimony was complete and unequivocal. His was the only testimony of an eye witness to the conditions he observed and reported. Neither Nick Renzella, the company safety escort, or Mike Veronis, the union representative, both of whom accompanied Inspector Williams, were called as witnesses. I find Inspector Williams testimony credible and I accept it.

6. On March 26, 1979, there was an accumulation of loose coal along the right side of the No. 2 belt extending approximately two-thirds of the length of the belt or 1,000 feet. Beyond that point, the area had been cleaned and the loose coal was shoveled onto the belt. The belt was not running at this time.

DISCUSSION

Mr. Barack testified that there was some spillage along the No. 2 belt but that it was "not excessive." He stated that cleanup had begun. Dale Goudy testified that he reported loose coal spillage for 700 or 800 feet from the No. 2 tailpiece outby toward the dumping point when he made his onshift inspection on March 26. He directed men to shovel it onto the belt. They worked to the end of the shift and cleaned all but 100 to 150 feet of the area. Bruce Armstrong testified that during his shift his crew shoveled approximately 500 feet and corrected the condition which he had previously noted in the fireboss book for March 23. However, he did not examine the entire belt line.

It is clear that applicant had started to clean up the accumulations along the No. 2 belt line. It is also clear that it had not completed the task and that accumulations of many days duration remained.

I have accepted Inspector William's testimony as to the condition of the No. 2 belt as I did with respect to the condition of the No. 1 belt.

UNWARRANTABLE FAILURE

7. The condition found along the No. 2 belt line had been reported in the preshift and onshift mine examiner's book since March 19 and was not corrected as of March 26.

8. The condition found along the No. 1 belt line was of such magnitude that it must have been present for some days.

9. Applicant was aware of the conditions described in Findings of Fact No. 5 and No. 6. It had ample opportunity to correct these conditions before March 26, 1979, but failed to do so.

SIGNIFICANT AND SUBSTANTIAL

10. The conditions found to exist in Findings No. 5 and No. 6 were such as could significantly and substantially contribute to the cause of a mine safety or health hazard.

DISCUSSION

Float coal dust if put in suspension is potentially explosive, and can propagate an ignition. There were many possible sources

of ignition in the area. Loose coal and coal dust can, of course, serve as fuel for a mine fire. The extent of the accumulations found herein could have contributed to a mine safety or health hazard. If the belts had been in operation, a dangerous situation would have been presented.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. The conditions found to exist on March 26, 1979, in Findings of Fact No. 5 and No. 6 constituted a violation of the safety standard contained in 30 CFR 75.400.
3. The conditions found to exist in Findings of Fact No. 5 and No. 6 resulted from Applicant's unwarrantable failure to comply with the safety standard in question.
4. The conditions found to exist in Findings of Fact No. 5 and No. 6 were such as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

ORDER

Order of Withdrawal No. 0810947 issued March 26, 1979, is AFFIRMED, and the contest of said order is REJECTED.



James A. Broderick
Chief Administrative Law Judge

Distribution:

By certified mail:

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Washington, DC 20005

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

OCT 15 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. HOPE 78-569-P
Petitioner, : A/O No. 46-01409-02028 V
v. :
: Maitland Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Karl T. Skrypak, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania for Respondent.

Before: Judge Forrest E. Stewart

On August 29, 1979, a hearing was held in the above-captioned proceedings in Charleston, West Virginia. At that time, the Administrative Law Judge approved a settlement negotiated by the parties and ordered Respondent to pay the agreed-upon sum of \$1,500 within 30 days of the date of the order.

A 104(c)(2) order of withdrawal had been issued on August 29, 1977, at Respondent's Maitland Mine alleging a violation of the approved roof control plan. The inspector described the condition or practice as follows:

Loose, unsupported roof and ribs were present along the mantrip and supply track haulage system at several locations from the first left belt overcast to a point about five crosscuts outby the two left supply hole, and the conditions were or should have been known to management in that they were obvious."

MSHA's Office of Assessments originally proposed a penalty of \$6,000. As grounds for the reduction in proposed penalty, Counsel for Petitioner asserted the following:

The Office of Assessments waived the use of the formula contained in 30 CFR 100.3 in determining the civil penalty on the basis that unwarrantable failure had been found and assessed a penalty in the amount of six thousand dollars.

As a result of prehearing discussions with the MSHA inspector who issued the Order and discussions with Mr. Skrypak, the attorney for Consol, an agreement was reached to settle the case for an amount of fifteen hundred dollars.

We believe the amount of fifteen hundred dollars in this instance is sufficient to support the purposes of the Act in preventing violations, accidents and injuries, and is in accordance with the criteria and the Act itself.

Essentially, the area which we cited is only vaguely described by the inspector as to gravity. Several locations were mentioned by him. In attempting to elicit definite testimony as to the exact nature of the roof conditions, the inspector had taken no notes and could not give a more precise and detailed description of the allegations on which the assessment was made.

I felt we would have problems in presenting a clearcut description as to the gravity and extent of the conditions cited. The area cited had not been used as an active haulage or entry for transporting men.

The prime consideration was the question of unwarrantability, and upon this Consolidation has given evidence that the condition was, at the time the Order issued, currently being rehabilitated and being brought up to the standards of the roof control plan, that good faith was being shown at that time, and even more so after the issuance of the Order, abating those conditions.

They were, in fact, expending time and money to remedy the condition before the Order had been issued. So, with these factors considered -- also the fact no injuries were either, in fact, caused or were they probable to be caused due to the remote area of the condition -- it is unlikely serious injuries would have resulted -- although ordinarily a roof condition must be considered as an extremely serious violation.

We feel the penalty in the amount of fifteen hundred dollars is sufficient to deter future violations and recommend it be accepted by the Administrative Law Judge.

Counsel for Respondent placed on record the following dollar amounts and man-hours which were expended by the operator to correct the situation prior to the issuance of the order:

During the period of approximately six weeks before this particular Citation or Order was issued and for a period of some four weeks thereafter, Consolidation Coal Company spent a total of forty-nine working days in this area, amounting to eighty-seven man shifts which covered over two thousand man hours.

During this two thousand man hours, the following work was performed: Over ninety feet of draw rock was taken down, the ninety feet was then rebolted with approximately ninety roof bolts.

Eleven breaks of locust timbers were set. That translates in layman's terms to approximately three hundred timbers. Thirty crossbars were set, those being steel crossbars.

The high voltage and trolley wire was rehung. The approximate cost of the work -- by figuring only the direct cost of labor and supplies -- is around seventy-five thousand dollars. The direct cost, which cannot be figured accurately, would probably place the value of this work in excess of one hundred thousand dollars.

The approval of settlement and the order requiring that the respondent pay the sum of \$1,500 within 30 days of the date of the hearing are hereby affirmed.



Forrest E. Stewart
Administrative Law Judge

Distribution:

Leo McGinn, Esq., Office of the Solicitor U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Karl Skrypak, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburg, PA 15231 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 15 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. HOPE 78-623-P
Petitioner : A/O No. 46-02877-02012 F
v. :
: No. 9 - No. 8 Drift Mine
CARBON FUEL COMPANY, :
Respondent :

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for
Petitioner.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding pursuant to section 110 of the Federal Mine Safety and Health Act of 1977. A hearing in this matter was held on August 29, 1979, in Charleston, West Virginia. At that time, settlement of the case was proposed in the amount of \$3,500. MSHA's Office of Assessments had originally proposed an assessment of \$10,000. In support of the motion for settlement, counsel for Petitioner asserted the following:

Your Honor, this case involves a single violation, a 104(b) Notice alleging a violation of 75.200 issued January 11, 1977, for failure to comply with the approved roof control plan, in that the roof bolting machine operator was not using the temporary supports, roof bolting in the face area, and an accident occurred; and the bolter was killed as a result of the accident.

An assessment was made at that time of ten thousand dollars. Your Honor, when this case was assigned for hearing during this week, I obtained the file from Mr. Edward Fitch, an attorney of our office, and was advised by him -- and this was confirmed by correspondence in the file -- this actually had been set last year for prehearing by another judge and had been continued. In the meantime, settlement negotiations had been carried on.

By letter dated July 30, 1979, a letter from C. Lynch Christian, III, attorney for Carbon Fuel, to Mr. Edward Fitch, Esquire, of the Office of the Solicitor, confirmed a settlement agreement reached between the parties in the amount of three thousand five hundred dollars.

I examined the material available in the file, discussed the case with Mr. Fitch, and was told by him agreement had been reached and that a motion, for some reason or another, had not been filed by the parties asking that the amount be approved and the case be dismissed.

Basically, the reasons are contained in a letter from Mr. Christian to Mr. Fitch which explains the allegations of negligence on the part of the operator. Evidently, the evidence accepted by Mr. Fitch is that temporary supports were available on the continuous mining machine and should have been used at that time.

The victim had attended the training classes in roof and rib control and had received a full explanation of the requirements of the plan only two months prior to the accident, including the requirement temporary supports be set while bolting.

The victim had been caught, as explained in the letter, "--by mine management without or with improperly set temporary supports on three occasions since 1974. On each of these occasions, the roof bolter had been shut down, the roof control procedures carefully explained and a verbal or written warning issued to Mr. Morris," the victim.

In view of these circumstances, Mr. Fitch accepted the contention that management could not be held to be grossly negligent in the unfortunate fatal accident which occurred here.

Although the violation is, of course, serious with the death of the man, it was considered a penalty in the amount of thirty-five hundred dollars was sufficient and would be acceptable under the circumstances of the evidence available for proof as to negligency.

Having concurred with Mr. Fitch and examined the documents in the file, I find no reason for the Office of the Solicitor to back out of the agreement which had been reached between the two attorneys at an earlier time.

So, I move the penalty in the amount of thirty-five hundred dollars be accepted and the proceeding be dismissed upon payment.

Counsel for Petitioner also introduced into evidence two letters from counsel for Respondent to counsel for Petitioner. The first of these was a letter of agreement, dated July 30, 1979. The second, dated May 3, 1979, set out Respondent's position with respect to the issue of negligence.

At the conclusion of the hearing, the settlement negotiated by the parties was approved by the Administrative Law Judge and Respondent was ordered to pay the agreed-upon sum of \$3,500. This approval of settlement is affirmed here.

ORDER

It is ORDERED that the approval of settlement negotiated by the parties in the above-captioned proceeding is hereby AFFIRMED.

It is further ORDERED that Respondent pay the agreed-upon sum of \$3,500 within 30 days of the date of this decision.



Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-1-P
Petitioner : A.O. No. 42-0081-02015
v. :
 : Co-op Mine
CO-OP MINING COMPANY, :
Respondent :

DECISION AND ORDER APPROVING SETTLEMENT

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on October 4, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation of the provisions of 30 CFR 70.250(b), and seeking a civil penalty assessment in the amount of \$190 for the alleged violation.

By stipulation and joint motion filed October 9, 1979, pursuant to Commission Rule 29 CFR 2700.30, the parties propose to settle this case without a formal hearing by the petitioner amending the proposed penalty to reflect a penalty of \$25 rather than the \$190 which was initially proposed, and respondent agreeing to withdraw its contest and to pay the \$25 proposed penalty.

In support of the proposed settlement, the parties have taken into account, and have submitted information concerning the six statutory criteria set forth in section 110(a) of the Act, including the following:

History of previous violations - Respondent has had a total of 110 violations from July 27, 1975 to July 26, 1977, only one of which was a violation of 30 C.F.R. 250(b).

Size - Respondent operates a coal mine which mines between 30,000 and 50,000 tons of coal each year.

Ability to continue in business - Payment of the proposed penalty will not impair respondent's ability to continue in business.

Good faith, negligence and gravity - Respondent is required by standard 30 C.F.R. 70.250(b) to take respirable dust samples from the mine atmosphere of miners at least once every 120 days. MSHA received information, allegedly from Respondent, that Respondent employed a miner with Social Security No. 528-96-5108. No respirable dust sample was submitted for an employee with that Social Security Number within the prescribed time, and an order for violation was ultimately issued. Respondent did in fact employ a miner with Social Security No. 528-96-5109, however, Respondent's personnel records show that no employee with the Social Security Number 528-96-5108 has ever been employed by Respondent, and Respondent's records show that samples for an employee with Social Security no. 528-96-5109 were submitted as required. Any error appears to have been clearly clerical in nature and MSHA does possess a sample for employee 528-96-5109 during the time in question.

DISCUSSION

After careful review and consideration of the argument in support of the proposed settlement, and taking into account those factors required to be considered by section 110(i) of the Act, I conclude and find that the proposed settlement should be approved. It would appear that the alleged citation in question resulted from a clerical error and does not in my view present a serious violation. Further, respondent is a small mine operator and has no significant prior history of violations.

ORDER

The settlement is approved, and the respondent is ORDERED to pay a civil penalty in the amount of \$25 within 30 days of the date of this decision and order in satisfaction of Citation No. 7-0770, July 26, 1977, 30 CFR 70.250(b). Upon receipt of payment, this case should be dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 18 1978

RONALD E. DUNLAP, : Application for Review
Applicant : of Discharge
v. :
: Docket No. BARB 78-66
CHAROLAIS COAL CORPORATION, :
Respondent : No. 1 Mine

DECISION

Appearances: Ronald E. Dunlap, White Plains, Kentucky, pro se.;
Joe A. Evans III, Esquire, Madisonville, Kentucky,
for the respondent.

Before: Judge Koutras

Statement of the Case

On December 5, 1977, applicant Ronald E. Dunlap filed a discrimination complaint with the Office of Hearings and Appeals, U.S. Department of Interior, Arlington, Virginia, pursuant to section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, asserting that he was discharged by the respondent on November 14, 1977, and that his discharge was in violation of section 110(b) of the Act. The complaint states as follows:

On November 14th, I was discharged from my job as a Euclid driver for Charolaois Coal Corp. For sometime, I had been complaining about the brakes. We were moving the Euclids on November 4, from one mine to the other, when the first Euclid stopped to let an oncoming car pass. The brakes failed on the Euclid that I was driving, so I had to run the Euclid off the road to keep from hitting the car, and as a result I hit the back of the other Euclid. I was sent home after the accident. The Euclid was down for seven days to repair the brakes. I reported to work everyday until November 14th, when they informed me I was fired due to the accident. I was discharged by the company in violation of section 110(B) of the Federal Coal Mine Health and Safety Act.

By letter dated January 17, 1978, from former Chief Administrative Law Judge Luoma, Mr. Dunlap was advised that his complaint had been docketed but that it appeared to be deficient in that there was no indication that a copy had been served on the respondent. He was advised to serve a copy on the respondent and to advise Judge Luoma's office that service was made on the respondent.

By letter dated February 22, 1978, Mr. Dunlap advised that a copy of his complaint was served on the respondent by MESA Special Investigator Jesse F. Rideout on December 28, 1977.

On March 27, 1979, Commission Chief Administrative Law Judge Broderick issued an order to the respondent to show cause why it should not be held in default and the matter summarily disposed of because of respondent's failure to file an answer.

On April 4, 1979, respondent filed a response to Judge Broderick's show-cause order, and on April 25, 1979, I issued an order indicating that respondent satisfactorily answered the show-cause order and should not be held in default. By notice of hearing issued May 9, 1979, the parties were advised that a hearing would be held in Evansville, Indiana, on August 21, 1979.

Issue Presented

The issue presented in this proceeding is whether the discharge of Mr. Dunlap from his truck driver's position was in fact prompted by his reporting of safety infractions to the Mining Enforcement and Safety Administration.

Applicable Statutory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq.
2. Section 110(b) of the Act provides in pertinent part that:

No person shall discharge or in any other way discriminate against or cause to be discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

Discussion

Applicant's Testimony

Ronald E. Dunlap testified that on November 4, 1977, while employed by the respondent as a Euclid truck driver, and while driving a truck which he believed had bad brakes, he ran the truck off the road in order to avoid hitting another car which had stopped on the road. He had previously complained about the bad brakes some 2 months prior to this incident. After the incident, mine foreman Tom Gamble sent him home, and he was subsequently fired by Mr. Bowles, the mine owner, and Mr. Bowles stated he fired him because he had received complaints about the manner in which the trucks were being operated on the road (Tr. 8-11).

Mr. Dunlap stated that he still does not know the reason why he was discharged by Mr. Bowles. After he was fired, he tried to obtain other employment but was unable to, and he believes it was because he "went to the Federal people over it" (Tr. 12). He called someone at MESA on the phone and complained about the truck brakes and he also sought help in filing his discrimination complaint. He subsequently went to work for Island Creek Coal Company in Madisonville on September 18, 1978, and is still employed there. Prior to that time, he was unemployed and was paid no unemployment benefits because of his discharge (Tr. 14).

On cross-examination, Mr. Dunlap confirmed that he was discharged on November 14, 1977, and that on November 26, 1977, he executed an affidavit alleging that he was fired because of reports of safety violations (Exh. R-1). He stated that sometime in mid-October of 1977 he called an unidentified man at the MESA Madisonville office to complain about the brakes on the truck in question. He did not file any written report, and to his knowledge, no one came to the mine to inspect or check on the condition which he reported. He continued to drive the truck after he complained about it and he was not discharged and continued to work with the respondent until his discharge on November 14 (Tr. 15-16).

Mr. Dunlap identified the manufacturer's specifications for a Euclid R-50 truck, the type of vehicle he was driving on the day of the accident (Exh. R-2). He described the truck braking system, and his duties entailed hauling spoil from one of the mine pits to a dumping area and this was done in tandem with another truck driver usually over an 8-hour daily shift. He confirmed that at the end of a shift he was required to fill out a slip stating the current condition of the truck, and he customarily filled it out by signing it and turning in the hours he worked (Exh. R-3, Tr. 17-23). He denied that he was ever informed that he was to report the condition of his truck on the report (Tr. 24). However, he stated he was not sure whether he has filled out any such reports indicating problems with his truck, but did identify one he turned in on October 12, 1977 (Exh. R-4).

Mr. Dunlap stated that he was instructed to advise the mechanic about any problems with his truck, and he also turned in reports to his foreman (Tr. 26). He admitted that at no time did he ever fill out a report stating there were problems with his truck and this is because he always reported it orally (Tr. 27). He denied that anyone has ever advised him to slow down while driving around the pit (Tr. 29).

Mr. Dunlap testified with respect to the accident with his truck and he indicated that he had to run his truck into a ditch to avoid the stopped car, and that he could not stop in time (Tr. 30-37). He confirmed that he wrecked his brother-in-law's truck 2 days after the accident in question and believed bad brakes caused that accident also (Tr. 39). He also admitted stating to Mr. Gamble that he would not blame Mr. Bowles for firing him for wrecking the Euclid truck (Tr. 40).

In response to questions from the bench, Mr. Dunlap stated that on October 15, 1977, he called someone at MESA and advised him that he damaged the truck transmission because he could not stop the truck and had to put it in gear to keep it from going over a bank. He could not recall who he talked to and no one from MESA came in response to his call. He never saw any MESA or state inspectors at the mine and he has never complained to any state inspectors about truck brake conditions. He also indicated that he never told Mr. Bowles about his call to MESA, and he told no one at the mine about it (Tr. 40-44).

Respondent's Testimony

Donald E. Bowles, mine owner, testified that he is familiar with the Euclid truck operated by Mr. Dunlap on the day of the accident, and he discussed the truck braking system. Mr. Bowles stated he drove the truck after the accident to get it out of the road. The truck windshield was knocked out and one door would not close. The truck was purchased in January 1977, and a new one costs \$280,000 (Tr. 62-65). Mr. Bowles stated he was unaware of any complaints made by Mr. Dunlap to MESA, and he first learned about the matter when MESA representative Rideout interviewed him after Mr. Dunlap filed his complaint (Tr. 66).

Mr. Bowles testified he has observed Mr. Dunlap's driving habits and asked pit foreman Gamble on two occasions to slow him down. Prior to the accident, he was not aware of any serious brake difficulties with the Euclid truck. He denied that Mr. Dunlap was fired for complaining about safety violations (Tr. 66-67).

On cross-examination, Mr. Bowles testified that the truck in question was still under warranty at the time of the accident, and that in addition to Mr. Dunlap, it was also driven by Mr. Gamble. He confirmed that there was a brake problem with the truck, but indicated

that it was caused by failure of the driver to use the retarder to slow it down and "riding the brakes" while going downhill (Tr. 70).

Mr. Bowles stated that he told Mr. Dunlap that a local county judge had complained about his driving too fast and reckless with the Euclid truck and that after the accident when he rode back with Mr. Dunlap to his car, Mr. Dunlap asked him if he were fired, and Mr. Bowles answered "I don't know" and told him he would have to talk to Mr. Gamble and Mr. Durall first and that he would let him know. On or about November 14, he told Mr. Dunlap that he was fired because of the complaints of his fast driving and that he could not permit anyone who was unsafe to operate his equipment (Tr. 71-72).

Mr. Bowles described the accident and indicated that one truck ahead of Mr. Dunlap had stopped to allow a car to pass by and Mr. Dunlap was trailing behind the lead Euclid truck which had stopped. Mr. Dunlap hit the truck which had stopped in the backend and ran off the ditch beside it (Tr. 73). Mr. Bowles stated that Mr. Dunlap's discharge was oral and he paid him his final check (Tr. 75).

In response to bench questions, Mr. Bowles testified that MESA does inspect his mine, but he could not recall the Euclid trucks being inspected in October or November 1977, nor could he recall any citations being issued against the trucks for deficient brakes (Tr. 76). He first met Mr. Rideout when he came to interview him concerning Mr. Dunlap's complaint. Mr. Rideout asked him to reinstate Mr. Dunlap and he told him he could not because he was not a safe workman (Tr. 77). He denied firing Mr. Dunlap for making any safety complaints and knows of no complaints that he may have filed with MESA, and Mr. Rideout mentioned none (Tr. 79).

Thomas E. Gamble, pit foreman, testified that Mr. Dunlap was a good worker but a "little bit fast" and sometimes a "little bit reckless" with his truck. He was aware of no complaints made to MESA by Mr. Dunlap and when he left the job he had received no complaints about bad truck brakes. He would not have permitted Mr. Dunlap to operate the truck if it were in fact in an unsafe condition. After the accident, Mr. Dunlap stated that if Mr. Bowles fired him "I guess I've got it coming" (Tr. 82-85).

In response to bench questions, Mr. Gamble stated that Mr. Dunlap worked directly for him and they were working together when the accident occurred (Tr. 86). Mr. Bowles consulted him as to whether Mr. Dunlap should be fired and he voted to fire him because of his reckless driving habits. Mr. Dunlap never indicated to him that he ever complained to MESA about any defective brakes on the trucks (Tr. 87). He is unaware of any citations issued against the trucks for defective brakes, and aside from his driving habits, Mr. Dunlap was a good worker (Tr. 89).

John S. Durall, pit foreman, testified he was aware of Mr. Dunlap's driving habits and that they were "average". On the day of the accident, he was driving the lead truck acting as a flag truck to slow down other vehicles coming from the opposite direction. The truck operator is responsible for filling out the slip tickets at the end of each shift. He is not aware of any MESA citations issued during October and November against the Euclid trucks (Tr. 92). He was not aware that Mr. Dunlap had registered any complaints with MESA.

Findings and Conclusions

On the facts and evidence adduced in this proceeding, I cannot conclude that Mr. Dunlap's discharge from his employment with the respondent was in any way connected with, or the result of, any discrimination resulting from any complaints which he may have made to MESA in connection with the brakes on the Euclid truck. As a matter of fact, there is no evidence to substantiate the fact that Mr. Dunlap ever complained to MESA about any defective brakes on the truck in question, and there is no evidence to substantiate the allegation that respondent was aware of such complaints and retaliated against Mr. Dunlap by discharging him. MESA's involvement in the case came after Mr. Dunlap filed his complaint, and from the record it would appear that this involvement was limited to a March 1978 interview by MESA inspector Rideout with the owner of the mine. Respondent's evidence and testimony establishes that Mr. Dunlap's discharge was prompted by the accident that he was involved in concerning the Euclid trucks owned by the respondent, and the fact that respondent considered Mr. Dunlap to be an unsafe truck driver.

During the course of the hearing, and in response to my question as to whether Mr. Dunlap had ever considered retaining counsel to represent him, he indicated that he had retained an attorney from Madisonville, Kentucky, who was aware of his complaint, but it was his understanding that he did not require an attorney. Out of consideration of the fact that Mr. Dunlap appeared pro se at the hearing, the record was left open for a period of 30 days to afford Mr. Dunlap an opportunity to contact his attorney further for the purpose of advising him as to the posture of his case and to afford the attorney an opportunity to file any further arguments in support of his claim (Tr. 93-96). No further information in this regard has been forthcoming either from Mr. Dunlap or his alleged attorney. Under the circumstances, I am of the view that Mr. Dunlap has had a full and fair opportunity to present his claim and he admitted as much at the hearing (Tr. 94-95). However, as indicated above, Mr. Dunlap has presented nothing to support his claim that his discharge was prompted by any protected activities afforded him under the 1969 Act.

ORDER

In view of the foregoing findings and conclusions, applicant is not entitled to any relief under section 110(b) of the Act, and his application for review is denied and this case is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 17 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-219-PM
Petitioner : A.C. No. 04-00035-05002
v. :
 : Docket No. DENV 79-241-PM
CALICO ROCK MILLING, : A.C. No. 04-00035-05001
INCORPORATED, 1/ :
Respondent : Calico Quarries & Mill

DECISION

Appearances: Donald F. Rector, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Howard M. Peterson, President, Calico Rock Milling,
Incorporated, Barstow, California, for Respondent.

Before: Administrative Law Judge Michels

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). On January 18, 1979, the Mine Safety and Health Administration (MSHA) filed a petition for the assessment of civil penalties, docketed in DENV 79-219-PM, alleging that Respondent committed violations of 30 CFR 56.9-87, 56.9-7, 50.20, sections 109(a) and 103(a) of the Act, and two separate violations of 56.14-1. Thereafter, on January 26, 1979, MSHA filed a second petition, docketed in DENV 79-241-PM, alleging that Respondent committed two violations of 30 CFR 56.14-6. On March 30, 1979, Respondent filed answers contesting the violations in both dockets. A hearing was held on August 7, 1979, in San Bernardino, California, at which Petitioner was represented by counsel and Respondent was represented by its president,

1/ At the beginning of the hearing, Respondent moved to amend the caption in this case from Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Calico Rock Company, to the above. Petitioner did not object to this change and the caption has been amended accordingly (Tr. 15).

Mr. Howard M. Peterson. The two dockets were consolidated for the hearing and for this decision (Tr. 2). 2/ At the start of the hearing, the parties stipulated (1) that Respondent does not have a prior history of violations, (2) that Respondent is a small company, and, (3) the imposition of these penalties would not impair the operator's ability to continue in business (Tr. 4-5). Thereafter, the following action was taken:

Docket No. DENV 79-219-PM

Citation No. 375049, July 18, 1978

Evidence was first received regarding Citation No. 375049, which alleges a violation of 30 CFR 56.9-87. The condition or practice cited by the inspector is as follows: "An automatic warning device which would give an audible alarm when the equipment is put in reverse was not provided on the Michigan 125 Front-end loader." The regulation, 30 CFR 56.9-87, provides that:

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

On the basis of the evidence presented, and in light of the statutory criteria, a decision was made from the bench finding a violation of the standard and assessing a penalty of \$40. This decision from pages 76-78 of the transcript, with some necessary corrections, is set forth below:

Now to get onto the citation. This citation is that an automatic warning device, which would give an audible alarm when the equipment is put in reverse, was not provided on the Michigan 125 front-end loader. This is cited as a violation of 30 CFR 56.9-87, which does require that heavy duty mobile equipment be provided with audible warning devices. The evidence indicates that this is the kind of equipment which should be so provided. It further indicates, and I do not believe that Mr. Peterson has disputed, that it was not provided. There is some question apparently as to whether this [equipment] was fully in operation, because the indication is that it was being used * * * in the process of doing a repair to test it out.

2/ The citations were heard in numerical order which meant that the two citations in Docket No. DENV 79-241-PM were heard in the middle of the citations heard in Docket No. DENV 79-219-PM.

Well, I would say this. That as far as the need for such a device is concerned, it is, of course, to warn people in back. It is hard for me to draw a distinction between operating generally or operating just in the context of the repair. So I fail to see that this would be much of a mitigating circumstance in this instance.

The net result is that I would find that there has been a violation as alleged. * * * We have already considered three of the criteria. As far as the abatement, I just don't think there is enough evidence for me to determine that it was not abated in good faith, so I will just simply let that finding go as though there was an abatement within the time set by the inspector.

There are two other elements or criteria to consider. As to gravity, the testimony was that people, that other miners were in the area and in back of it. In my mind, there is no question about the seriousness of not having these devices. It is all too easy for somebody to get injured when they do not hear the machine being backed up. So I would have to naturally find that it is serious.

There is also the question of the negligence. Based on the evidence I heard, I think there is no question that Mr. Peterson and his company knew that these were required and apparently also knew that it was not on this machine, although it should have been. There is one slight mitigating factor, that maybe it was not appreciated that this should have been on there in this particular situation, where it was being used in connection with other repairs to test out the machine.

As I said, I can't see any distinction, so I wouldn't make much of a point of that. The Government has asked for \$56 here, which is, of course, nominal. But taking into account this slight mitigating factor, I would reduce that somewhat to \$40. I will take \$16 off.

So, accordingly, my finding would be for an assessment of \$40 for this citation.

The above bench decision and assessment are hereby AFFIRMED.

Citation Nos. 375050 and 375051, July 18, 1978

Following the above decision, Petitioner and Respondent introduced evidence in a consolidated fashion on Citation Nos. 375050 and 375051 which both allege violations of 30 CFR 56.14-1. The condition or practice cited in Citation No. 375050 states: "The V-belts on the

drive motor of the secondary crusher was not guarded to keep employees from coming into contact with the pinch points." On Citation No. 375051, the inspector, as to the practice stated: "The balance wheel on the secondary crusher was not guarded to keep the employees from coming in contact with it." The regulation requires that: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

The following bench decision found at pages 130-137 of the transcript, with some necessary corrections, was issued at the hearing on the merits of these two violations:

To begin with, I must find whether or not there was a violation, you see. In this case, we are dealing with two different citations, 375050 and 375051, both charging a violation of 30 CFR 56.14-1. This is under 30-CFR. The evidence shows that the citations were issued against a piece of machinery which on either end had a V-belt and a balance wheel which were not covered.

The charge was, of course, that they were not guarded and 56.14-1 requires that moving machine parts which may cause injury shall be guarded. So the evidence that has been received has turned on, in part at least, a question of whether or not there was a guarding. Now, I think there is one disputed area and that is whether or not there was a chain with a sign as shown in one of the pictures.

The inspector testified that he did not see any such chain or sign, and I think that -- or I will accept his testimony on that, because Mr. Cowley also stated that on the date of the abatement that there was a screen there; that there was no chain or sign. * * *

As I observed, it is my understanding that this machinery was previously guarded either completely or with separate guards. I don't know which. And that these were removed. They were removed apparently because the State inspector had believed that if there was no access, then that would be adequate.

Now, as it turns out, however, there was access and it is admitted that there was a ladder there on that day so that miners could have gone up there. I believe it is clear that they did go up there for maintenance and oiling, but it is not clear, of course, in fact there is no evidence, that anybody was ever up there while the machinery was moving.

Well, I am getting a little bit ahead of myself. The question is whether or not that was guarded. Now, the question has been raised, and properly so, as to whether or not the regulation that we have is adequate and I think it is. At least in relation to this particular piece of machinery, a guard simply means -- it seems unquestionably -- a cover that would keep people out, so that they would not get pulled into it or their clothing pulled into it. If it is inaccessible, I would go along with the proposition that you wouldn't necessarily have to have a guard. If it is way out of reach of anybody. But this was not out of reach. * * * [I]t could be reached via the ladder and right into the machine. Of course, the inspector did not observe any person up there, but I believe that it is clear that people do go there, and that was the reason for the ladder, to allow access so that they could get up for maintenance. That is my understanding.

Now, I just would have no alternative really except to find that this was unguarded as alleged, and I do so find. In other words, there is a violation as charged in both of these citations of 30 CFR 56.14-1. * * *

So that brings us to the point of the assessment. The findings have already been made on all of the criteria, except abatement, seriousness and negligence. I think counsel, Mr. Rector, has made a big point on abatement because of Mr. Peterson's statement that he wasn't going to do anything further or guard this. I really didn't understand it that way. What I understood you [Mr. Peterson] were saying, and I so interpret it, is that you believed what you had there was adequate in all the circumstances.

So I don't add, I would not add a further penalty or increase the penalties for that reason. * * * Abatement did not take place within the time permitted, but it did take place eventually to the satisfaction of Inspector Cowley.

Now that brings up seriousness or gravity. My finding would be that it is a serious violation. I think that open machinery which is not guarded is very dangerous. [The cited condition] is mitigated here a little bit by that fact that nobody was seen there, and there is no evidence at all that anybody was ever there when the machinery was moving. * * *

Now, as far as negligence is concerned, I find ordinary negligence, because I believe that it should be known that these should be guarded. I mean, either an operator knows or should know about that. I think that it is a mitigating

factor that the State inspector did give his advice or permission to remove those guards under certain circumstances. So it is not, as I see it, the gross negligence that has been suggested. But even with all of those factors in mind, I don't think I can reduce these fines. So therefore, I will assess the penalties that have been assessed by MSHA in their Assessment Office, namely, that is, for each of these violations the sum of \$56.

(Tr. 130-137).

I hereby AFFIRM the above bench decision.

Docket No. DENV 79-241-PM

Citation Nos. 375052 and 375053, July 18, 1978

Thereafter, the parties presented evidence on Citation Nos. 375052 and 375053, which are the only two citations docketed in DENV 79-241-PM. Both charge Respondent with separate violations of 30 CFR 56.14-6. The condition or practice cited in Citation No. 375052 states: "The guard for the V-belts of the drive motor on the No. 2 Shaker Screen was not in place while belt was running to keep employees from coming into contact with the pinch points." The wording of Citation No. 375053 is the same except that it refers to the No. 1 Shaker Screen. 30 CFR 56.14-6 provides: "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

After considering the evidence, a decision was issued from the bench. This decision found in the transcript at pages 153 and 154, with some corrections, is set forth below:

These citations are 375052 and 375053. They both involve charges of 56.14-6, alleging that the guards on the particular pieces of machinery involved were not in place while the machines were running. This particular regulation, I will read it in full, states: "Except when testing the machinery, guards shall be securely in place while the machinery is being operated."

Now, it is clear from the testimony that guards were not on the machinery while it was being operated. I suppose then the issue is whether the conditions come within the exception, that is, except when testing the machinery. Mr. Peterson has testified to the effect that they were in a testing posture. The one indication that this might not have been true was mentioned by the inspector, and that is that one [guard] seemed to be covered with dust or dirt or rock, indicating it had been there a long time, although

Mr. Peterson has explained that. [He testified that within an hour's running, dust could build up to an inch or an inch and a half (Tr. 152-153).

There was no rebuttal of that [the claim that tests were taking place]. I have no reason whatsoever not to believe Mr. Peterson on his explanation. Therefore, my understanding would be that it comes within the exception. This is no criticism of the inspector. He called it as he saw it when he went there. Unfortunately, he didn't find out, I guess, that it was in a testing posture.

That being the case, I would dismiss then as to those two citations. Accordingly the petitions [are vacated] and the whole docket, DENV 79-241-PM, is dismissed.

(Tr. 153-154).

I hereby AFFIRM the above decision vacating Citation Nos. 375052 and 375053 and dismissing DENV 79-241-PM.

Docket No. DENV 79-219-PM

Citation No. 375054, July 18, 1978

Next, evidence was introduced on Citation No. 375054 which charges a violation of 30 CFR 56.9-7. After the conclusion of the parties' presentation of evidence, the following decision found in transcript pages 171-174, with some corrections, was rendered from the bench:

I will therefore make my decision. This is Citation 375045. The citation states that the conveyor side of the walkway on the hopper/conveyor was not equipped with emergency stop devices or a cord along the full length of the conveyor belt. The standard, in this instance, states: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."

Well, the evidence here on a number of points seems undisputed, that is, that there was a walkway along a conveyor that was in operation; furthermore, that there was no emergency stop device on the walkway. I don't think there is any dispute about that.

Mr. Peterson has mentioned several points in his defense. The first one being, I believe, the contention that it was in fact guarded, so that it was not unguarded -- asserting and testifying that there was a chain.

Contrary-wise, if my recollection of the testimony is correct, I think Mr. Goodspeed did say that there was no

guard and it was accessible. So I have a direct conflict in the testimony and in the evidence.

Here, again, of course, we have some kind of problem or controversy as to what we would mean by guarded. Would, for example, a chain be adequate if it was there or if it had been there?

Well, I have to make a decision on it, and I don't know perhaps enough about this whole procedure or arrangement to make a decision which I think is necessarily going to be a precedent for other cases, but I am thinking just in terms of this situation. I would find for this citation that the mere chain would not be enough. I agree that a chain can be too easily taken down. It is usually just put up with some snap, and if somebody wants to use it they go under it or use it in some way. * * * Therefore, that guard has to be a secure kind of guard that would probably have to be some kind of a link fence or whatever the barrier would be. I say, I readily admit, I have not researched this area, and I don't want to be making a kind of a ruling that would be necessarily a broad precedent here. But I think, as I understand this situation, it would not be guarded [with only a chain].

So then the next point -- well it was not equipped with the emergency stop devices. * * * If [the conveyor] doesn't have this cord, it violates this standard. Now, that may seem harsh and it may seem strict, but I believe that these regulations were written with the thought that if these are enforced, it will prevent those accidents from happening which shouldn't occur. Men probably shouldn't, maybe very seldom go on it, but just as surely as you don't follow the correct procedures, we will find miners doing that, and we will find injuries. So I would have to sustain the proof as alleged, and I find then a violation as charged of 30 CFR 56.7-9.

So far as the criteria specifically applicable to the abatement, the evidence is that it was not abated within the time set, so I would have to take that into account in assessing the penalty. As far as gravity is concerned in this instance, I believe it is serious, although it is mitigated to some extent by the testimony that it [the walkway] was rarely used.

Negligence: It seems to me that this was a regulation and a requirement which the company knew or should have known. So I will find ordinary negligence.

I will assess the penalty which has been requested by MSHA, which is \$48.

(Tr. 171-174).

The above decision and assessment are hereby AFFIRMED.

Citation No. 375055, July 18, 1978

Following this decision, the parties presented evidence on Citation No. 375055 which states: "Records pertaining to reporting of accidents, injury, illnesses, and employment are not being kept at the mine site office as required in the Mine Safety and Health Act of 1977." A violation of 30 CFR 50.20 was charged in the petition but not on the citation issued to the Respondent. This standard reads in pertinent part: "Each operator shall maintain at the mine office a supply of MSHA Mine Accident Injury and Illness Report Form 7000-1."

After considering the parties' evidence, the following bench decision was issued:

I will proceed to decide on this citation. My understanding of the testimony is that there were no records [at the site], which namely are the completed records, and that this was what the charge entailed. However, as I understand it, and as we have discussed it formerly, the matter has become confused because of the charge in the petition [was] that it was a violation of 30 CFR 50.20, which raises a different issue entirely. There is no testimony on that issue and accordingly I have no recourse except to vacate and dismiss as to this citation.

(Tr. 193-194).

The matter was dismissed without prejudice (Tr. 212).

The above decision vacating Citation No. 375055 and dismissing the petition as to it without prejudice is hereby AFFIRMED.

Citation Nos. 375061 and 375067, July 18, 1978

Following this decision, Petitioner and Respondent introduced evidence on Citation No. 375061, which alleges a violation of section 109(a) of the Act stating that: "Citations issued during the inspection made July 18, 1978, had not been posted on the mine bulletin board." The cited section of the Act requires that:

At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the

office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

Evidence was also presented on Citation No. 375067, which alleges a violation of section 103(a) of the Act stating: "H. M. Peterson denied entry by ordering the inspector, Tyrone Goodspeed, off the mine property preventing him from completing an inspection under the Mine Safety and Health Act of 1977." Section 103(a), in pertinent part, provides:

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

These citations were decided orally from the bench. The decision rendered on these citations is located at pages 214-218 of the transcript.

As to Citation No. 375061, it was found that the Act in section 109(a) requires such postings, that according to the testimony, there were no postings and, in substance, that the Respondent violated the Act as charged. Respondent's defense that it was not aware of the requirement was accepted but only as justification to reduce the penalty.

It was further found that the abatement took place at the time the next inspector arrived, that the violation was not serious, and that there was slight or no negligence in connection with the violation.

Respondent was fined a penalty of one-half of the amount assessed by the Assessment Office or a penalty of \$7.

Concerning Citation No. 375067, it was found that the operator had denied entry by ordering the inspector, Mr. Goodspeed, off the mine site, preventing him from completing an inspection under the Act. This was found to be a violation as charged.

It was further found that no abatement time was set and that the violation was thereafter abated when two other inspectors, Mr. Cowley and Mr. Plumb came to the mine and were allowed to inspect it. The violation was found to be highly serious because inspections are fundamental to an orderly administration of the Act and because inspectors must have freedom of movement at the mines. Finally, it was found that the operator was greatly negligent because it interfered with orderly procedures to prevent accidents and did so knowingly.

The fine levied by the Assessment Office of \$345 was found appropriate and assessed against the operator for this violation.

I hereby AFFIRM the decision and assessments for Citation Nos. 375061 and 375067.

The summary of the dispositions in these two dockets is as follows:

Docket No. DENV 79-219-PM

<u>Citation No.</u>	<u>Assessment or Action Taken</u>
375049	\$ 40
375050	56
375051	56
375054	48
375055	vacated
375061	7
375067	345

Docket No. DENV 79-241-PM

<u>Citation No.</u>	<u>Action Taken</u>
375052	vacated
375053	vacated

ORDER

It is ORDERED that Respondent pay total penalties of \$552 within 30 days of the date of this decision.

Franklin P. Michels
 Franklin P. Michels
 Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 17 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner : Docket No. DENV 79-327-P
v. : A. C. No. 23-00462-03002V
THE PITTSBURG & MIDWAY COAL
MINING COMPANY, : Empire Strip Mine
Respondent

DECISION

Appearances: Robert S. Bass, Esq., Office of the Solicitor,
U. S. Department of Labor, for Petitioner;
George M. Paulson, Jr., Esq., The Pittsburg &
Midway Coal Mining Company, for Respondent.

Before: Judge Lasher

This proceeding arose under Section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Joplin, Missouri, on September 20, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed oral opinion on the record. It was found that the violation of 30 CFR 77.404(a) charged in the citation for Respondent's failure to maintain a rotary drill in a safe condition did occur. It was also ultimately found that this large operator had no history of previous violations, that it proceeded in good faith to achieve rapid compliance with the safety standard after being served with the citation, that any penalty assessed would not adversely affect its ability to continue in business, that the violation was very serious and resulted from gross negligence. A penalty of \$2,000.00 was assessed.

Respondent is ordered to pay the penalty of \$2,000.00 within 30 days from the date of this decision.

Michael A. Lasher Jr.

Michael A. Lasher, Jr., Judge

Distribution:

Robert S. Bass, Esq., U. S. Department of Labor, 911 Walnut St.,
Rm. 2106, Kansas City, MO 64106 (Certified Mail)

George M. Paulson, Jr., Esq., The Gulf Companies, Law Department,
1720 S. Bellaire St., Denver, CO 80222 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 18, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 79-234-M
Petitioner	:	A.C. No. 11-01764-05007
v.	:	
	:	Spivey Mine
ALLIED CHEMICAL CORPORATION,	:	
Respondent	:	

ORDER APPROVING SETTLEMENT AND DIRECTING PAYMENT

On October 9, 1979, Petitioner filed a motion to approve a settlement agreement and to dismiss the proceeding. In support of its motion, Petitioner states that the amount of the settlement is \$226 for alleged violations and the amount of the original assessment was \$452. The motion contained an analysis of the criteria to be followed in determining the appropriateness of the penalty, and submitted documentation in support of the motion.

The settlement agreement should be approved for the following reasons:

1. Citation No. 366017 - there were no miners working in the expected rock fall area. Miners attempted to remove the rocks but were unsuccessful. The Operator exhibited good faith by drilling down the rock and bolting the area to abate the condition.
2. Citation No. 366019 - a guard was placed across the end of the pumps to abate. There were no moving parts and employees did not travel between or in front of the pumps.
3. Citation No. 366020 - Operator placed warning devices on the bin chutes although the operator stated that the chutes were plainly visible and it thought that they posed no danger to the miners.
4. Citation No. 366022 - a loose slab was removed from the roof by the Operator. The slab was not located in a working area of the mine and was not readily visible to the Operator.

5. Citation No. 366024 - waterlines were raised 4" to abate the citation. The lines in question had been in place for 4 years prior to citation. Those riding the motor had adequate clearance under the lines both before and after the citation was abated. No specific height was required by the governing standard.
6. Citation No. 366025 - Rocks from area which had been blasted broke ladder rungs. Operator had planned to repair the ladders prior to commencing any additional work. To abate, the Operator installed a new ladder and ladder rungs.
7. Citation No. 366026 - Operator removed slab which contained visible fracture. Area in which slab was located had not been worked in some time. Operator assigned extra men to abate the citation.
8. Citation No. 366027 - Operator provided safety belts and life check lines to abate citation. Although small, openings of 8" X 12" and 19" X 12" posed possibility that someone might fall through them.

Having analyzed the following factors; (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 violation, I conclude that the settlement agreement should be approved.

Therefore, it is ORDERED that the proposed settlement agreement is APPROVED.

It is FURTHER ORDERED that Respondent pay the agreed amount within 30 days of this order.


James A. Broderick
Chief Administrative Law Judge

Distribution:

Mr. Gilbert Falter, Safety Supervisor, Allied Chemical Corporation,
Cave-in-Rock, IL 62919

Miguel J. Carmona, Attorney, Office of the Solicitor, U.S. Department
of Labor, 230 South Dearborn Street, Eighth Floor, Chicago, IL 60604

DKT8 Assessment Officer, MSHA, Office of the Solicitor. U.S. Department of
Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 18 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-617-P
Petitioner : Assessment Control
: No. 15-00600-02009F
v. :
: No. 4 Mine
DRY LAKE COAL COMPANY, INC., :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
William R. Forester, Esq., Forester & Forester,
Harlan, Kentucky, for Respondent.

Before : Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Barbourville, Kentucky, on September 11, 1979, the parties asked that I approve a settlement agreement under which respondent had agreed to pay a civil penalty of \$5,000 instead of the penalty of \$10,000 proposed by the Assessment Office. The Assessment Office had waived the formula provided for in 30 CFR 100.3 and had made findings of fact based on a fatality report. Counsel for both parties stated that if a hearing were to be held, most of the facts stated in the fatality report would be contested by respondent's witnesses.

Counsel for MSHA noted that he had been unable to get exact data to serve as a basis for findings with respect to the criteria of the size of respondent's business and respondent's history of previous violations. It appears that difficulties as to the data needed for findings regarding those criteria resulted from the fact that information stored in the computer had become mixed with respect to whether the alleged violations occurred at the No. 4 Mine involved in this proceeding or at other mines which respondent had previously operated (Tr. 6-7). Also the data available to MSHA did not remove doubt as to whether respondent is a small company operated by one individual or part of other interests controlled by several individuals (Tr. 7-8). In the absence of definite information, it was agreed that respondent should be found to operate a small business which produced about 200 tons of coal per day (Tr. 8). The lack of specific facts also results in a finding that respondent has no significant history of previous violations which would warrant any increase in any penalty that might be assessed in this proceeding.

Finally, it was agreed that since respondent pulled out of the area of the roof fall, the criterion of whether respondent made a good faith effort to achieve rapid compliance was inapplicable to any penalty which might be assessed (Tr. 8).

There is nothing in the record to show that payment of the settlement penalty of \$5,000 will cause respondent to discontinue in business. In the absence of any information to the contrary, I find that the payment of the settlement penalty will not cause respondent to discontinue in business.

The foregoing discussion shows that any penalty which might be assessed would have to be based entirely upon the two criteria of negligence and gravity. As to the criterion of negligence, the Assessment Office found that the roof fall which killed one miner and injured another was the result of considerable negligence. Counsel for respondent challenged any finding of gross negligence (Tr. 24) by arguing that his witnesses would testify that a check of the roof shortly before the roof fall occurred indicated that the roof was in good condition (Tr. 18). Also respondent's counsel stated that the inspectors who wrote the fatality report did not see the actual entry in which the roof fall occurred and that the fatality report was the result of interviewing other persons who had been in the area of the roof fall. Counsel for respondent stated that the fatality report's claims that insufficient timbers had been set in the area of the roof fall would be challenged because the roof fall had knocked down the timbers which had been erected before the roof fall and he also said that it was difficult to obtain timbers to help support the roof while they were trying to remove the injured miners. Timbers were taken from some entries where they had previously been set and used in the entry where the roof fall had occurred. In such circumstances, it was contended that no one knew whether an adequate number of timbers had been set before the roof fall occurred (Tr. 22).

Respondent's attorney also stated that the fatality report's claim that the miners did not have an understanding of the roof-control plan would be contested. It was pointed out that respondent keeps a copy of the roof-control plan on the bulletin board at all times and that the miners know the provisions in the roof-control plan. Additionally, they were using a Wilcox continuous-mining machine and most of the miners were experienced in that type of mining and understood the provisions of the plan (Tr. 18-19).

There would be no way that anyone could deny that the roof fall was extremely serious because one miner was killed and another injured as a result of the roof fall (Exh. 2; Tr. 28). Respondent claimed that the main reason that the roof fell was that it was not known before the roof fell that respondent's No. 4 Mine was directly under an abandoned mine which had pillars directly above the site of the roof fall in respondent's mine. Respondent claims that the roof in its mine took weight suddenly and unexpectedly and that the mine foreman could not have anticipated the roof fall which occurred (Tr. 27).

Counsel for MSHA stated that the inspectors would testify in support of the facts as they were stated in the fatality report, but he said that they would be unable to support their measurements and data concerning the number of timbers in the mine and width of the entries because a flood had occurred after the fatality report had been written and the flood had inundated the MSHA files where the inspectors' notes were kept and the notes had been destroyed. Therefore, if a hearing had been held, the inspectors would not have had available in the hearing room any written data to support their testimony other than the facts in the fatality report whose accuracy had been challenged by respondent's prospective witnesses (Tr. 5).

The foregoing discussion of the evidence which would have been submitted if a full hearing had been held indicates that any findings as to gravity and negligence would not be so firm as to justify the assessment of a maximum civil penalty of \$10,000 where a small mine is involved. Consequently, I find that respondent's agreement to pay a civil penalty of \$5,000 is reasonable in the circumstances and should be approved.

WHEREFORE, it is ordered:

(A) The parties' request that I approve a settlement under which respondent would pay a civil penalty of \$5,000 is granted and the settlement proposal is approved.

(B) Pursuant to the parties' settlement agreement, respondent, within 30 days from the date of this decision, shall pay a civil penalty of \$5,000 for the violation of Section 75.200 cited in Order No. 1 KF (7-20) dated February 9, 1977.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Stephen P. Kramer, Trial Attorney, Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

William R. Forester, Esq., Attorney for Dry Lake Coal Company, Inc.,
Forester & Forester, First Street, Harlan, KY 40831 (Certified
Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, NW, SUITE 229
WASHINGTON, DC 20006

October 19, 1979

CONSOLIDATION COAL COMPANY, : Contest of Order
Applicant :
v. : Docket No. WEVA 79-171-R
: :
SECRETARY OF LABOR, : Order No. 0811292
MINE SAFETY AND HEALTH : May 15, 1979
ADMINISTRATION (MSHA), :
Respondent : McElroy Mine
and :
: :
UNITED MINE WORKERS OF AMERICA, :
(UMWA), :
Representative of Miners :

DECISION

Appearances: Michel Nardi, Esq., Pittsburgh, Pennsylvania, for Applicant;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Respondent;
Richard L. Trumka, Esq., Washington, D.C. for Representative of the Miners, the United Mine Workers of America.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above case arose upon the filing of an application for review (called a contest of order under the newly adopted rules of procedure 29 CFR 2700.20) of an order issued under section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(b) on May 15, 1979.

Pursuant to notice, the case was heard on the merits in Wheeling, West Virginia, on September 5, 1979. Kenneth R. Williams, a Federal mine inspector testified for Respondent; William M. McCluskey and Robert J. Huggins testified for Applicant; Daniel Lee Rine testified for the representative of the miners. At the close of the hearing, the parties waived the filing of written proposed findings and conclusions, and the matter was submitted for decision.

ISSUES

1. On May 8, 1979, did a violation of 30 CFR 75.1403 exist in the subject mine as described in Citation No. 0811290?
2. If the answer to the first issue is in the affirmative, was the condition abated before order of withdrawal No. 0811292 was issued on May 15, 1979?
3. If the answers to the first two issues are in the affirmative, should the period of time for abatement have been further extended?

STATUTORY PROVISION

Section 104 of the Act provides in 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. * * *

REGULATORY PROVISION

30 CFR 75.1403 provides: "Other safeguards, adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

FINDINGS OF FACT

1. On May 8 and 15, 1979, and on all other dates pertinent to this proceeding, Applicant was the operator of a coal mine in Marshall County, West Virginia, known as the McElroy Mine.

2. On March 15, 1973, Charles B. Sturn, a Federal coal mine inspector issued a notice to provide safeguards under 30 CFR 75.1403 to the operator of the subject mine. The notice was issued because the main haulage track was not being maintained in a safe workmanlike manner. It directed that "all haulage tracks shall be maintained in a safe workmanlike manner."

3. On May 8, 1979, the supply track from the junction of 4 left off 2 North to the working section in the subject mine had numerous kinks, high and low joints and grease on two curves to compensate for an improperly maintained gage between the rails.

4. The track described in Finding No. 3 was a haulage track. It was not being maintained so as to minimize hazards and not being maintained in a safe workmanlike manner.

DISCUSSION

William McCluskey, Applicant's safety supervisor at the subject mine, testified that the track in question "was as good or better as any supply track in the McElroy Mine." He implied that supply tracks because they were primarily constructed of 40 pound iron (mainline tracks were made with 60 or 80 pound iron) always had kinks and loose joints. However, he also admitted that he had reports (after the citation was issued) that derailments had occurred. It is clear and I find that the supply track in question was not being safely maintained on May 8, 1979.

5. On May 8, 1979, Federal mine inspector Kenneth Williams issued Citation No. 0811290 alleging a violation of 30 CFR 75.1403 because of the condition described in Finding No. 3. He fixed the time for abatement at 9 a.m. May 15, 1979.

6. After the citation was issued, two crews were assigned to abate the condition. A crew under the supervision of assistant mine foreman Ivan R. Blake worked on the abatement as follows: On May 9, 1979, three men worked an entire shift; on May 10, three men worked one shift; on May 11, four men worked one shift; and on May 14, three men worked one shift. Under maintenance foreman Chester Nadolski, three men worked on May 9; five on May 10; two on May 11. On May 12, a Saturday, six people worked an entire shift, four of them working 2 hours overtime. On May 14, two men worked all shift and on May 15, two men worked all shift. The work of these two crews consisted in leveling and blocking track, replacing broken rails, bent ties, angle bars and missing bolts.

7. When Inspector Williams arrived at the section on May 15, 1979, foreman Nadolski's crew was working on the curve where the gage had been cited as too narrow.

8. When Inspector Williams arrived at the section the narrow gage on the curve had not been corrected. The other conditions described in the citation had been corrected.

DISCUSSION

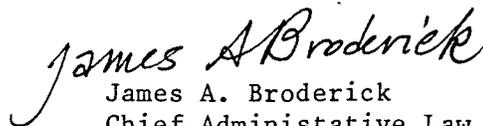
Although Inspector Williams indicated that other areas of the track needed more work, his testimony was somewhat vague and unconvincing. The only work done after the issuance of the order other than widening the gage at the curve was the replacement of an angle bar and a bolt on a joint.

CONCLUSIONS OF LAW

1. The condition described in Finding of Fact No. 3 taken in conjunction with the notice to provide safeguards referred to in Finding No. 2 constituted a violation of 30 CFR 75.1403.
2. The violation referred to in Conclusion No. 1 was not totally abated within the period of time originally fixed in Citation No. 0811290.
3. In view of the substantial work done to abate the condition as described in Finding of Fact No. 6 and the fact that this work was continuing, the period of time for abatement should have been further extended.
4. The order of withdrawal 0811292 of May 15, 1979, was not properly issued.

ORDER

Based on the above findings of fact and conclusions of law order of withdrawal 0811292 is VACATED.


James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Michel Nardi, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241

James H. Swain, Esq., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Attorney, United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, DC 20005

JAB

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

OCT 19 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VINC 79-109-P
Petitioner	:	A.O. No. 33-01172-03011
v.	:	
	:	Docket No. VINC 79-148-P
SOUTHERN OHIO COAL COMPANY,	:	A.O. No. 33-01172-03013
Respondent	:	
	:	Meigs No. 1 Mine
	:	
	:	Docket No. VINC 79-110-P
	:	A.O. No. 33-01173-03009
	:	
	:	Docket No. VINC 79-111-P
	:	A.O. No. 01173-03010
	:	
	:	Meigs No. 2 Mine
	:	
	:	Docket No. VINC 79-112-P
	:	A.O. No. 33-02308-03010
	:	
	:	Docket No. VINC 79-114-P
	:	A.O. No. 33-02308-03012
	:	
	:	Docket No. VINC 79-115-P
	:	A.O. No. 33-02308-03013
	:	
	:	Docket No. VINC 79-141-P
	:	A.O. No. 33-02308-03009
	:	
	:	Raccoon No. 3 Mine

DECISIONS

Appearances: Linda Leasure, Attorney, Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for the
petitioner;
David M. Cohen, Esq., Lancaster, Ohio, 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 a total of 14 alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed timely answers, hearings were held on June 19, 1979, in Columbus, Ohio, and the parties appeared and participated therein. The parties filed posthearing arguments in support of their positions and they have been considered by me in the course of these decisions.

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (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 CFR 2700.1 et seq.

Discussion

Docket No. VINC 79-109-P

Citation No. 279540, July 28, 1978, alleges a violation of 30 CFR 75.507, and states as follows: "The battery charger unit for the

scoop car operating the 002 section was located in the return air course in the crosscut from the No. 4 entry to the No. 5 entry in the 002 section."

Petitioner's Testimony

John W. Collins, Federal coal mine inspector, testified that on July 28, 1978, he conducted an inspection of the 002 section of the Meigs No. 1 Mine and that he observed an S & S scoop car battery-charging unit located in the return air course in the No. 5 entry. He observed that the permanent stoppings were installed to the third connecting crosscut outby the faces, and the second connecting crosscut outby the face had a curtain which, according to the roof-control plan, is a temporary stopping. However, it was separating the intake from the return. On the other side of the temporary stopping located in the return entry, he observed a battery charger unit which he cited as a nonpermissible piece of equipment since it was not located out of the return. The only connection that the battery charging unit should have with the return is that the air current that flows over the battery charger should be air that is coursed directly on the return (Tr. 52-56).

Inspector Collins confirmed his prior statement made on his inspector's statement that the occurrence of the event against which the cited standard is directed was "probable." The mine does liberate methane and it is currently on a 15-day spot inspection cycle. The return air comes off the section and returns over the nonpermissible battery charger which is a potential hazard in the event of a possible accumulation of methane. He determined that the condition "should have been known to the operator" because the preshift and onshift examinations of the section should have revealed the existing condition. With respect to good faith, the inspector indicated that there was normal compliance (Tr. 57-60).

On cross-examination, Inspector Collins testified that the battery charger was operating at the time the citation was written or he would not have issued the citation (Tr. 61-63). However, in response to questions from the bench, he testified that he had no present recollection as to whether or not the battery charger was in fact operating, and his notes did not reflect anything that would indicate that it was operating. However, his normal practice is not to issue a citation of this kind unless the battery-charging station is in fact operational. The charging units are moved quite often because of advancing sections, and it is often necessary to reroute them around crosscuts in order to get them to the proper location on the section so that the charger units can be ventilated directly to the return. The function of the battery charger is to recharge the batteries for the sand scoops. If a nonoperational battery-charging unit was located in the return, it is possible that someone would hook it up to some other piece of equipment at some time during

the mining cycle, and in such a situation, he would not cite the condition unless he actually saw it connected to the power center or in operation. Since the unit is moved from one section to another, he did not know how long this particular battery-charging unit was in the area cited, and the unit was not mentioned in the preshift and/or onshift books, (Tr. 63-67).

On redirect examination, Mr. Collins testified that he observed the area after abatement and that the location of the temporary stopping had been changed by moving a line brattice made of a flame-resistant plastic material on the other side so that it would make a difference in the intake and return (Tr. 67).

Respondent's Testimony

W. Keith Carpenter, respondent's safety representative at the No. 1 Mine, testified that he made the drawing (Exh. R-1), which shows the air course on the day the subject citation was issued, and it depicts the location of the battery charger, the ventilation curtains, and the stoppings, but does not indicate a curtain between the battery control unit and the No. 4 entry. He discussed with Jack Stallings, a union representative and safety committeeman who was present when the citation was written, whether there was a curtain between the No. 4 entry and the battery charger at the time the citation was written and his response was that he saw no curtain. The battery unit is located in intake air which does not come through the return until it reaches the immediate return. The air that passes over the battery charger does not reach or go back to the working faces, but rather, goes directly into the return air. The battery charger was not energized at the time the citation was written, and copies of the permissibility book signed by two mechanics the day that they were checking the scoop, reflects it was unplugged from the power center due to the fact that the mechanic was checking the permissibility of the power center at that time. Abatement was achieved by installing a curtain between the battery charger and the No. 5 entry (Tr. 68-73).

On cross-examination, Mr. Carpenter testified that he made the diagram (Exh. R-1) the day after he returned to the mine surface. He also noted a description of the process of the movement of the air, but does not recall whether or not he did that on the same day. He made the diagram because he felt that the condition was not a violation, and he discussed his observations regarding the alleged violation with Jack Stallings the day before the hearing and he does not remember having a similar conversation with him over a year ago (Tr. 75-76).

In response to questions from the bench, Mr. Carpenter testified that the basic difference between his diagram and that of the inspector, is that the inspector's diagram does not indicate the presence of

a curtain. The curtain which was installed as part of the abatement was not present at the time the citation issued. He did not see the curtain, but he was present when the condition was observed by the inspector. Assuming that the curtain was there at the time of the citation, this would have placed the battery charger in intake air although the inspector stated that it was in the return. Even though the curtain was on the left side of the charger, there was still intake air flowing over the return because all the air is pulled in at the stopping depicted by the double parallel line on the diagram which connects the two blocks. There was a movement of air coming over the charger, and even though the curtain was behind it, this was still considered intake air as it came over the charging unit (Tr. 77-80).

Inspector Collins was recalled for rebuttal testimony, and testified that if the battery charger were located where it is located in Exhibit R-1, and there was no curtain on either side of it, he still would have issued the notice of violation since the area is also a return area because the air from the section is returning through it (Tr. 81-82).

On cross-examination, Mr. Collins testified that on Exhibit R-1, although a curtain had been drawn between the No. 4 and No. 5 entries, there was no curtain on either side of the battery charger; thus the battery charger is located in return air and anything returning in that area is return air (Tr. 82-83). If the battery charger were located between the No. 4 and No. 5 entries without curtains on either side, it would be located in return air since it would be on a return area because the battery charger was located as indicated by both diagrams (Tr. 83-86).

Mr. Carpenter, upon being recalled, testified that intake air comes up the No. 1 entry to the face and around the check curtain and back out the entry, and that the purpose of the check curtain is to prevent complete and total loss of air. There is enough leakage in the intake air to prevent complete, total loss of air, and the air goes around the faces and back out, and it becomes return air when it gets to the immediate return in the No. 5 entry (Tr. 86-87).

Docket No. VINC 79-148-P

Citation No. 279550, August 2, 1978, alleges a violation of 30 CFR 75.1003(a), and states as follows: "The trolley wire was not guarded where supplies for the 006 section were located along the 006 section track. Men were required to pass under the trolley wire in order to place supplies from the supply cars to the storage area for the supplies for the 006 section."

Petitioner's Testimony

MSHA inspector Collins testified that during the course of conducting an inspection of the Meigs No. 1 Mine on August 2, 1978, he

observed along the 006 section track that the trolley wire was not guarded where supplies for the 006 section were located along the 006 section track. Men were required to pass under the trolley wire in order to place supplies from the supply car to the storage area with the supplies in the 006 section. Supplies were being unloaded into the crosscut from the supply car to the storage area, but he could not recall whether or not he actually saw the supplies being unloaded; however, his notes indicate that he had spoken with two utility men on the section who indicated that they had gone to the supply area to pick up some resin and that they had passed under the trolley wire to obtain it. He indicated that the condition should have been known to the operator because in order to gain access to the section, it is necessary to travel through the area. With respect to the gravity of the situation, he noted that injury could be a "probable" result since persons could come in contact with the trolley wire as they pass under it and injury could result from the shock that they could receive because the supply car itself is grounded to the track and one person would be in danger.

The respondent uses a yellow piece of trolley guard to guard trolley wires in the mine and it is possible for one to come into contact with this guarding and not receive a shock. The normal guarding procedure is to put the trolley guarding, which is a plastic-type of insulated material, over the top of the wire itself and install belt hangers to keep it in place. To his knowledge, no temporary type of guard had ever been used in the mine (Tr. 102-107).

On cross-examination, Mr. Collins confirmed that his notes reflect that the trolley wire was energized at the time he cited the alleged violation, but they do not reflect whether or not it was energized at the time the two men passed under it. The only time that the trolley is deenergized at the mine is during any installation of a trolley system, and a trolley wire is deenergized by the tripping of switches that are located at certain branch line locations and in outby areas (Tr. 107-109). The trolley wire is not normally guarded along its entire length, but it is guarded at the mantrip stations and areas where persons have to pass under it, such as refuse holes, supply areas, and also at doors on the track. A trolley wire is required to be guarded at any place a person has to pass under it. The supply area involved was regularly used, and the trolley wire is required to be guarded so long as men pass under it while taking supplies from the supply cars to the storage area (Tr. 110-113).

Inspector Collins testified that he could not recall the height of the trolley wire, the height of the entry, or the type of roof present, and he does not have such information in his notes. The height of the trolley wire throughout the mine varies with the height of the seam. The height of the working mine seam is 54 to 52 inches, but the track and trolley cause it to be even higher--sometimes 6 to 7 feet. His notes indicate that he actually saw the supplies being

unloaded, and he considers his notes to be accurate, but he had no independent recollection of the particular event (Tr. 110-122).

Respondent's Testimony

Mr. Carpenter testified that he was with Inspector Collins at the time the citation was issued but did not notice any miner loading or unloading supplies at the place indicated on Exhibit R-1. They rode into the area on a jeep and then pulled in directly behind the mantrip that was parked there. The supplies were already there when they arrived but there was no motor crew or any person unloading supplies at the time. He conceded that in retrieving the supplies from where they were stored, it was necessary for the men to pass under the trolley wire. Except for unloading supplies, there was no reason for men to pass underneath the trolley wire on a regular basis. The trolley wire is sometimes deenergized since all the motor crews and the men that are involved with transporting supplies from one part of the mine to the other are instructed that the trolley wire is to be deenergized when they are working under or around it. When unloading, the men are instructed to deenergize the wire if it is not guarded, and there are cut-off switches at the mouth of the track spur as it comes off the main mine (Tr. 114-127).

On cross-examination, Mr. Carpenter testified that he did not know for certain whether the trolley wire switch was pulled when the supplies were being unloaded. He indicated that it is reasonable to assume that if the two supply cars were in the location corresponding to Exhibit R-1 and somebody brought some equipment into the mine and wanted to off-load it, they could not put the cars under the guard, but had to move them elsewhere. Mr. Carpenter stated that it is reasonable to conclude that if the inspector came in and saw the supplies, he would naturally assume that at some point in time somebody put those supplies in by passing under the unguarded cable (Tr. 132). The citation was abated by guarding the area (Tr. 134-138). He did not recall the height of the trolley wire (Tr. 139).

Docket No. VINC 79-110-P

Citation No. 278046, May 11, 1978, alleges a violation of 30 CFR 75.503, and states as follows:

The No. 7009 shuttle car involved in the non-fatal accident in 008 section was not maintained in permissible condition in that at 7:30 p.m. on 5/10/78, the cable was pulled out of the reel and burned the insulation off the reel and the cable was re-entered, the shuttle car put back in operation and the damaged reel was not repaired.

Petitioner's Testimony

MSHA inspector Dalton E. McNece, Jr. testified that while conducting an accident investigation at the mine on May 11, 1978, he issued a citation involving the No. 7009 shuttle car which was involved in an accident in the 008 section. His investigation began on the evening of May 10, shortly after he had received word from a company official that an accident had occurred. In investigating the shuttle car which was involved in the accident, he and fellow inspector Don Osborne found one place in the trailing cable where the accident victim had received a shock from the trailing cable while standing in mud, and in addition, a bare place was found in the trailing cable. A citation was issued for a violation of 30 CFR 75.517 because the trailing cable was not properly and adequately insulated. Mr. McNece then proceeded to inspect the shuttle car and found that the cable had been pulled out of the trailing cable reel. When it had been pulled out of the trailing cable reel, the 250-volt, DC power cable caused a short circuit and burned the insulation off the trailing cable reel. There was a sharp edge on the reel despite the fact that the shuttle car was equipped with insulation on the trailing cable reel, and the car had been put back into operation in that condition. Had this condition continued, another man could have been shocked or possibly electrocuted by the shuttle car becoming deenergized.

Mr. McNece stated the operator was negligent because one man had already been injured by the trailing cable, and the repair work was supervised by a certified company official. Although the cable reel had been checked, anyone shining a light into the reel compartment would see the bare metal on the cable reel. Mr. McNece believed the condition cited was very serious due to the fact that it could cause another person to receive an electrical shock or possibly be electrocuted. Approximately 11 persons could be affected as a result of the condition since 10 people work in the section in addition to the foreman. The condition was abated by insulating the trailing cable reel and by spraying approved insulating paint onto the shuttle car reel and trailing cable reel. After the paint dried, it provided adequate insulation for the trailing cable reel and restored it to its original approved condition (Tr. 150-152).

On cross-examination, Mr. McNece testified that the earlier injury which prompted the investigation occurred when a miner came in contact with an energized power cable that had a bare place in it. When he arrived at the mine, the miner who was hurt was still at the hospital, but he would not classify the injury as serious because there was no lost time. However, the electrical shock that was sustained by the miner was serious enough to warrant hospital treatment and it disturbed the miner's nervous system. The existence of an uninsulated area on the trailing cable reel could lead to the electrocution of an individual. Although there is short-circuit

protection to keep the current from going to ground, any malfunction to this short-circuit protection would send 250 volts of direct current onto the shuttle car. If an individual were to come into contact with the car he could possibly be electrocuted since the area was very wet, and mud and water is a very good conductor of electricity. In order for an individual to be hurt, three conditions have to be present; namely, insulation being off the cable, insulation being off the reel, and a malfunction in the short-circuit system. A violation of section 75.503 occurred because the insulation was not on the trailing cable reel as it came approved, and section 75.503 requires that it be maintained in permissible condition (Tr. 153-157).

Mr. McNece testified that the shuttle car had been taken out of service at 7:30 p.m., the day the citation issued, and men were taking up cable slack from the power center that was anchored behind the trailing cable. While in the process of reeling the cable, the individual who was pulling up the extra slack came into contact with the exposed bare wire and was shocked when it came by the anchor point. The shuttle car was then placed back into operation, but after learning that the injured man was to go to the hospital, the area was fenced off for the investigation. He could not explain the interval between the time when the man was injured and when it was determined that the injury was serious. It was evident that no examination was made of the trailing cable reel after the shock incident to determine whether it was damaged. The only thing that was done was to pull up the cable slack, reenter it in the reel, and placing the excess on the reel. He had to personally pull the cable off the reel in order to wipe the mud off with a rag so that he could examine the cable and reel compartment (Tr. 163-168).

Mr. McNece testified that he determined the trailing cable was not examined because if it had, the bare place in the trailing cable, which was approximately 2 inches in length, would have been seen. The bare place was obvious and he took a rag and wiped the mud off the trailing cable to see the 2-inch spot. The cable in question was approximately 500 feet long, and he conceded it was possible that someone could examine a 500-foot cable and not locate a 2-inch bare spot covered with mud. He could not state that mine management did not conduct a visual observation of the cable by just walking along and looking at it, but in his opinion, the cable needed very close attention since it lay in mud and water and an individual had been shocked by it (Tr. 169-171).

In addition to the citation for the insulation being burned off the reel, another citation was issued for a violation of section 75.517, in regard to the insulation being burned off the cable. He examined the cable and found only one bare spot, and in order for an injury to occur to an individual, a bare spot on the reel would have to come into contact with any bare spot on the cable, but in this particular case, only one bare spot was detected (Tr. 171-173). The

insulation was worn off the reel and this rendered the shuttle car nonpermissible since it is required to be insulated. The reason the shuttle car was not taken out of service was because mine personnel had to pick up the excess cable on the shuttle car in order to move it out. When the man was injured and the accident was determined to be of a serious nature, the trailing cable reel should not have been picked up again. However, he does not contend this was done intentionally. By use of the term "put back in operation," he does not mean that the shuttle car was actually used to run coal, but rather, he means that it was moved back out of the way (Tr. 173-180).

On redirect examination, Mr. McNece testified that he determined that the violation was "significant and substantial" because it met the four criteria for the unwarrantable category, namely, (1) it was a violation of a mandatory health and safety standard, (2) it did not constitute an imminent danger, (3) it was significant and substantial in that it could cause death or serious physical harm to the miner, and (4) it was known or should have been known by the operator (Tr. 180-182).

Docket No. VINC 79-111-P

The proposal for assessment of civil penalties filed in this proceeding alleges two violations. Citation No. 280459, July 25, 1979, alleging a violation of 30 CFR 75.605, was settled by the parties. The initial assessment was for \$305, and the parties were afforded an opportunity to present arguments on the record in support of a proposed settlement for \$150. In support of the settlement, petitioner argued that if called to testify, the inspector would state that the trailing cable in question was not clamped securely to the machine, that the strain clamp had loosened and slipped, but the inspector was of the view that there was no negligence on the part of the respondent in allowing the condition to exist. However, in the initial assessment, the Assessment Office considered that the respondent was negligent. In view of the absence of negligence, petitioner argued that the reduction in the assessment is warranted. In the circumstances, the proposed settlement was approved (Tr. 19-24).

The remaining citation in this docket, namely, No. 278095, July 20, 1978, 30 CFR 75.200, was tried, and testimony and evidence was adduced by the parties in support of their respective positions, and a discussion of this citation follows.

Citation No. 278095, July 20, 1978, alleges a violation of 30 CFR 75.200, and states as follows: "The approved roof control plan was not being complied with in 005 section in that a cut of coal 18 feet wide and 10 feet deep was loaded out and temporary roof supports were not installed in the crosscut between Nos. 2 and 3 entries."

Petitioner's Testimony

MSHA inspector McNece testified that on July 20, 1978, in making a routine inspection of the Meigs No. 2 Mine, he observed that the crosscut between the No. 2 and No. 3 entries was driven 17 feet wide and 10 feet deep, and that temporary supports were not installed as required by the approved roof-control plan. The mine's approved roof-control plan requires that such supports, on 5-foot centers, be installed within 15 minutes after the loading has been completed in the area. When he arrived on the section at 11 a.m., the loading crew was loading the crosscut from the No. 3 entry towards the No. 4 entry and the loading cycle was two-thirds of the way completed. It took more than 15 minutes to mine out two-thirds of a cut of coal, and he was told by the loading crew that they had cleaned up the crosscut between No. 2 and No. 3 entries and had moved into the crosscut between No. 3 and No. 4. At the time, he made notes and drew a small sketch or diagram of the area, labeling the entries, and it indicated that the crosscut to the right in No. 3 entry was loaded out (Tr. 190-192).

Mr. McNece testified that the respondent should be familiar with the approved roof-control plan, and a certified company official on the working section should have instructed someone to install the temporary supports. A foreman was on the section at the time. As for the gravity of the situation, Mr. McNece testified that the lack of temporary supports would leave an area 18 feet wide and 10 feet deep unsupported and it would be possible for someone to walk under unsupported roof believing it was roof bolted. The condition of the roof was solid, and it had no breaks or cracks in it (Tr. 193-194).

On cross-examination, Inspector McNece testified that he issued the citation just after he arrived at the location cited and he did not remain there for 15 minutes in order to determine whether 15 minutes had actually passed. Instead, he determined the passage of time from the fact that the individuals who were loading the crosscut between No. 3 and No. 4 had loaded two-thirds of the cut, and they could not have accomplished such loading in just a 15-minute period. The term "loading cycle" means using a loading machine for loading the coal out, bringing it to the shuttle car, transporting it from the face to the section loading point, and then discharging it onto the belt conveyor. This process of loading could occur in every face area where coal is shot or cut down (Tr. 194-198).

Respondent's Testimony

Lowell Carte, safety supervisor, Raccoon No. 3 Mine, testified that he is familiar with the approved roof-control plan (Exh. R-1), and that the plan requires that the installation of temporary roof supports after a loading cycle must be started within a 15-minute

time period, and once such support work is begun, it must be completed. Conceivably, in the event of damaged supports, it could take more than 15 minutes to install such supports (Tr. 199-204).

Mr. Carte testified that if Mr. McNece arrived on the section at 11 a.m., it would probably take an additional 5 or 10 minutes to arrive at the actual mining area. He further testified that based upon his mining experience, he would not agree with the inspector's statement that two-thirds of a cut of coal could not be loaded out in 15 minutes, because he has run a loader in a coal mine and he knows that a decent loaderman can load a place out in 20 minutes, and in 15 minutes if he is a good loaderman (Tr. 204-205).

On cross-examination, Mr. Carte stated that he was not present when the inspector made his inspection, and he only recently conferred with the safety supervisor concerning the citation. There are people in the Raccoon No. 3 Mine who are capable of loading a section in 15 to 20 minutes, and although he has never timed such individuals, he has observed them loading coal in the past, and would estimate they could load an 18-foot cut-out 110 feet deep in less than 10 minutes, and that it is even possible to do it in less than 15 minutes, depending on how far the coal has to be transported and how close the feeder is to the face area (Tr. 205-207).

Mr. Carte testified that the usual procedure followed in the Raccoon Mine with regard to roof control is that a loading crew, the loaderman, or helper, install the temporary supports before leaving the area. The only reason for not following such a procedure would be that they did not have the temporary supports or the supports they were using were damaged. In such a case, they would probably relay the information to the utility man on the section who would probably go to the supply area and bring in additional temporary supports (Tr. 208-209).

On rebuttal, Inspector McNece testified that based on his experience, if everything were working properly and assuming the men were working productively, he would estimate that it would take 30 to 45 minutes to load a section similar to the section in question (Tr. 209-213).

Docket No. VINC 79-141-P

In this docket, the proposal for assessment of civil penalties filed by the petitioner seeks civil penalties for three alleged violations. However, the parties proposed a settlement for two of the violations and were afforded an opportunity to present arguments on the record in support of the proposed settlement for Citation No. 279953, July 25, 1978, 30 CFR 75.400, and Citation No. 279990, August 3, 1979, 30 CFR 75.1100-2(f). With respect to Citation No. 279953, the petitioner argued that the conditions cited were abated in a rapid fashion

and that the respondent exhibited good faith in the abatement of the conditions. With respect to Citation No. 279990, the petitioner pointed out that there was an arguable question of interpretation with respect to the application of the cited standard, particularly with respect to the question of what constituted an "oil storage station" within the meaning of the cited standard. Coupled with the fact that fire extinguishers were in fact provided on the section, and that the respondent exhibited rapid abatement of the violation, a decrease in the initial proposed settlement amounts were warranted (Tr. 42-45). After consideration of the the arguments presented in support of the proposed settlements, I find and conclude that they should be approved. Accordingly, civil penalties in the amount of \$160 for Citation No. 279953 (originally assessed at \$345), and \$160 for Citation No. 279990 (originally assessed at \$225) are approved as dispositive of these two citations.

The remaining citation in this docket, No. 279989, August 2, 1978, 30 CFR 75.1710-1(a)(4), was tried, and testimony and evidence was adduced by the parties in support of their respective positions, and a discussion of this citation and the supporting arguments follows.

Citation No. 279989, August 2, 1978, citing a violation of 30 CFR 75.1710-1(a)(4), states as follows: "The front canopy had been removed from the Co. No. 4539 roof bolting machine operating in 006 section. The average mining height was more than 42 inches."

Petitioner's Testimony

MSHA inspector Jesse J. Petit testified that during the course of conducting an inspection at the 006 section of the Raccoon No. 3 Mine, he observed that the front canopy of the No. 4539 roof-bolting machine had been previously removed. The machine was in operation at the time he observed this condition and he issued a citation. The average mining height on this particular section was 48 to 50 inches, and the condition was abated by installing the front canopy. In filling out the gravity sheet accompanying the citation, Mr. Petit indicated that the machine had previously passed through some extremely low coal in the section, and this evidently resulted in the removal of the canopy. He determined that the operator should have known about the alleged violation because the front canopy on the roof-bolting machine is not to be removed, and he believed that the condition could have resulted in a probable roof fall (Tr. 216-219).

On cross-examination, Inspector Petit testified that he took measurements at various locations on the section to determine that the average coal height was 48 to 50 inches. His notes do not indicate that he took such measurements, but he knows that he would not have issued the citation unless he had taken measurements. Even if the

mining height is less than 42 inches, he would still have issued a citation because the front canopy is supposed to remain on the machine. The mining height in this particular section of the Raccoon No. 3 Mine fluctuates (Tr. 219-221).

In response to questions from the bench, Mr. Petit testified that the front canopy must remain on under all conditions. All three of Southern Ohio Coal Company's mines have been granted relief for up to 56 inches mining height before the canopies can be removed from roof-bolting equipment, with the exception of the front canopy. Even when the equipment is operating in low coal, the front canopy cannot be taken off. He does not know the height of the canopy or the canopy adjustment heights. No one gave him an explanation as to why the front canopy was off at the time he cited the condition, and he served the citation on Ray Lieving, the master mechanic. The canopy in question was a hydraulic canopy, and at the time he issued the citation, the roof bolter was energized. However, he did not know if it was in the process of installing bolts, and he did not remember whether he saw anyone using it, standing under it, or kneeling under it. The roof conditions in the section were good, and under the circumstances, he would consider this a nonserious violation although it could conceivably result in a fatality (Tr. 219-225).

Respondent's Testimony

Mr. Carte, testified that he is familiar with, and has previously measured the height in the 006 section, and that at the time the citation was issued in the No. 1 and No. 2 entries, the coal seam measured anywhere from 29 to 31 inches. He measured several areas on the section, and there were areas on the section in Nos. 3, 4, and 5 entries in by the feeder that ranged anywhere from 46 to 56 inches in thickness. In the No. 2 entry where the coal vein had lowered, it was from 29 to 31 inches in thickness. Once low coal was encountered, they were operating in it for four or five breaks and they had to mine at least another five breaks before they exited the small seam of coal. The particular roof-bolting machine that was cited was working in the low coal area, and fireclay had to be taken to make height for the miner to get in to mine the low seam of coal. In order for the roof bolter to bolt the top, the canopy had to be removed because it extends approximately 8 inches higher than the roof-bolting machine itself. There was no way possible to bolt with the canopy on, the canopy could not be raised, and there was no human way of raising it or even going into the area (Tr. 226-239).

Docket No. VINC 79-112-P

In this docket, the proposal for assessment of civil penalties filed by the petitioner seeks civil penalty assessments for four alleged violations of certain mandatory safety standards. During the course of the hearings, the parties were afforded an opportunity to

present arguments in support of a proposed settlement for three of the violations, namely Citation Nos. 279961, August 9, 1978; 279964, August 10, 1978; and 279973, August 15, 1978; all of which were issued for alleged violations of the provisions of 30 CFR 75.606. The initial assessments made for these citations were \$225, \$295, and \$195, respectively. In support of a proposed settlement in the amounts of \$122, \$140, and \$90 for each of these citations, petitioner argued that the reductions were warranted in view of the fact that after evaluation of the negligence criteria, the petitioner was of the view that there was little or no negligence on the part of the respondent in that there was no way that the respondent could have been aware of the fact that the equipment involved in each of these citations was in fact positioned in such a fashion as to be resting on the cables in question. The citations were issued after the inspector found that certain pieces of equipment had been parked in such a fashion as to come to rest on the trailing cables. Although petitioner conceded that the operator is responsible for insuring against the type of violations cited, it believes that the respondent could not have been aware of the fact that the equipment operators had in fact positioned the equipment in question in such a fashion as to be in violation of section 75.606, which requires that the trailing cables be adequately protected to prevent damage by mobile equipment (Tr. 31-35).

In view of the fact that the evidence and abatements reflect that the conditions cited were immediately abated and that the cables in question were not damaged, I conclude and find that the proposed settlements should be approved. With respect to the remaining citation in this docket, the parties presented testimony and evidence in support of their respective positions, and a discussion of this citation follows.

Citation No. 279997, August 8, 1978, 30 CFR 75.402, states as follows: "Rock dust had not been applied to the roof, ribs and floor of the last open crosscut between Nos. 4 and 5 entries, 009 section. A spot rock dust sample was collected to substantiate the citation. The distance through the crosscut was 60 feet."

Petitioner's Testimony

MSHA inspector Petit testified that during the course of conducting an inspection at the Raccoon No. 3 Mine on August 8, 1978, he observed that rock dust had not been applied to the last open crosscut between the Nos. 4 and 5 entries. He took a dust sample at the location, which involved a band sample of the roof, rib and floor, and the results indicated 47 percent incombustible. The dimension of the crosscut was 60 feet, and during the time that he was in the area, he did not observe any rock dusting in any other crosscuts or entries. The mine does have a program for rock dusting that calls for all crosscuts to be rock dusted within 40 feet of the faces except

in those areas that are too wet. He does not remember looking at the preshift book; however, he usually makes it a practice to so do before entering the mine. The respondent shut the whole section down and immediately assigned men to rock dusting. The rock dusting was completed at 11 o'clock, and he believes that the men must have had some additional work to do in the area, such as shoveling the ribs, or scooping up the crosscut, since it should not have taken an hour to rock dust 60 feet. The only explanation for taking that long to rock dust 60 feet is the lack of available rock dust on the section, or the cleaning of the section first. He observed rock dusting being done prior to terminating the order, and he remained there while it was being done (Tr. 249-253).

On cross-examination, Mr. Petit testified that if there was a coal accumulation he would have had to issue the citation under a different standard, and he did not know what time the company discovered the condition. On his gravity statement, he indicated that the condition "should have been detected" by a preshift examination at the end of the prior shift. The citation was written at 10 o'clock in the morning, and the oncoming shift does not arrive on the working section until 8:45 a.m. or 9 a.m., and the earliest arrival time would be 8:30 a.m. The citation was abated at 11 a.m, and prior to issuing the abatement, he is certain that he did not leave the section and go to other areas. However, he indicated that it is possible that he was in another area of that particular section and that the area that needed rock dusting had been taken care of in 5 or 10 minutes (Tr. 253-256). There was the possibility of fire resulting from a cable being shorted or an energized cable being shorted (Tr. 256-257).

Docket No. VINC 79-114-P

Citation No. 277726, August 29, 1978, alleges a violation of 30 CFR 75.1405, and states as follows: "The Company Nos. 8730 and 8107 stone haulage cars, located on the surface track in the supply yard could not be coupled without a person going between the ends of the cars. Order issued because: sufficient effort was not made to abate the citation."

Petitioner's Testimony

MSHA inspector Petit testified that in conducting an inspection on August 29, 1978, at respondent's Raccoon No. 3 Mine, he observed that certain uncoupling devices on a train of six rock cars, namely, car Nos. 8107 and 8730, had broken uncoupling devices. The cars were loaded with rock, and they were eventually going to the rock dump. The cars could not be uncoupled without someone going between the ends of the cars, and he determined this due to the fact that it was necessary to position oneself in between the cars in order to uncouple them. Each uncoupling device consisted of a rod or lever that extends on both sides of the car, from the middle of the car outward where a

person can raise it up from the outside and uncouple it without going near the rail. He issued the citation at 1:15 p.m., and set a termination deadline for 4 p.m., that same day. He checked the coupling devices on other haulage cars and found that they were all right (Tr. 276).

On August 30, 1978, he returned to the mine to check the cars again and he found that no effort had been made to abate the citation by the 1:15 p.m. deadline. The No. 8107 haulage car had been used after the citation was issued, but car No. 8730 was tagged out and off the track, but no effort had been made to have it repaired. The subsequent order was abated in 31 minutes.

Mr. Petit believed that the operator was negligent in that a more thorough check of the haulage equipment should have detected the damaged uncoupling devices. He believed that the condition could result in a fatal injury in the event the car should happen to roll while someone was trying to uncouple it. That person could be run over, or at the least be knocked down or receive a broken leg. When he returned on August 30, 1978, he issued an order rather than granting additional time for abatement because while the company had tagged out two of the cars, car No. 8107 rock car was not tagged out and was still on the rails (Tr. 277-279).

On cross-examination, Inspector Petit testified that the last time that the cars had been removed was when they were brought out of the mine. At the time he issued the order of withdrawal, the cars were not in use, but car No. 8107 was still on the rails and could have been used at any time. It had been used after the citation issued, but this was not improper as long as it had been repaired by the abatement deadline. There was no danger connected with car No. 8730 since it was tagged out and off the track, and he does not recall asking anyone if car No. 8101 had been repaired (Tr. 279-281).

According to Mr. Petit, a welder would have been required to repair the uncoupling devices, but he did not know whether there was a welder on each shift, how busy the repair shop was that particular day, or how many jobs the welder had to do, and he did not attempt to find out. He cited a violation of section 75.1405, which is the section that pertains to underground mining, and he chose to cite it under that section rather than Part 77 because the cars are underground more than they are on the surface. It is possible that they are used 1 or 2 days a month, and would be on the surface the other portion of the month. He does not know of any requirement in Part 77 that requires automatic coupling devices for cars while they are located on the surface (Tr. 281-283).

In response to questions from the bench, Mr. Petit testified that the surface area was a regular track haulage area for transporting

supplies underground and transporting loaded rock cars from underground to the surface. The track does go underground, it is a spur of the mine, and the rock that was in the two cars came from underground. He did not consult with anyone in regard to fixing the abatement time since he believed that 7 hours was a sufficient time in which to repair the equipment, and he does not remember whether anyone complained about the abatement time (Tr. 286-288).

Respondent's Testimony

Chris Mapper, surface foreman, Raccoon No. 3 Mine, testified that after the citation was issued, he was instructed to remove the two cars and unload them, remove them from the track, and then transport them to the shop for repairs. When they finally got the cars to the shop it was probably 3 to 3:30 p.m., and due to the weight of the cars, a forklift had to be used to get them off the track. Each car weighs approximately 5 to 6 tons, and the cars were not used prior to the time they were taken off the track. He is aware that Mr. Petit issued Order of Withdrawal No. 277727, stating that sufficient effort was not made to abate the citation. Moreover, the welder that was working on the cars works a straight day shift, leaving work around 3:45 p.m., and he thus he did not have time to work on the cars that day. After the citation was issued, five other cars were tagged out for repairs (Tr. 293).

According to Mr. Mapper, the rock cars are used only onch a month when they shoot overcasts, but on occasion they are used 3 or 4 days a month. The cars spend most of the time on the surface, and last winter they were not used at all. It is possible to uncouple the cars on the surface without an automatic coupling device, but it is dangerous (Tr. 293-294). Only one welder is on duty on the mine surface and he is supposed to check the cars to see if they have automatic coupling devices before they go underground. However, once the cars are underground, they can get bent up and they are treated roughly when underground (Tr. 299-300).

Mr. Carte testified that at the time the initial citation issued there was no confusion. However, on the duplicate copy of the citation received by mine management, the car numbers were confused and one of the wrong cars was tags out. Company policy dictates that all cars be equipped with automatic couplers and are not to be taken underground in a damaged condition. On the day following the citation in question, five additional cars were tagged out for being in need of repairs and this was done at the initiative of the company (Tr. 305-306).

Docket No. VINC 79-115-P

Citation No. 277736, September 12, 1978, alleges a violation of 30 CFR 75.200, and states as follows: "Temporary supports were not

installed in the unsupported face area of No. 1 entry, 006 section as required by the operator's approved roof control plan."

Petitioner's Testimony

MSHA inspector Petit testified that on September 12, 1978, he inspected the Raccoon No. 3 Mine and observed that temporary supports were not installed in the unsupported area of the No. 1 entry, as required by the roof-control plan. An area 7 feet wide by 11 feet long was not roof bolted. The area was drilled, the cutter was ready to cut the place, and the area had been reported by the 8 a.m. to 4 p.m. shift as being bolted. The applicable section of the approved roof-control plan required that temporary supports be installed or that installation be begun no later than 15 minutes after the loading cycle is completed. He determined that this provision had not been complied with because the coal driller already had drilled the area, and it takes 10 to 12 minutes to drill such an area. When he observed the operation, the cutter was getting ready to cut the area, so he determined the cutter was either moving in or was ready to move in. The coal drill operator, or the cutting machine operator, told him that he was told by the section foreman that the area was ready to cut.

With respect to whether the operator had been negligent, Mr. Petit testified that a more thorough examination of the working section should have detected the violation and the fact that the area was not ready to be cut, drilled, and shot down. Such an observation should have been made by the preshift examiner. He determined the gravity of the condition and found that a roof fall was probable, but the roof was solid and in good condition. He abated the citation after temporary roof supports were installed on not more than 5-foot centers, and the roof-control plan was reviewed with the crew (Tr. 327-328).

On cross-examination, Mr. Petit confirmed that the place was drilled and that the cutter was about ready to cut the area. The cutter was to undercut the new face and the scrap coal that is left. Mr. Petit's notes did not reflect whether scrap coal was left, and had there been scrap coal left, this would have indicated that the area already had been drilled. The mining cycle was begun when the area was drilled because it is not normal to drill ahead of the cutting machine. In this particular case, the driller came before the cutter (Tr. 330-331).

Mr. Petit further testified he is aware of the fact that the roof-control plan permits 15 minutes from the second loading cycle to begin on a new face of coal, but it does not permit another loading cycle to start. Although the area had been previously drilled, the roof bolter came in and supposedly bolted it and then the coal driller came in. In response to the question of how he knew that 15 minutes

had elapsed without beginning the installation of temporary supports. Mr. Petit indicated that he did not even think about the 15 minutes. He knew that the next mining cycle had started since the place had been drilled and it was reported roof bolted (Tr. 330-331).

Respondent's Testimony

Mr. Carte testified that when the preshift examiner who is the section boss already on the section, made his rounds in the last 3 hours of the shift, and called out his report to the boss that is coming onto the section, he automatically told him that the area was bolted because there was enough time to allow the roof bolter to bolt it. He noticed that the place had not been completely bolted because there was some scrap coal left on the bottom. In the meantime, he instructed the cuttermen to go back in the area and scrap the coal so that the roof bolter could continue bolting (Tr. 336-339). The mining cycle had not been completed in this area, and under the roof-control plan, until the cycle is completed, the plan does not require the setting of temporary supports. Once it is started, however, it must be completed (Tr. 340).

On cross-examination, Mr. Carte testified that although he was not present on the 006 section on September 12, 1978, he obtained information through his safety assistant who travels with an inspector and the oncoming and offgoing section boss. On September 12, the scrap coal was taken care of on the next cycle of the shift in which the citation was issued. As the cutting machine moved in, he would have scraped the coal, sent his roof bolter back in to install another row of bolts, and a new cycle would have begun. The cycle could not be completed until after the citation issued. Thus, at the time the inspector was there, there should have been scrap coal present. However, at the point after the section was drilled and the cutter was being moved in, the other cycle was not being started due to the fact that scrap coal had been left and the loader would have to come back in and clean it out and then the roof bolter goes back in and finishes bolting (Tr. 341-343).

Stipulations

The parties stipulated that the inspectors who issued the citations in issue were duly authorized representatives of the U.S. Department of Labor, that they were issued to the respondent on the dates indicated, and that the conditions cited were terminated within the time-frames set forth in the citations (Tr. 51, 101).

Findings and Conclusions

Docket No. VINC 79-109-P

Citation No. 279540--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.507, which provides as follows: "Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air."

The citation here charges that the battery-charging unit in question was located in return air rather than intake air as required by the cited standard. After review of the testimony and evidence presented by the parties in support of their respective positions, the key question presented with regard to the location of that unit lies in the positioning of a brattice curtain or temporary stopping. According to the inspector, the course of the ventilation current at the cited location is determined by the installation and location of the curtain, and the positioning of the curtain determines whether or not the unit is located in intake or return air (Tr. 68). Here, the inspector contends that the air being coursed over the unit was return air, and while the same air was used to abate the citation, the crux of the violation lies in the fact that complete air separation was not being maintained because the unit was being ventilated by return air, and the purpose of the curtain is to serve as a temporary stopping separating intake air from return air (Tr. 88-95).

Petitioner argues that the intent of the cited standard is to insure that such battery chargers are adequately ventilated and are positioned in such a manner so as to preclude a buildup of methane, thereby posing an explosion threat in the event of arcing from the unit (Tr. 99). In its posthearing proposed findings and conclusions, petitioner argues that even assuming the absence of a temporary stopping, the lack of a stopping would have permitted the intermingling of intake and return air. Further, petitioner points out that the nonpermissible battery charger unit was located immediately on the return side of the temporary stopping between the check curtain or line brattice and the No. 5 entry, and by being positioned between the unit and the No. 4 entry, the curtain prevented or reduced intake airflow over the charger and exposed it to methane content in the return air.

Respondent's argument is that the battery charger was located in intake air and that there was no curtain between the battery charger and the No. 4 entry. Further, respondent maintains that the charger was not operating, and since the inspector conceded that chargers of this type are moved often, one can assume that it was not in operation at the particular location cited (Tr. 96-98). Respondent presented the testimony of safety representative Carpenter who apparently

was not present when the inspector made his observations. His sketch of the scene, Exhibit R-1, was prepared a day after the citation issued and was based on purported conversations with a safety committeeman who was apparently present but not called as a witness. The inspector's sketch of the scene, as reflected in his notes made at the time the citation issued, Exhibit P-1, is consistent with the inspector's testimony concerning the positioning of the curtain and the location of the charger unit. Mr. Carpenter's notes on his sketch reflect in pertinent part that "The battery charger was not moved to abate the citation. The only thing that was done was to place a curtain behind the battery charger." This tends to support the inspector's observations, rather than to contradict it.

I find and conclude that the petitioner has established a violation as charged in the citation by a preponderance of the evidence. Respondent's contention that petitioner must first establish that the battery charger unit in question was energized in order to support a violation of section 75.507 is rejected, notwithstanding the inspector's practice of not issuing citations if it is not energized. I find no such requirement in the standard and respondent has not persuaded me otherwise. The question of whether the unit was energized at the time of the inspection goes to the question of gravity and may not serve as an absolute defense to the violation. The citation is AFFIRMED.

Gravity

The inspector's testimony reflecting that the mine liberates methane and was on a 15-day spot inspection cycle has not been rebutted by the respondent. However, there is no evidence here that the inspector made any methane check at the location of the battery unit. Further, although the inspector made a sketch of the location of the unit, for some unexplained reason, he failed to note whether or not the battery charger in question was energized or operating at the time the citation issued, and there is no evidence that the unit was in other than good condition. Also, there is nothing in the record concerning the quantity or quality of air being coursed through the section or entry where the unit was located, no indications as to how long the unit had been in the location, and there is nothing in the record to suggest any other violations concerning nonpermissible equipment operating, etc. In my view, these are critical questions concerning the actual conditions which prevailed at the time of the citation, and lacking any further evidence in this regard, I cannot conclude that the condition cited was serious.

Negligence

I find that the respondent failed to exercise reasonable care to prevent the condition cited and that an onshift inspection of the area

cited would have detected the condition. Although the inspector and Mr. Carpenter alluded to pertain preshift and onshift books, they were not produced, and there is nothing in the record to support a finding that respondent was not oblivious to, or unaware of, the condition cited. I find that the violation resulted from respondent's ordinary negligence.

Good Faith Compliance

I find that respondent exercised normal good faith compliance in abating the condition cited.

Findings and Conclusions

Docket No. VINC 79-148-P

Citation No. 279550--Fact of Violation

f Respondent is charged with a violation of 30 CFR 75.1003(a), which states:

Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:

- (a) At all points where men are required to work or pass regularly under the wires;
- (b) On both sides of all doors and stoppings; and
- (c) At man-trip stations. [Emphasis added.]

In its posthearing proposed findings and conclusions, petitioner argues that miners were required to pass under the unguarded wire in question in order to unload supplies from the supply car and place them in a storage or supply area which is indicated on Exhibit R-1. In support of this contention, petitioner cites the inspector's notes, recorded at the time of the inspection, which indicates that the inspector based his conclusions in this regard on conversations with two utility men working on the section who indicated that in picking up some resin from the supply area in question, they passed under the unguarded trolley wire. Petitioner contends this area was an "active supply hold" (Brief, p. 7). Petitioner presented no further arguments during the hearing (Tr. 143), but did concede that it was not contending that men normally passed back and forth under the unguarded wire as a normal routine (Tr. 142).

Respondent asserts that the petitioner failed to establish a prima facie case in that it presented no evidence that men regularly

passed under the cited unguarded trolley wire. Further, respondent asserts that the inspector could not state whether he actually observed men passing beneath the unguarded trolley wire, and that respondent's testimony reflects that company policy dictates that the wire be deenergized before men walk under it (Tr. 140-141). In addition, in its posthearing proposed findings and conclusion, respondent asserts that petitioner has not established that the trolley wire was energized at the time the citation issued, and that supplies could be removed from the supply area without men passing under the trolley wire.

As I read the requirements of section 75.1003(a), it mandates that trolley wires be guarded at all points where men are required to work or pass regularly under such wires. I agree with the respondent's position that petitioner has not established that men were required to regularly pass under the wires at the place where the supplies in question were located on the day the citation issued. However, the standard also requires that trolley wires be guarded where men are required to work. In this case, the inspector testified that the supply area in question was one which was regularly used for that purpose and respondent has not rebutted this fact. In this regard, I believe the definitions of the terms "working section" and "active working" found in the definitions section on Part 75, 30 CFR 75.2, is broad enough to sustain a finding that the area cited by the inspector was in fact a place where miners were required to work, and respondent's evidence does not convince me otherwise. With regard to the argument that petitioner has not established that the trolley wire was in fact energized at the time the citation issued, I believe that this fact goes to the gravity of the situation presented, and may not serve as an absolute defense to the asserted violation. The standard, on its face, requires that trolley wires be guarded under the conditions and terms specifically set forth therein, and there is no requirement that petitioner establish as a condition precedent that it be energized before a violation may be established. Thus, on the facts presented here, I cannot conclude that the fact that the petitioner did not establish that men regularly passed under the wire or that the wire was in fact energized is controlling as to the question of whether a violation occurred. In my view, the critical question is whether or not men passed under an unguarded trolley wire while performing work at the location cited by the inspector.

In this case, I believe it is clear that the inspector did not personally observe men passing under an unguarded trolley wire, and the inspector candidly admitted that this was the case. His conclusion that men passed under the wire was based on the fact that the supplies were positioned in such a fashion that it was physically impossible for them to be off-loaded from the adjacent car and track without men actually passing under the unguarded wire. His conclusion was supported by statements purportedly made to him by two men who told him that they passed under the unguarded wire to obtain some

of the supplies stored there, and his conversations in this regard were documented by notes made at the time of the inspection.

Respondent does not dispute the fact that the trolley wire in question was not in fact guarded, or that the supplies were not stored at the place indicated by the inspector. Further, Mr. Carpenter candidly conceded that in retrieving the supplies from the storage area in question, it was necessary for men to pass under the unguarded wire, and he also conceded that it was natural for the inspector to assume that due to the location of the supplies someone had to pass under the unguarded wire in order to place them in that location.

The burden of proof in this instance lies with the petitioner. Although the best evidence of the fact that men passed under the unguarded wire would be the testimony of the two men who purportedly spoke to the inspector, neither the petitioner nor the respondent saw fit to call these men as witnesses. However, on the facts presented here, I believe the inspector's testimony is credible, and the inference that men passed under the unguarded wire in off-loading the supplies is supported by credible and probative testimony from the inspector, including the notes made at the time of the event in question. I find and conclude that the petitioner has established a prima facie case which remains unrebutted by any evidence or testimony presented by the respondent. As a matter of fact, I believe that Mr. Carpenter's testimony corroborates the inspector's testimony that the supplies were in fact stored in such a fashion that required men to pass under the unguarded wire in storing or retrieving them. On the facts and circumstances here presented, I conclude and find that the petitioner has established a violation by the preponderance of the evidence. Respondent's defense as to the fact of violation is rejected, and the citation is AFFIRMED.

Gravity

It is clear that the inspector's notes reflect that the trolley wire was energized at the time the citation was issued, but do not reflect that it was so energized at the time men may have passed under it. Although the inspector indicated that two men told him they passed under the wire, they apparently did not state that it was energized at the time, and that fact is still in dispute. Respondent's witness did not know whether the trolley wire switch was on or off at the time the supplies were off-loaded, and he alluded to the fact that employees are instructed to deenergize the wire when they are working under or around such wires. Neither party disputed the fact that passing under an energized trolley wire constitutes a hazard of shock or electrocution. Under the circumstances, I conclude that the violation was serious.

Negligence

The supplies in question were located at a place where men had to walk under the unguarded wire to either store or retrieve them.

In these circumstances, I conclude that the respondent had a duty to exercise reasonable care to insure that the wire at that location was guarded. Its failure to do so constitutes ordinary negligence and that is my finding.

Good Faith Compliance

The citation was abated by guarding the area in question, and there is no evidence that abatement was not achieved within the time fixed by the inspector. I find that respondent exercised normal compliance in abating the condition cited.

Findings and Conclusions

Docket No. VINC 79-110-P

Citation No. 278046--Fact of Violation

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

The thrust of the violation in this case is the assertion that the presence of a worn or "burned out" spot on the cable reel on the shuttle car, which resulted in the destruction of the insulation at that point, rendered the car nonpermissible and in violation of the permissibility requirements of section 75.503. In support of the citation, petitioner has presented the testimony of Inspector McNece, who, upon investigation of an accident concerning a shock received by a miner in conjunction with the use of the shuttle car in question, determined that the cable reel had been damaged. The inspector determined that the car in question had been used in by the last open crosscut and that the damaged reel rendered the car nonpermissible. Respondent presented no evidence to rebut the inspector's findings concerning the condition of the shuttle car. Its defense to the citation focused on the manner in which MSHA's Office of Assessments assessed the violation (Tr. 187-189), and this argument is addressed by me below in my findings concerning the question of gravity. As for the fact of violation, I find that petitioner has established a violation by a preponderance of the evidence and the citation is AFFIRMED.

Negligence

The inspector conceded that the one bare spot in question on the cable reel was approximately an area of some 2 inches and the cable was some 500 feet in length. He also indicated that he discovered the bare spot only after he wiped some mud off the cable with a rag,

and further conceded that it was possible that someone could examine the cable and not locate or observe the mud-covered, 2-inch bare spot. While he could not state that any visual examination was made, he did indicate that "close attention" was required to discover the bare spot (Tr. 170, 173-174).

With regard to the movement of the shuttle car after the injury, and the inspector's assertion that the car was "put back in service," one could be led to believe that the respondent in this instance totally disregarded any safety considerations after the bare spot was discovered, and deliberately placed an unsafe piece of equipment back into operation running coal. However, this is not the case. Although the inspector's testimony was somewhat misleading and confusing on this point, it is now clear from the record that the car in question was operated and moved back out of the way some 50 feet in order to facilitate its movement out of the area so that it could be examined to ascertain the cause of the shock incident (Tr. 176-180). Under these circumstances, I conclude that under the then prevailing conditions, the respondent acted reasonably and I cannot conclude that there was any reckless or deliberate disregard for safety.

Based on the total circumstances which prevailed and in light of the foregoing discussion, I cannot conclude that the evidence supports a finding that the respondent was negligent in failing to discover the somewhat miniscule bare spot on the cable reel.

Gravity

It seems clear from the record that the shock incident in question resulted in an injury to a miner. Fortunately, the incident did not result in a fatality, but it did cause some trauma to the individual involved and he was taken to a hospital. The inspector indicated that no "lost time" was recorded, but that conclusion remains unexplained, and there was no testimony concerning the actual injuries, sustained by the shock victim. However, the bare spot on the reel was hazardous and could have resulted in further serious injuries had it gone undetected. In the circumstances, I conclude that the condition cited was serious.

During the course of the hearing, respondent's counsel alluded to the fact that during the initial assessment of this citation, a clerical error apparently occurred in that a "gravity sheet" pertaining to another citation somehow found its way into the official file for the instant citation (Tr. 158). I have taken this into account and have assessed the matter de novo based on the testimony and evidence presented by the parties at the hearing.

Good Faith Compliance

I find that the respondent abated the condition in a timely fashion after the citation issued.

Findings and Conclusions

Docket No. VINC 79-111-P

Citation No. 278095--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.200, which provides:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The approved roof-control plan of April 25, 1978, for the Meigs No. 2 Mine (Exh. R-1), contains, in pertinent part, the following requirements listed under "Safety Precautions for Temporary Support," page 8, paragraphs 2 and 8:

* * * * *

2. * * * the installation of temporary supports shall be started no later than 15 minutes after the loading cycle is completed, and after the installation of such supports is started, installation shall be continued until at least the minimum number are installed as required by the approved plan.

* * * * *

8. In areas where temporary supports are required, only those persons engaged in installing the temporary

supports will be allowed to proceed beyond the permanently supported roof.

Before any person proceeds inby permanently supported roof to install temporary supports, a thorough visual examination of the unsupported roof and ribs shall be made. If the visual examination does not disclose any hazardous condition, persons proceeding inby permanent supports shall do so with caution and shall test the roof by the sound and vibration method as they advance into the area.

The applicable roof-control provision (p. 8, paragraph 2, Exh. R-1) requires that the installation of temporary supports be started no later than 15 minutes after the loading cycle is completed. Once started, the installation of such temporary supports shall be continued until at least the minimum number are installed as required by the plan. From the inspector's point of view, the gist of the violation is that after observing an area of unsupported roof, he looked into the next entry, observed that approximately two-thirds of the entry had been loaded out, and he surmized that the loading process there took more than 15 minutes. He therefore assumed that the mining cycle had advanced from the previous cut without the installation of the required temporary roof support (Tr. 214). No temporary supports were installed, and a loading crew had cleaned up a place, moved into another area where two-thirds of the cut had been loaded out, and no temporary supports had been set in the previous cut that had just been left. The inspector supported his findings by notes and a sketch of the area made at the time of the citation, and he spoke with the loading crew at the scene.

In its posthearing proposed findings and conclusions concerning this citation, respondent advances the defense that two-thirds of a cut can be loaded out within 15 minutes, and that by failing to remain at the location in question or initially observing the conditions at the location and returning at least 15 minutes later, the inspector had no basis for concluding that the applicable roof-control provision was violated. This assertion by the respondent is rejected, and I find that the petitioner has established a violation by a preponderance of the evidence. On the facts presented here, the fact that a place can generally be loaded out in 15 minutes or less is not persuasive since the conditions which prevailed at the time of the citation control, and I conclude that respondent has not rebutted the fact that more than 15 minutes had elapsed from the completion of the loading cycle. As correctly pointed out by the petitioner, Mr. Carte was not present at the time of the citation, and I find the inspector's testimony in support of the citation and the prevailing conditions at the time it was issued to be credible. I find that the preponderance of the evidence adduced supports a finding of a violation as charged. Failure to comply with a provision of the roof-control plan here

constitutes a violation of section 75.200. Peabody Coal Company, 8 IBMA 121 (1977); Affinity Mining Company, 6 IBMA 100 (1976); Dixie Fuel Company, Grays Knob Coal Company, 7 IBMA 71 (1976). The citation is AFFIRMED.

Good Faith Compliance

The inspector confirmed that abatement was achieved immediately, and that the respondent "got right on it and put the temporary supports up" (Tr. 215). I find respondent acted in good faith in abating the citation.

Gravity

The inspector stated that the lack of temporary roof support left an unsupported area of some 18 feet wide and 10 feet deep, and that someone could have "unconsciously" walked through that area believing that the roof was bolted and in so doing they would in fact be under unsupported roof (Tr. 193). I find that the lack of roof support presented a hazard of a possible roof fall and that the condition cited was serious.

Negligence

I find and conclude that the respondent failed to exercise reasonable care to insure that the roof area in question was adequately supported in accordance with its own approved plan. Its failure to do so, either through a thorough preshift or onshift examination, constitutes ordinary negligence.

Findings and Conclusions

Docket No. VINC 79-141-P

Citation No. 279989--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.1710-1(a)(4), which provides:

(a) Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib

and face rolls. The requirements of this paragraph (a) shall be met as follows:

* * * * *
(4) On and after July 1, 1975, in coal mines having mining heights of 36 inches or more, but less than 48 inches;

In defense of the citation, respondent argues that there is no requirement that cabs or canopies be installed on self-propelled electric face equipment where the mining heights are less than 30 inches (actual height from bottom to top less than 42 inches). In support of this assertion, respondent cited Exhibit R-2, an MSHA memorandum dated January 24, 1979, which explains and supplements MSHA's enforcement policy concerning the use of cabs and canopies as previously detailed in a prior memorandum issued on July 11, 1977 (Exh. R-2). The 1979 memorandum contains detailed instructions concerning the testing of equipment underground, and the monitoring of such tests by MSHA to determine whether an operator has in fact acted in good faith in complying with the requirements of installing canopies on underground equipment, and whether such efforts would warrant the granting of extensions on citations issued for noncompliance. Paragraph 3 of the memorandum states in pertinent part as follows:

To reduce the repeated issuance and termination of citations on self-propelled electric face equipment operated without canopies in mines which experience frequent changes in the mining height (measured from the mine floor to the mine roof) below 42 inches, the following policy is established.

Where the mining height fluctuates below and above 42 inches, a citation for a violation of Section 75.1710-1, 30 CFR 75, shall not be issued when such fluctuations below 42 inches would routinely create the necessity to remove cabs or canopies. An evaluation of the mining height shall be made periodically, not less than two times a year, to determine if such fluctuations still exist. These evaluations should normally be made as a part of a mandated complete mine inspection.

This policy is not applicable where the mining height does not frequently fall below 42 inches.

Although Inspector Petit testified that he took measurements to substantiate his conclusions that the average mining height was 48 to 50 inches, he could not state where those measurements were taken. He indicated that his notes did not reflect that he took any measurements at all, or where they may have been taken. When asked whether he remembered taking any notes, he responded "Yes. I wouldn't have

issued a citation unless I had have, even though I didn't have to because the front canopy is not supposed to be removed" (Tr. 220). He also stated that the front canopy was not to be removed even if the mine height is less than 42 inches (Tr. 220). And, he conceded that the operator had previously come through "very low coal" and that the mining height in the 006 section fluctuated (Tr. 221, 245). He also testified that any measurements he may have taken were restricted to an area inby the section dumping point and this was because he believed that was the only place where the bolter would be operating (Tr. 245). However, he conceded that it was possible that it had been used in other low areas, which necessitated that the canopy be taken off, and that someone forgot to put it back on (Tr. 245). When asked whether he measured the specific location where he found the roof bolter energized, he answered "Yes." However, when asked to describe the area, he answered "I don't recall" (Tr. 245). And, although he indicated that he never measured anything on the section below 48 inches and that "it fluctuated 46, 47, 48, 49," he also indicated that he never measured a place below 42 inches on the section, but he could not recall how many time he measured, did not know the distance from the section dumping point to the face area, speculated that it may have possibly been 500 feet, and could not remember how much of that distance he measured (Tr. 247).

Cutting across this entire episode with respect to the citation concerning the lack of a front canopy on the roof-bolting machine in question is a prior proceeding involving these very same parties. The prior proceeding concerned a petition for modification filed by the respondent pursuant to section 301(c) of the 1969 Act. The petition sought a modification of the canopy requirements of 30 CFR 75.1710-1(a) for the Meigs No. 1 and No. 2 Mines and the Raccoon No. 3 Mine. My decision in that proceeding was issued on October 29, 1976, Southern Ohio Coal Company v. MESA, et al., Docket No. M 76-349. On appeal, my decision was affirmed, with certain modifications, by the former Interior Board of Mine Operations Appeals, 7 IBMA 331 (1977). I have reviewed my prior decision and the IBMA decision, and aside from the fact that the inspector touched on it during the course of the hearing when he alluded to the fact that the respondent had obtained some relief from the requirements of the standard in mining heights of 56 inches, the parties have offered no further arguments in this regard. Further, I see nothing in those prior proceedings that would permit the respondent to operate the roof bolter in question without a canopy assuming that the petitioner has established through credible evidence that the mining heights were more than the required 42 inches.

The burden of proof in this instance lies with the petitioner. Petitioner must establish that the average mining heights where the roof bolter was operating was more than 42 inches. If the petitioner can establish that fact, then I believe it has established a violation. However, based on the evidence presented, namely, the testimony of the inspector who issued the citation, I cannot conclude that the

petitioner has established a case. I find the testimony of the inspector to be confusing and contradictory with respect to the key question concerning the operational mining height in the section where the roof bolter was operating. He failed to take detailed notes or otherwise establish as a matter of fact that the mining heights were such as required the use of a canopy. Based on a close scrutiny of his testimony, I conclude that he made only a cursory evaluation of the situation and failed to establish a true average of the mining heights on the section. I find and conclude that petitioner has failed to establish a violation by a preponderance of the evidence and the citation is VACATED.

Findings and Conclusions

Docket No. VINC 79-112-P

Citation No. 279997--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.402, which states:

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

Respondent's "policy and procedure" cleanup program dated June 1, 1974, is set out in Exhibit R-1, and the applicable provisions of that plan are paragraphs 8 and 10 which provide:

After a thorough clean-up the section will be blanket dusted when the section is advanced or before the end of your regular shift.

All areas from feeder inby will be cleaned up and dusted before end of regular shift.

Respondent's defense is that its plan fixes no time-frame for the completion of rockdusting, it permits rock dusting as the section advances or by the end of the shift, and that time did not permit rock dusting at the time the conditions were observed by the inspector (Tr. 259-260). Mr. Carte's testimony in defense of the citation reflects that he was not present at the time the inspector observed the conditions, he had not observed the conditions during the prior

shift, and he indicated that the section bosses in charge of the section, including the foremen, were unaware of their own cleanup plan (Tr. 262). Respondent's additional defenses, as articulated in its posthearing proposed findings and conclusions, focus on the provisions of 30 CFR 400-2, which deals with cleanup programs dealing with cleanup and removal of accumulations of coal and coal dust, and I fail to understand the relevance of that provision to the facts presented here. Respondent is not charged with failure to clean up coal accumulations; it is charged with a failure to rock dust as required by section 75.402. With regard to respondent's assertion that the petitioner failed to establish that the last open crosscut between the Nos. 4 and 5 entries were within 40 feet from a working face, the inspector specifically stated that he observed no rock dust applied to the last open crosscut between those entries, that the crosscut extended some 60 feet, and that he observed no rock dust in any of the other entries or crosscuts (Tr. 249). In the circumstances, I find that the testimony of the inspector concerning his observation of the area cited supports a finding that rock dust had not been applied to the ribs, roof and floor in the area described by the inspector in his citation, and the respondent's evidence and testimony has not rebutted this fact. The citation is AFFIRMED.

Good Faith Compliance

The inspector testified that abatement was achieved immediately and that the respondent "shut the whole section down and immediately got on it." Although abatement took an hour, it was suggested that other work had to be done first, and while the inspector believed that the necessary rock dusting could have been done in less than an hour and speculated that the reason it was not was the fact no rock dust was available, he really did not know that this was in fact the case (Tr. 252-263). He remained on the section and observed the rock dusting operation taking place to achieve compliance, and since he believed that the respondent "got right on it," I conclude and find that abatement was achieved through rapid compliance, and that the respondent acted in good faith in this regard.

Gravity

Although the inspector believed that there was a fire hazard presented by the lack of rock dust (Tr. 251), he could not support that conclusion and there is nothing of record to indicate why he believed this was the case. Further, he specifically stated that the mine in question is "blessed" because of the absence of methane, and while he alluded to the fact that a fire could occur in the event of a cable short, there is no indication of the presence of damaged cables or nonpermissible equipment operating in the area (Tr. 256-257). In short, I cannot conclude that the record supports a finding of any threat of fire, and I cannot conclude that the circumstances presented were serious.

Negligence

The inspector stated that his "inspector's statement" reflects that the conditions cited "should have been detected through a proper preshift and onshift examination" of the section, and that the conditions cited "had to exist at the end of the prior shift," but he could not remember whether he checked the preshift books, and his notes apparently did not reflect that he did (Tr. 251). Although Mr. Carte indicated that the section bosses and foreman were not aware of their own cleanup plan, that is no excuse. I find it rather incredible that such supervisory personnel, who are responsible for the safety of their crews, are unaware of the company's own cleanup plan. I can understand someone misinterpreting a particular plan, but cannot understand someone in a responsible supervisory position being completely oblivious of a cleanup plan. I find that the respondent failed to exercise reasonable care to insure that its plan was followed and that such failure constitutes ordinary negligence.

Findings and Conclusions

Docket No. VINC 79-114-P

Citation No. 277726--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.1405, which provides:

All haulage equipment acquired by an operator of a coal mine on or after March 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on March 30, 1970, shall also be so equipped within 4 years after March 30, 1970.

30 CFR 75.1405-1 provides: "The requirement of § 75.1405 with respect to automatic couplers applies only to track haulage cars which are regularly coupled and uncoupled."

In its arguments presented at the hearing, and detailed in its proposed findings and conclusions, respondent asserts that the citation should be dismissed because section 75.1405 does not apply to the surface work area of an underground mine. In support of this argument, respondent contends that the supply yard for the Raccoon No. 3 Mine where the cars were located constituted a surface work area of an underground mine and was therefore subject to the requirements of Part 77, Title 30, Code of Federal Regulations, which contain mandatory safety standards "for bituminous, anthracite, and lignite surface coal mines, including open pit and auger mines, and to the

surface work areas of underground coal mines, * * *." 30 CFR 77.1. Since there is no comparable standard requiring automatic coupling devices for stone haulage cars while located on surface work areas, respondent contends that petitioner has failed to establish a prima facie case and that the citation should be dismissed.

A second defense argued by the respondent is that assuming that section 75.1405 does apply to the cars in question, petitioner has not established they are regularly coupled and uncoupled are stated in section 75.1405-1. Respondent contends that the subject haulage cars are used sporadically, rather than regularly, and therefore, section 75.1405 does not apply. In support of this argument, respondent relies on the testimony of surface foreman Mapper and Mr. Carte.

Respondent does not dispute the fact that the cars in question are taken underground by means of the regular mine track haulage system which goes in and out of the underground areas of the mine, nor does it dispute the fact that the cars in question were used underground in loading out materials resulting from the "shooting-out" of overcasts (Tr. 286-299, 293). As for the frequency of use of the cars in question, Mr. Mapper confirmed that they are used in connection with the shooting of overcasts, and that this is done once a month over a period of 3 or 4 days (Tr. 293).

On the day the citation issued, the inspector observed a train of six such cars, including the two with defective coupling devices, and they were all loaded with rock obviously taken from the mine and awaiting transportation to the rock dumping area. Under the circumstances, I conclude and find that the cars in question are regularly used within the meaning of the cited standard. I believe it is reasonable to conclude that the shooting of overcasts underground is an important and ongoing underground mining activity essential to the production of coal, and respondent has not established that this is not the case. That is, respondent does not contend that the shooting of overcasts is a onetime or infrequent event. I find that it is an ongoing and regular incident to the mining of coal which takes place once a month over a period of 3 or 4 days, and the mining cars in question are an essential and integral part of those operations. The fact that the cars in question remain idle during the winter months is irrelevant. Curtailment of mining activities during the winter months is not unusual, particularly in the case of track haulage areas where inclement weather, snow, ice, etc., present practical and potentially hazardous problems. Respondent's defense that the cars were not regularly used is rejected.

With regard to the application of section 75.1405 to the cited rock haulage cars, respondent's assertions that they do not apply in this case are rejected. It seems clear to me that the mine in question is in fact an underground mine within the meaning of the Act and the mandatory standards set forth in Part 75 of the regulations. It

is also clear that the track haulage system is an integral part of that underground mine, that the rock haulage cars were in fact used underground, and respondent concedes that the storage area where the cars were located at the time the citation issued was in fact part of the underground mine. The definition of the term "coal mine" found in the Act includes the surface storage area in question and it is clearly within the definitional terms an area of land * * * under or above the surface * * * used in * * * the work of extracting * * * coal. I conclude and find that section 75.1405 is applicable to the rock haulage cars in question, and that petitioner has established a violation. The citation is AFFIRMED.

Gravity

I find that the conditions cited presented a real danger of serious injury or death to miners who may have had to position themselves between the cars to couple and uncouple them. Since the cars in question were loaded and awaiting transportation at the time the citation issued, one can reasonably infer that someone had to go between the cars to couple them. Respondent's own witness, Mapper, conceded that while the cars could be coupled and uncoupled without an automatic coupling device, it is a dangerous practice and that one has to be careful. His own words are "It is best to have automatic couplers on it" (Tr. 293). In addition, respondent's witness Carte stated that company policy dictated that automatic couplers be installed on the rock cars, and one of considerations for this policy was that "We didn't want to get nobody hurt" (Tr. 305). I find that the conditions cited were serious.

Negligence

I find that the record supports a finding that the conditions cited resulted from respondent's failure to take reasonable precautions to insure that the coupling and uncoupling devices were maintained in good working order, and that its failure to do so here constitutes ordinary negligence. Respondent's own witness, Mr. Carte, confirmed that the rock cars and coupling devices are subjected to damage "just about everytime they are taken underground" due to normal wear and tear in the loading process. This being the case, I believe it is reasonable to expect that more time and attention be given to the priority inspection, maintenance, and repair of the cars, notwithstanding the shortage of welders or other maintenance personnel.

During the hearing, there was some confusion surrounding the fact that the actual cars cited by the inspector were not the ones taken out of service by the respondent and tagged for repair. In addition, there appeared to be a suggestion by the inspector that the respondent intended to put the cars back into operation after they were cited, thus presenting the possibility that the respondent may have been guilty of recklessness and total disregard for the safety of miners

bordering on gross negligence. After close scrutiny of the testimony and the explanations given by the witnesses presented by the respondent, I find the testimony on this question to be credible and plausible, and thus cannot conclude that there was gross negligence in this case.

Good Faith Compliance

The initial citation in this case was issued on August 29, 1978, at 1:15 p.m., and the inspector fixed the abatement time as 8 p.m., that same day. Upon returning to the mine the next day, August 30, 1978, the inspector observed that neither car had been repaired. Although one of the cars (No. 8730) had been tagged out, he believed that the other car (No. 8107), which was not tagged out, had also been used after he had cited it. This prompted him to issue Order No. 277727, at 9:40 a.m., taking both cars out of service, and he noted on the face of the order that "sufficient effort was not made to abate the condition." The initial Citation No. 277726, was then terminated less than an hour later on August 30 after repairs were made to the cars and the coupling and uncoupling devices were restored to effective operating condition.

Respondent asserts that it acted with due diligence by removing from operations the two cars respondent believed were the subject of the initial citation, and that on its own initiative, removed other cars in need of repair, and acted diligently in making repairs to those cars. Further, respondent argues that as soon as it discovered the actual cars to which the inspector was referring, and since they were awaiting repairs, it acted in a diligent manner to correct and abate the conditions cited.

Petitioner's posthearing proposed findings and conclusions contain no further proposals with respect to the question of good faith compliance. The inspector obviously believed that the initial citation was not abated in good faith since he made a finding that the respondent was making an insufficient effort to comply and that prompted him to issue the order taking the equipment out of service. Once that order issued, there was prompt and immediate compliance. Based on a close scrutiny of the testimony of the witnesses during the hearing, it seems clear to me that the parties had a communication problem as to which cars were required to be taken out of service and repaired, and I take note of the fact that this seems to be a recurring problem in cases of this kind. That is, an inspector will cite a condition and leave it up to the respondent to take corrective action. On the facts presented here, the inspector cited two cars and the respondent apparently took the wrong car or cars out of service, and apparently left the defective car or cars on the rail. Respondent's defense seems to be that there was a shortage of welders, and that the initial time for abatement was far too short. This is no excuse.

It seems to me that if an operator believes the time fixed for abatement is not reasonable, he should at least attempt to convey this to the inspector. By the same token, I believe that an inspector has a duty to listen and not simply walk away for the situation. In short, the time for resolving these differences is at the time the citation issues, and not a year later when the case is litigated.

Respondent's assertion in its posthearing proposed findings concerning the extension of the abatement time is irrelevant in this proceeding. This is a civil penalty proceeding and not a review proceeding, and the time for abatement is not in issue insofar as the fact of violation is concerned. However, I have considered the question as part of my findings concerning the questions of good faith compliance and negligence.

In light of the foregoing, and based on all of the circumstances, I cannot conclude that respondent was dilatory or exhibited such a total lack of good faith or disregard for the law requiring to supporting a substantial increase in the civil penalty assessed for the citation in question. Although it is true that respondent had not completed the repairs on one of the cited cars because of certain logistical problems connected with removing it from the tracks and transporting it to the repair shop, the other car was apparently misidentified, and the wrong one was tagged out. In any event, I believe that viewed in perspective, the respondent attempted to comply, and while its goal fell short of the inspector's expectations that repairs could have been made within the time originally fixed, I am not totally convinced that this was not the case.

Findings and Conclusions

Docket No. VINC 79-115-P

Citation No. 277736--Fact of Violation

Respondent is charged with a violation of 30 CFR 75.200, for failing to install certain temporary roof supports as required by its approved roof-control plan. The parties stipulated that the applicable roof-control plan with respect to this citation is the same one previously discussed with regard to Citation No. 278095 (Docket No. VINC 79-111-P) (Tr. 335).

Respondent's defense is based on the testimony of Mr. Carte, who was not present when the citation issued. He contended that the mining cycle had not as yet been completed when the inspector arrived on the scene because there was scrap coal that had to be loaded out. He conceded that had it not been for the presence of that scrap coal, the cycle would be considered completed. He believed the applicable roof-control provisions were being followed, and under his interpretation of those procedures, temporary supports need not be installed as

long as scrap coal remains to be removed, because any attempts to set such temporary supports at the face area while removing scrap coal introduces another hazard into the process. Although the inspector's notes did not reflect the presence of any scrap coal, he testified that had scrap coal been present, this would indicate that the area had already been drilled. In this case, his unrebutted testimony is that a face area 7 feet wide by 11 feet long was drilled and a cutter was about to begin cutting with no supports installed. Further, although the area had previously been reported as roof bolted, the fact is that it was not completely bolted, and Mr. Carte admitted this was the case (Tr. 337).

After careful consideration of the testimony presented, I conclude that the respondent has not established that scrap coal was present and that the mining cycle requiring the installation of temporary supports had not been completed. To the contrary, I conclude and find that the testimony presented by the inspector in support of the citation supports the conditions cited and supports a finding that respondent failed to install the temporary supports required by its own roof-control plan, and the failure to do so constitutes a violation of section 75.200. The citation is AFFIRMED.

Gravity

The inspector testified that the roof condition was "solid and good," and although his conclusion that a roof fall was "probable" is somewhat illogical in light of the roof conditions, the fact is that the area and extent of specific unsupported roof at the face where coal is being cut presents a potential danger and hazard of a roof fall in that immediate area. Under the circumstances, I find that the violation is serious.

Good Faith Compliance

Abatement was achieved by the installation of temporary roof supports as required by the roof-control plan and the plan was reviewed with the crew (Tr. 328). The citation was terminated and the conditions abated within the time fixed by the inspector and I conclude that the respondent exercised normal compliance in correcting the cited conditions.

Negligence

It is clear that the respondent failed to follow its own roof-control plan in this instance, and while there is testimony reflecting that the area was reported bolted, when in fact it was not, I cannot conclude there is sufficient evidence to support a finding of gross negligence or a reckless disregard for safety. I have taken into account the fact that the respondent may have believed that it was following its plan, but I conclude that a closer examination and

attention to that plan, coupled with the conditions which prevailed at the time the citation issued, should have alerted respondent to the fact that the required roof supports were not installed. I find that respondent failed to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence.

The following findings and conclusions are applicable to all of the dockets:

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

Information developed during the hearing reflects that respondent's Meigs No. 1 Mine has a daily coal production of 3,000 tons, and that the mine operates 2 production shifts and one maintenance shift, employing 204 surface employees, and 447 underground employees (Tr. 16-17). The Raccoon No. 3 Mine also produces 3,000 tons of coal daily on three similar shifts, but employs 58 surface employees and 373 underground. Both mines have eight to nine active working sections (Tr. 35). No information was forthcoming with respect to the scope of respondent's operations at the Meigs No. 2 Mine. However, I believe the evidence adduced supports the conclusion that the respondent is a large coal mine operator and that is my finding. Further, absent any information to the contrary, I conclude that any civil penalties assessed by me with respect to any proven citations will not adversely impair the respondent's ability to remain in business.

History of Prior Violations

Respondent's prior history of violations is reflected in three computer printouts submitted by the petitioner at the hearing (Exh. P-1) for the Meigs No. 1 and No. 2 Mines, and the Raccoon No. 3 Mine (Tr. 6, 26, 35). The printout for the No. 1 Mine reflects 558 paid violations amounting to \$92,948.20 for the period July 18, 1976 through July 18, 1978. For the No. 2 Mine, the printout reflects that respondent paid \$110,069 for 589 violations covering the period August 15, 1976, through August 15, 1978. The printout for the Raccoon No. 3 Mine reflects 454 paid violations totaling \$70,281.40, for the period August 15, 1976, through August 15, 1978. For the time period in question, the prior history of paid violations reflects that respondent has paid civil penalty assessments for 1,601 violations, approximately 180 of which were for violations of the roof-support provisions of section 75.200, and some 140 for violations of the permissibility requirements of section 75.503. Based on this prior 2-year history of violations, I conclude and find that it constitutes a significant history of prior paid violations which I have taken into account in assessing civil penalties in these cases.

ORDERS

Pursuant to 29 CFR 2700.30, settlement is approved for the following citations, and respondent IS ORDERED to pay civil penalties in the amounts shown below in satisfaction of the settled citations:

Docket No. VINC 79-111-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
280459	07/25/79	75.605	\$150

Docket No. VINC 79-141-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
279953	07/25/79	75.400	\$160
279990	08/03/79	75.1100-2(f)	\$160

Docket No. VINC 79-112-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
279961	08/09/78	75.606	\$122
279964	08/10/78	75.606	\$140
279973	08/15/78	75.606	\$ 90

In view of the foregoing findings and conclusions, the following citation is VACATED, and the proposal for assessment of civil penalty for this citation is DISMISSED:

Docket No. VINC 79-141-P--Citation No. 279989, August 2, 1978,
30 CFR 75.1710-1(a)(4).

In view of the foregoing findings and conclusions, affirming the following citations, including consideration of the six statutory criteria pursuant to section 110(i) of the Act, civil penalties are assessed as follows:

Docket No. VINC 79-109-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
279540	07/28/78	75.507	\$400

Docket No. VINC 79-148-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
279550	08/02/78	75.1003(a)	\$700

Docket No. VINC 79-110-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
278046	05/11/78	75.503	\$700

Docket No. VINC 79-111-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
278095	07/20/78	75.200	\$600

Docket No. VINC 79-112-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
279997	08/08/78	75.402	\$350

Docket No. VINC 79-114-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
277726	08/29/78	75.1405	\$975

Docket No. VINC 79-115-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
277736	09/12/78	75.200	\$900

Respondent IS ORDERED to pay civil penalties, as shown above, totaling \$5,447 within thirty (30) days of the date of these decisions and orders.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

001 25 1979

CONSOLIDATION COAL COMPANY, : Application for Review
Applicant :
v. : Docket No. PENN 79-75
: :
SECRETARY OF LABOR, : Citation No. 0618570
MINE SAFETY AND HEALTH : April 18, 1979
ADMINISTRATION (MSHA), :
Respondent : Renton Mine
:
UNITED MINE WORKERS OF AMERICA, :
Respondent :

DECISION

Appearances: Michel Nardi, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Applicant;
Barbara K. Kaufmann, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent MSHA.

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 105(d) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company for review of a citation issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 104(d)(1) of the Act.

By an amended notice of hearing, this case was set for hearing on October 10, 1979, in Pittsburgh, Pennsylvania. The notice of hearing required the filing of preliminary statements. The applicant and MSHA filed preliminary statements, and the case was heard as scheduled. The applicant and MSHA appeared and presented evidence.

Bench Decision

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. Upon consideration of all documentary evidence and testimony, and after listening to oral argument, I rendered the following decision from the bench (Tr. 145-148):

This case is an application for review of a citation issued under section 104(d)(1) of the Act for a violation of 30 CFR 75.400.

Section 75.400 prohibits accumulations of coal dust, float coal dust and loose coal, and other combustible materials in active workings. Section 75.2(d)(4) defines "active workings" as any place in a coal mine where miners are normally required to work or travel. The subject citation cites accumulations of fine dry coal dust, loose coal, and float coal dust in several locations.

I will consider the loading ramp first. The inspector testified that accumulations at the ramp were 4 feet wide, 60 feet long, and 7 inches deep. The operator's shift foreman admitted accumulations at the ramp were 4 feet wide, 40 to 50 feet long, and 5-1/2 inches deep. The inspector further testified that the coal at the ramp was dry, packed tight and not rock dusted. Because the coal was packed so tight, the inspector believed it had been there 2 weeks. I accept the inspector's description of the coal accumulations at the ramp which was the most detailed description given with respect to the nature of these accumulations.

Based upon the inspector's testimony, I conclude the coal had been there for a number of days in violation of section 75.400, and, most particularly, in violation of the clean-up plan which requires that the ramp be shoveled as spillage occurs and that rock dust be applied at the end of each shift or more frequently if needed. Moreover, even the operator's shift foreman believed the coal at the ramp was left from the prior shift, and the operator's section foreman specifically admitted the ramp area should have been checked and cleaned up. Accordingly, even under the testimony of the operator's own witnesses, there was a failure to comply with the clean-up plan and meet the requirements of section 75.400.

In light of the foregoing, I find the accumulations at the ramp constituted a violation.

I further conclude this violation was significant and substantial. I accept the inspector's testimony that there were energized trailing cables in the area and that the nip station was nearby. Also, there was

unwarrantable failure. The operator is charged with knowledge of its clean-up plan. Moreover, through preshift and onshift examinations, the operator should have known about the accumulations at the ramp and taken care of them.

Based upon the accumulations at the ramp, the citation must be upheld.

The inspector also cited the operator for accumulations at five pillar splits. The determination whether a violation existed at those locations depends upon whether they were active workings, that is, places where miners are normally required to work or travel. This, in turn, requires a determination regarding credibility, because a clear conflict exists between the inspector and the operator's witnesses over the nature and character of the pillar splits. The inspector placed a continuous miner machine in the area in question. He said that when he arrived on the scene, men were ready to go to work there, and that the area had not been blocked off by posts. On the other hand, the operator's witnesses asserted that the area of the five pillar splits had been abandoned, that the continuous miner machine was not where the inspector placed it, and that the pillar area had been blocked off by posts and dangered off by a sign and wire.

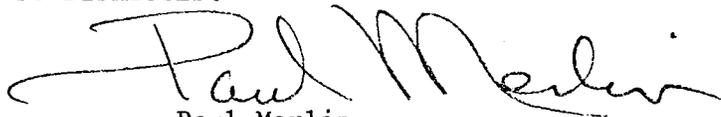
After careful consideration of the testimony and the demeanor of all the witnesses, I have concluded that the inspector's version should be accepted. I note the operator's witnesses contradicted each other over how deep the water was in the splits and how well the coal had been cleaned up in the splits. I further accept the inspector's testimony that the coal in the splits was left over from mining and was not from sloughing and that this coal was dry.

In light of the foregoing, I find a violation of section 75.400 existed in the five pillar splits as active workings in the manner testified to by the inspector. I further accept the inspector's testimony that there were trailing cables in the area which constituted potential ignition sources. On this basis, I conclude that the violation in the pillar splits was significant and substantial. Clearly, the operator should have known of these conditions through preshift and onshift examinations. Therefore, unwarrantable failure on the part of the operator was present. f

Accordingly, the citation in all its respects is upheld.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Citation No. 0618570 be UPHELD and that the operator's application for review be DISMISSED.



Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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Standard Distribution

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

OCT 25 1979

CONSOLIDATION COAL COMPANY, : Application for Review
Applicant :
v. : Docket No. PENN 79-72-R
: :
SECRETARY OF LABOR, : Order No. 0622333
MINE SAFETY AND HEALTH : June 8, 1979
ADMINISTRATION (MSHA), :
Respondent : Renton Mine
: :
UNITED MINE WORKERS OF AMERICA, :
Respondent :

DECISION

Appearances: Michel Nardi, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Applicant;
Barbara K. Kaufmann, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent MSHA.

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 107(e) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company to review an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 107(a) of the Act for imminent danger.

By amended notice of hearing, this case was set for hearing on October 10, 1979, in Pittsburgh, Pennsylvania. The notice of hearing required the filing of preliminary statements. The applicant and MSHA filed preliminary statements, and the case was heard as scheduled. The applicant and MSHA appeared and presented evidence.

Applicable Statute

Section 107(a) of the Act provides:

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.

Bench Decision

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. Upon consideration of all documentary evidence and testimony, and after listening to oral argument, I rendered the following decision from the bench (Tr. 123-126).

This case is an application for review of a withdrawal order for imminent danger. Imminent danger is defined in the Act as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

The evidence shows there was loose and scaly roof in the track haulageway. According to the inspector, the roof had cracks and there were two or three places he saw where rocks had fallen out. The inspector said the fallen rock could have been there for a few hours or a few days. He testified that he believed an imminent danger existed because there was so much of it, i.e., such a large area was involved.

The extent of the area involved is, however, not a sole basis for a finding of imminent danger. What is crucial

is the time element, that is, that the condition cannot be abated before the reasonable expectation of death or serious physical harm. In other words, the nature of the peril posed is the relevant inquiry. Accordingly, based upon the inspector's own testimony, a finding of imminent danger must be vacated.

In addition, however, the testimony of the operator's witnesses further demonstrates that an imminent danger did not exist. The operator's safety escort expressed the view that the roof was not going to come down immediately and that places where the roof could be scaled could be taken care of before they fell. So, too, the mine superintendent stated that the roof did not look like it would fall out right away, and the mine foreman said that it is a rare occurrence for rock such as this to fall out spontaneously and that usually it falls because it is pried out. The mine foreman also testified that the two or three pieces of fallen rock the inspector saw came from rock intentionally pried out by men the foreman had working in the area. I accept the foregoing testimony of the operator's witnesses. In this connection I particularly note that the day the inspector issued the subject order was only the second time he had been in the mine, whereas the operator's witnesses possessed a far greater familiarity with the area and with the roof.

The Solicitor introduced evidence regarding a roof fall and accident in the area, which occurred three days before the subject order was issued. I do not find evidence of the prior fall persuasive regarding the existence of an imminent danger here, because in the prior instance a locomotive had knocked out roof supports, causing the fall, a situation not presented in this case. However, the evidence regarding the prior fall is interesting because the operator's witnesses testified without contradiction that many MSHA experts, including roof control experts, were present in the subject area to investigate the roof fall and accident, but did not cite the roof as deficient in any respect, although as the operator's mine superintendent pointed out, they would have done so had anything been out of order.

In addition, uncontradicted evidence from all the operator's witnesses indicating that after the withdrawal order was issued, the subject area was traveled many times by the inspector and the operator's personnel militates

against a finding of imminent danger. If the inspector really believed an imminent danger existed, I do not think he would have walked the area or allowed the operator's people to walk it so many times. In this connection also I note the undisputed testimony from the operator's witnesses that the inspector first stated he would issue a withdrawal order for unwarrantable failure. When told by the mine superintendent that this could not possibly be correct, because the area had just been worked on after the recent accident, he then changed the order to one for imminent danger.

I cannot overlook any of these circumstances, and all of them indicate to me that an imminent danger did not exist.

According to the evidence, the subject area was mined 20 or 30 years ago. Moisture conditions, particularly in the summer, cause flaking and scaling. Continual vigilance on the part of the operator is therefore, called for. I am mindful that roof falls are serious and that as the former Board of Mine Operations Appeals of the Department of Interior stated in Zeigler Coal Company 2 IBMA at 220, they constitute a principal cause of serious injury in the mines. Roof conditions are consequently not to be taken lightly. However, every roof condition is not an imminent danger. Here the overwhelming evidence demonstrates that an imminent danger did not exist.

The order is therefore, vacated.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 0622333 be VACATED and that the operator's application for review be GRANTED.



Paul Merlin

Assistant Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 25 1979

SECRETARY OF LABOR : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 79-13-M
Petitioner : A.C. No. 23-00254-05001F
v. :
: Ava Quarry
WELTON GRAVEL AND LIMESTONE :
COMPANY, :
Respondent :

DECISION AND ORDER

APPROVING

SETTLEMENT OF CIVIL PENALTY PROCEEDING

Appearances: Robert S. Bass, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
James E. Curry, Esq., Ava, Missouri, for
Respondent.

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petition for assessment of civil penalties was filed by the Mine Safety and Health Administration on April 3, 1979, and Respondent filed a timely answer thereafter. A hearing was held on September 5, 1979, in Kansas City, Missouri, at which both parties were represented by counsel.

At the beginning of the hearing, counsel for Petitioner moved for the court to approve a settlement for the two violations which are docketed in this case. 1/ As grounds for the proposed settlement, counsel stated the following:

1/ Exhibit "A" of the petition for assessment of civil penalties listed six other alleged violations besides the two involved in this case. At the hearing, Petitioner advised that these other violations had been settled at the assessment conference level. Thus, the petition had been incorrect in so listing these (Tr. 3-4).

MR. BASS: The penalty proposed for 191425(d) was \$3,000.00. The parties have reached an agreement in which Respondent agrees to pay \$1,500.00 for that violation. The proposed penalty for 191425(g) is \$5,000.00. The Respondent has agreed, and I've accepted their offer of, to pay \$3,000.00. Both of these violations came under a general classification of electrical violations.

The violation in 191425(d) is a violation of 30 C.F.R. 56.12-8; and that specific standard requires that power cables, going into metal boxes and other enclosures, have bushings or fittings, some kind of insulation around the particular conduit; [and] in this case [the cable] did not have a, I think it's referred to as a squeeze connector or a bushing around it.

Part of the insulation around the live cable came in contact with the metal box, starter box, on a conveyer and thereby energized the conveyer, the framework around the conveyer.

That particular violation, as I said, we have agreed to settle for \$1,500.00. It's the opinion of the mine inspector, Ernest Scott, that the particular violation was the result of the ordinary negligence of the Respondent; and that it was not nearly as directly related to the fatality in the case as the other violation.

One of the other reasons that we've, that I've agreed to accept less than the full amount for this violation is that the Office of Assessments, who I personally consulted yesterday, had not given any credit at all to Respondent for good faith in his abatement of the violation.

It has, it's brought out in the file that--and I believe Your Honor has a copy of the prehearing response filed by Mr. Curry * * * it's brought out in there that immediately after the withdrawal order was issued to Respondent, Respondent caused the plant to be shut down for a period of approximately two months, during which time Respondent expended around \$22,000.00 to have the entire plant rewired. Mr. Scott personally went back to the plant and viewed what had been done; and he can confirm that their steps were far and above that which was required to abate the violation. They could have very easily have done it for a very small outlay of money; but instead they chose to really reshape the plant up, converted from their diesel power generator to utility

power; and they changed the method. I think they went from a three-phase Y to [a corner crowned delta system.] * * * I confirmed with him [Mr. Scott] this morning that the plant is in excellent shape from an electrical standpoint; and Mr. Scott is an electrician.

One of the other factors we consider [in] mitigation is the prior history. Mr. Welton [Respondent's owner] has not been cited for any violations of the Act prior to this order. Specifically, he has been inspected on several occasions, by employees of what used to be MESA, under the Department of Interior; and never has an electrical violation been pointed out to him concerning, that concern the starter box or the grounding requirements at his plant.

So we believe those factors, together with the fact that the Office of Assessment didn't properly evaluate good faith, lend credence to a lesser penalty than was originally proposed. We both believe, all the parties believe, that this would effectuate the purposes of the Act. Mr. Welton has come into compliance with the mandatory standards and has demonstrated some very, very good faith in his abatement requirement, abatement procedures; and I believe that the public interest would be served by accepting a \$1,500.00 penalty for this violation.

With respect to 191425(g), which is a violation of 30 C.F.R. 56.12-25, that standard requires that the, that electrical equipment, or systems such as the one in this case, be grounded. Now, Mr. Welton had a type of grounding system in effect when the accident occurred. That [system] is no longer approved by MSHA. It had been inspected prior, on previous occasions by MESA; and * * * there had never been any indication there was anything wrong with it. It consisted of having a lead wire coming off the framework of the generator and attached to a coal-metal pipe driven into the ground.

Now, in this particular case, that system didn't prove to be effective because there, the framework of the side conveyer did become energized and an employee was electrocuted when he came into contact with it.

It's Mr. Scott's opinion that this violation was far more severe than the other violation. Consequently, the higher penalty that was proposed. The parties agreed that the degree of negligence in this particular case was greater than ordinary negligence. However, there are

mitigating circumstances, as I've already outlined. He had been inspected before by officials at MESA; and this system had been approved.

It's our opinion that this indicates that it wasn't a willful negligence on the part of Mr. Welton to do anything, that the system is no longer approved. They are not disputing that there's a violation; but we don't believe the degree of negligence goes so far as to be a willful conduct on his part.

We also believe that the element of good faith was not properly evaluated, as I've previously outlined. The company did spend a great deal of time and a great amount of money to get things in shape to protect its employees in the future; and we'd also submit that the gravity is not -- even though there was a fatality in this case -- Mr. Scott would support me in this, that * * * it was almost like a fluke accident, this wire that came in contact with the frame, with the box, that caused the frame to be energized.

When he came out the next day, it wasn't in contact with it any more. It was just a fluke accident that caused -- due to the vibration of the equipment -- caused it to make contact, an arc, that the condition could have existed for a long period of time and no injury have occurred. As a matter of fact, employees have been climbing all over this piece of equipment during the same day that the employee, who was killed, suffered his fatal injuries. So it was merely an unfortunate fortuitous event that the wire contacted the metal box the particular time the employee started to step up onto the framework.

It's our opinion that payment of the \$3,000.00 penalty is in the public interest and that with respect to both of these violations, we would submit that [consideration should be given to the financial condition of the company.] Mr. Welton is the sole proprietor. He operates the Ava Quarry and another small quarry, both of which qualify as the smallest operations that the Act recognizes.

His profit for the past year was very low and payment of the full \$8,000.00 for these two cases would amount to about 80 or 90 percent of his profit for the past year; and due to his financial condition, and the other factors I've outlined, we believe that the settlement is in the

public interest and will effectuate the purposes of the Act; and we would request that you approve it.

(Tr. 4-10).

Following this, Respondent's counsel elaborated on the company's financial condition:

MR. CURRY: May I? I want to commend Mr. Bass for his very fair statement of the facts, as I understand them. I would go one step further with respect to something about the company.

As Mr. Bass indicated, the company is a sole proprietorship, owned solely by Mr. Welton, who, some two years ago, purchased the interest of a deceased partner. Up until that time, this business had been operated as a partnership. He went into considerable debt at that time in order to accomplish the take-over of a business; and just before the hearing today, in that connection, I asked him if he could tell me what his debts were at this time.

I thought it might have some bearing on this matter; and he tells me that he now owes C.I.T. in the neighborhood of \$100,000.00. He owes the Citizen Bank at Ava approximately -- these are not exact figures -- \$40,000.00; and, then, Production Credit Association, he owes the sum of \$300,000.00.

Now, that last item is not in connection with this business. He has a farm and -- which his wife operates -- and that last item was in connection with the operation of the farm.

This business is a seasonal business in that the chief customer of Welton Gravel is the State of Missouri, purchasing aggregate chips and gravel and crushed stone for the construction of the system of state highways in Missouri and down in that area. Those purchases are made on a bid basis. Mr. Welton has to bid against other gravel contractors to secure these jobs.

Now, the reason I mention that at this time, Your Honor, is the fact that there are no bid lettings in the offing in Missouri at this time, for the balance of this year; and possibly for most of next year.

(Tr. 10-11).

After considering the parties' representations, the following decision was delivered from the bench approving the proposed settlement:

THE COURT: Well, thank you very much, gentlemen, for the clear and comprehensive recitation of all the significant elements. I agree that the settlement arrived at here is wholly appropriate. As I understand it, and I'll just restate it for the record, the parties have agreed -- and you may affirm after I finish -- have agreed that in the case of 191425(d), in which case an assessment of \$3,000.00 was originally levied, to settle for the sum of \$1,500.00; and in the case of 191425(g), which was originally assessed at \$5,000.00, the parties have agreed to settle for \$3,000.00; and for the reasons stated by the parties on this record, I accept that settlement and those sums as being appropriate.

(Tr. 12).

This decision is hereby AFFIRMED.

ORDER

It is ordered that Respondent pay the agreed-upon penalties of \$4,500 within 60 days of the date of this decision. 2/


Franklin P. Michels
Administrative Law Judge

Distribution:

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2/ This time period was requested by the parties at the hearing (Tr. 12-13).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 26 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-41-PM
Petitioner : 30-00591-05003
v. :
: Docket No. WILK 79-72-PM
: 30-00591-05001
ST. JOE ZINC COMPANY, :
Respondent : Docket No. WILK 79-73-PM
: 30-00591-05002
: :
: Balmat #2 Mine
: :
: Docket No. WILK 79-74-PM
: 30-01184-05001
: :
: Balmat #3 Mine
: :
: Docket No. WILK 79-75-PM
: 30-01688-05001
: :
: Hyatt Property
: :
: Docket No. WILK 79-76-PM
: 30-00591-05001
: :
: Edwards Mine & Mill

DECISION

Appearances: Anthony C. Ginetto and Deborah B. Fogarty, Esqs.,
Office of the Solicitor, U.S. Department of Labor,
for Petitioner;
Sanders D. Heller, Esq., Gouverneur, New York, for
Respondent.

Before: Administrative Law Judge Michels

These 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

petitions for assessment of civil penalties were filed by the Mine Safety and Health Administration on December 7, 1978, and January 18, 1979; timely answers were filed thereafter by Respondent. A hearing was held on September 18 and 19, 1979, in Watertown, New York, at which both parties were represented by counsel.

WILK 79-74-PM

At the beginning of the hearing, the parties proposed to settle in Docket No. WILK 79-74-PM, Citation Nos. 224253 for \$44 which is the full amount of the original assessment; 224255 for \$66, the original assessment; 224227 for \$228, a reduction from the original assessment which was \$255. As grounds for the proposed settlements, Petitioner represented that less negligence was involved than originally considered by the Assessment Office. Motions were introduced to vacate the two remaining citations in this docket, Nos. 224254 and 224257. Both parties indicated their agreement to this disposition for the citations in WILK 79-74-PM. The justification for the proposed action appears on pages 3-8 of the transcript. A decision was rendered at the hearing approving the settlement for the three citations and the vacation for the remaining two (Tr. 8-9). I hereby AFFIRM that decision.

WILK 79-75-PM

Thereafter, the parties moved to settle Citation Nos. 210406 and 210407 in WILK 79-75-PM for the full amounts of the original assessments, \$72 and \$44 respectively (Tr. 9-11). This settlement was approved by the court under the terms and conditions mentioned on the record which included a reduction of Respondent's negligence points 1/ (Tr. 11). The bench decision is hereby AFFIRMED.

WILK 79-76-PM

With regard to the one citation, No. 209615, in this docket, the parties proposed a settlement for the original assessment of \$52 and a reduction of the negligence factor for assessment purposes (Tr. 11-12). The settlement was approved and this decision is hereby AFFIRMED.

1/ I have approved these and other settlements mentioned below because the parties have agreed to settle for the full amounts of the original assessments which were determined to be proper penalties. As a part of the settlements MSHA agreed to reduce the negligence points charged against Respondent in the assessment process. It is not exactly clear how the Respondent is benefited from this, but because the parties incorporated such penalty point changes into their agreements, the procedure was accepted as part of the settlements.

WILK 79-41-PM

The parties agreed to the following stipulations for the remaining dockets: (1) Respondent has a prior history of violations, (2) Respondent had 3,061,602 production tons for the year 1978; the production for the particular mine was 359,402 tons, (3) Respondent would not introduce evidence of inability to pay any penalties (Tr. 13-15).

Thereafter, the parties presented evidence in a consolidated fashion on Citation Nos. 210082, 210083, and 210084.

The following bench decision found at pages 108-110 of the transcript, with some corrections, was issued at the hearing:

JUDGE MICHELS: Unless there's something further, gentlemen, I'll proceed to make the decision.

This matter, as I've stated before, involves WILK 79-41-PM. The petition for assessment of civil penalty charges St. Joe Zinc Company with violations of three mandatory standards. The nature of these charges and all other pertinent information has been fully developed on the record. A major defense, which is a threshold issue raised by the Respondent here, concerns the independent contractor issue, a matter which I was fully prepared to address myself to. However, based on the evidence, and specifically the testimony of the inspector, it now appears that the charges were addressed to a company that's not before this Court, namely, the E.K.P., Inc., a sub-contractor doing work for the Respondent, the St. Joe Zinc Company. Now, counsel for the Secretary has characterized this as a technical matter. It is extremely difficult for me to understand this as technical at all. The inspector knew who the mine owner was and he's specifically charged the E.K.P., Inc., rather than the mine owner. That was his intention, and the records reflect that. Now, then, at some later date, the Secretary in the petition charges St. Joe Zinc Company as the Respondent, but as I indicated, the citations here were addressed to an entirely different company, a company not here present. I know of no precedent in this field of law by the Board of Mine Operations Appeals or the courts that would suggest that this technicality, if you will, is such that you could sustain a charge against the company not cited in the citations. I previously alluded to the fact that part of the difficulty is that a dismissal on the ground of what is really a failure of proper notice would possibly subject the company to a citation for these same charges. As I have indicated, I think that would be a very bad result because there should

be finality in these cases. It's been clearly brought out that this lack of notice or the fact that St. Joe Zinc Company was not named was brought out in the answer. The Secretary has been aware of this, and it could have [within an] appropriate time, amended the citations or issued new citations which would address themselves to St. Joe. Under those circumstances, I think the government has had its day in court. I think this matter ought to be final. On that basis, I will dismiss these charges with prejudice. That is my decision.

The above decision vacating the citations and dismissing the petition in WILK 79-41-PM is hereby AFFIRMED.

WILK 79-72-PM

The parties agreed to settle Citation No. 210003 for \$66, the full amount of the original assessment, based upon a lowering of the negligence categorization (Tr. 110-112). Additionally Petitioner moved to vacate Citation No. 210021 (Tr. 112-113, 255-256). Both proposals were approved at the hearing and I hereby AFFIRM that decision.

Thereafter, evidence was introduced on Citation No. 210007. At the conclusion of the parties' presentation, the following bench decision found on pages 141-146 of the transcript, was issued:

JUDGE MICHELS: My decision on this citation is as follows: Since prior to this I have not made findings on the criteria, I will also do that now for this citation, but the general findings for the general criteria, I will not make hereafter. This is citation 210007. The inspector charged a violation of 30 CFR 57.15-4, alleging as a condition or practice, "Safety glasses were not worn by the driller while operating a jack leg drill." This mandatory standard reads as follows: "All persons shall wear safety glasses, goggles, or face shields, or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

My finding as to the fact of the violation is as follows: It is clear, and there is no dispute that the miner in this instance was not wearing goggles. The question is, or seems to be whether he was, in fact, in or around an area where a hazard existed. The testimony differs, at least to some extent, on that issue. The inspector clearly indicated his belief that there was a hazard, that material at different stages of the drilling can be thrown off and into the eyes of the miner. Mr. Stevens,

witness for the operator, testified that he had never seen an accident to the eyes by such drilling due to the fact that the miner is some six feet away, at least in the beginning of the drilling, and that because of the nature of the material and the use of water, the danger of chips flying off did not exist. However, upon my question, as I understood it, he did admit that it was possible for chips to fly off and affect the eyes. In this instance, I will accept the testimony of the inspector. He was at the scene and saw the condition as it existed. He also had responsibility of requiring goggles for such a situation even though at the particular or precise time there may not have been chips flying off. The situation such as he described in his testimony, that because of the blasts of air and other factors, show there are at least two stages where the eyes can be subjected to danger. I don't know that I can make a finding as to whether such injury is very likely, but it does seem at least that it could happen, and it is the purpose for the standard. Accordingly, I find that there was a violation of 57.15-4 as charged.

My findings as to the criteria are as follows: A computer printout was submitted, Petitioner's Exhibit 10, showing the past history. The history is for previously issued citations and none of these are violations of this particular standard. In my judgement, this is not a significant history, and I so find.

As far as the size of the company is concerned, there is a stipulation for production tons -- I believe that it was 359,420 for this particular mine. There is no evidence as to the number of employees. I am not exactly clear in my own mind just from those production figures as to where that would place this mine and operator as far as size. It seems to me, however, that it is a substantial amount of production, and for the purposes of this record, at least, I would find that it was a medium-size operator.

There is no evidence that the fines that will be levied here will affect the operator's ability to continue in business. I find as to the gravity of the violation, since this involves a hazard to the eyes, it could be a serious violation. However, taking into account the substantial testimony that there is a relatively low likelihood of that happening, I would find it relatively minor seriousness, and I'm confining that to the circumstances of this record. On the negligence, the inspector testified to the affect, according to my notes, that the operator could not have known or predicted that this miner would not have worn these glasses. The testimony was that the mine

operator did provide the glasses and also training in the use of glasses, so there is a slight negligence on that. On good faith, the violation was abated within the time set.

On this violation, the assessment of the assessment officer was \$30, but taking into account the very low negligence and the evidence that shows the low relative seriousness, I am going to reduce that by one-half, so my fine would be \$15 for this violation.

The above decision is AFFIRMED.

Evidence was then introduced on Citation No. 210013. At the conclusion of which, the following decision was rendered from the bench (Tr. 168-170):

JUDGE MICHELS: I will proceed to make the decision. This is citation 210013. The inspector issued a citation charging the violation of 57.9-2. The condition or practice which he alleged was as follows: "The 500 level Eimco 911 loader left front wheel hub was not in good repair -- One stud was broken." This mandatory standard, that is, 57.9-2, reads as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

On the fact of the violation, I find as follows: There is no dispute that a stud was missing from the wheel or from the hub in question; therefore, the machine was not in good repair. The defense has been raised, however, that the machine was not in use and was out of use for the purpose of being in repair. The testimony of Mr. Stevens is to that effect. Mr. Mitchell the inspector, testified that he did not know or had no reason to know whether the machine was out for repair. At this time, according to the testimony, the company was not using a tag to indicate on the machine being in repair status. I should add that this was shortly after the Act became effective, so far as this company was concerned. As I understand it, the company does now use such tags. In my view, the inspector, knowing what he knew, was justified in issuing the citation. However, the evidence received does indicate that the machine was out for repair. The inspector has admitted that had he known that it was not being used, but was in a repair status, he would not have issued this citation. So then I say he was justified on the basis of what he knew; nevertheless, because of the circumstances now brought out, and we know, in fact, that it was out for repair, my finding would be that there was no violation. Accordingly, Citation No. 210013, is hereby vacated, and the petition as to that citation is dismissed.

This bench decision vacating the citation is hereby AFFIRMED.

Following this decision, evidence was introduced on Citation No. 210019. The following bench decision was issued on the merits of that citation (Tr. 251-255):

JUDGE MICHELS: This citation is 210019. The inspector cited a violation of 57.3-22 alleging a condition or practice as follows: "Adequate scaling and ground support was not provided at the water course zone in the surface decline. This was the principle travelway to the working faces." The standard in question, which is 57.3-22, contains a number of provisions, at least two of which require the testing and examination for conditions. The inspector testified to the effect that these two provisions were not complied with, but it would be my view that there was not substantial evidence to support that. Two other provisions, however, in the standard read as follows: "Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulage-ways and travelways shall be examined periodically and scaled or supported as necessary." Now, the issue before me is not whether or not the inspector was correct in issuing an imminent danger order. At least, as I understand it, the only issue before me is whether or not the conditions which I just read existed, and then, if they did, of course, the penalty that should be assessed. I hope I'm clear on that, that I am not here passing on the exercise or the discretion of the inspector in issuing an imminent danger order. The fact is, he could issue such an order if he thought there were dangerous conditions even though no violation of any mandatory standard existed.

In this case, it so happened that the inspector did charge, in addition that there was, in his words, a lack of adequate scaling and ground support. Now, the testimony is, I suppose you might call it, somewhat contradictory on the question of whether there was or was not adequate support, which I am addressing myself to. The inspector, on the one hand, considered that there wasn't adequate support, but as I understand it, that did not have to do with the water course itself. That had to do with the area around the water course, and the testimony of other witnesses, I believe it was Mr. Stevens, was that there was twelve to fifteen pins in this area, and that the purpose of these pins was to support the whole area. The inspector, on the other hand, was unable to testify as to the number of pins. The inspector testified that a rock was scaled down, and there is some other testimony that is in the nature of hearsay and indirect to the effect that there was nothing scaled down.

I will accept the inspector's testimony that a rock was pulled down because he was the only person who testified who was there at the time. In spite of the fact that other witnesses did testify, and I believe sincerely that they had examined this area, and that it was, in their opinion, safe, the fact that a rock could be scaled out of the area suggests to me that it was, in fact, not safe and needed additional support. My decision has no relation to the support that was eventually given to the roof. I am not passing on the abatement, but I am just simply stating and deciding that because of the fact of the loose rock to which the inspector testified, I find that the ground conditions had not been scaled or supported as necessary. On this basis, I find there was a violation of 30 CFR 57.3-22.

There are three criteria which, in addition to those previously found, that I will take into account. So far as the gravity is concerned, it is obvious that rocks and loose material which may fall represented a grave hazard, and I find that this was a serious violation. On the question of negligence, as I previously indicated, the witnesses for the operator testified uniformly that they had examined this area and had come to the conclusion it was safe. I don't think this record shows how common it is to require a fence or to put a fence up for protection such as was done here. I have the impression, however, that it may be extraordinary. Furthermore, there is at least the possibility that the loose rock was simply a type of rock that could not be ordinarily detected under the conditions. So for that reason, I would find a small degree of negligence in this case. There is no issue on the good faith abatement because the mine or the area was closed due to the imminent danger. No finding is necessary on that. The assessment, in this case by the assessment officer, was at \$325. In view of the fact that I have found a small degree of negligence, * * * I will assess a penalty of \$150 for this violation. That completes the decision on citation 210019.

The above decision on Citation No. 210019 is hereby AFFIRMED.

Thereafter, the parties presented evidence in a consolidated fashion on Citation Nos. 210027 and 210028 which both allege violations of 30 CFR 57.3-20. At the conclusion of the parties evidence, the following bench decision, recorded at pages 356-362 of the transcript, was delivered:

JUDGE MICHELS: This is the decision on citation number 210027. The inspector charged a violation of 30 CFR

57.3-20, listing the condition or practice as, "The ground control method was not adequate to control deterioration between the roof bolts." The mandatory standard 57.3-20, [states]: "Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used." I note that this was an order of withdrawal and it was issued on the basis of the inspector's determination that this was, in his view, an imminent danger. It is my understanding that the issue of imminent danger is not before me, except insofar as it may be applicable to one of the criteria, namely, the question of gravity. The operator may ask for a review of an imminent danger order, but it is not my understanding that such a review has been requested here. Accordingly, my decision is confined solely to the question of whether or not the mandatory standard was violated and, of course, if so, the amount of the assessment.

In this citation, the evidence, as I understand it, is seriously in conflict on several vital points. The inspector has a basis for his determination and testified that there were roof bolts hanging down in the pertinent area which was fifteen-by-fifteen foot area, from two inches to one foot. Also, upon his request, a miner sounded out the area and, according to the inspector's testimony, it was drummy. Mr. Streeter, who was with the inspection party, testified that there were not any hanging bolts. Furthermore, he testified that he did not hear any drummy sounds. Mr. Stevens, who had seen the area before and also after the screen was put in, testified that there were no hanging pins or bolts. The decision that I'm going to make has nothing to do with the [truthfulness of the testimony] of any of the witnesses. So far as I can determine, they were telling the truth of the situation as they saw it. As is not unusual, different persons saw the same situation in entirely different ways, which brings me, then, to the precise decision.

I emphasize that I'm not passing on the question of whether the inspector was entitled to issue an imminent danger order. It is not before me. I don't believe, however, that on the state of the record that I have, that I could conclude that the government has proved its case by a preponderance of the evidence, which is the requirement under the Commission's rules. There's equally plausible evidence on both sides. I should stress that I understand

the inspector's determination to be based on his determinations that bolts were hanging down and that it was dry. It is my further understanding that he would not have issued that order had he not found those conditions. His findings, however, are contradicted by other evidence, and under the circumstances, it seems to me that there has been a failure of burden of proof. The witness that might have been helpful, who actually did the sounding, was not called, and there is no information in the record as to what his testimony might be. Accordingly, as to 210027, I find that because of the failure of proof by a preponderance of the evidence, there is no violation shown of 30 CFR 57.3-20. I hereby vacate the citation and the petition will be dismissed as to that citation.

The decision as to citation 210028 is as follows: The inspector, again, charged a violation of 30 CFR 57.3-20, stating the condition or practice to be, "Loose ground was not removed on the 1100 D-2 decline, the back and the ribs, from the 1100 to the face." I have already quoted the mandatory standard of law. The inspector testified as to this citation that he saw hairline cracks in an area approximately one inch wide by two inches in length on the back or roof, and he also observed loose ground on the ribs. He testified that several small pieces of approximately one pound were removed. In this instance, he testified that the roof was sounded and it indicated a drummy sound. The inspector did not observe roof bolts. He further testified that, on returning to the area, he believed that a piece of material had been removed from the roof or back, based on the fact that the area looked clean.

The witnesses for the Respondent were Mr. Streeter and Mr. Stevens. Mr. Streeter testified that no material was brought down off the roof or back. However, he did agree that there was loose material on the side which was observable. He testified that it was gapped open. Mr. Stevens testified that he did not see, upon observing the area after abatement, any part of the roof or back in which material had been scaled down. It is obvious therefore, that the testimony is in disagreement as to the fact of whether there was loose material or ground on the roof or back. It is not in disagreement that there was loose material on the rib. It is my finding that this loose material on the ribs does violate the standard 57.3-20. [Further], I do not think the evidence sufficient to support a finding that there was loose, unsupported material on the roof or back.

Findings have already been made heretofore as to the criteria except for gravity, negligence, and abatement. So far as the gravity is concerned, since the finding concerns only the loose material on the ribs, it is not as serious as if there had been loose material on both roof and ribs. However, I do find that it is a serious violation. On negligence, the inspector testified that the operator should have known of the condition, and he believed that a foreman passed through the area on a daily basis because it was a travelway. Mr. Streeter also conceded that the foreman would have inspected the area at least in the prior night shift, although, he might have missed observing this particular condition. I find ordinary negligence. There being nothing to the contrary, I find that the condition was abated rapidly in good faith. For the violation found in citation 210028, the assessment office has asked for a penalty of \$395. In light of the finding of lesser gravity, I will reduce that penalty to \$200. The sum of \$200 is, therefore, the assessment for this violation.

The above bench decision vacating Citation No. 210027 and assessing a penalty of \$200 for Citation No. 210028 is hereby AFFIRMED.

Following this, Petitioner proposed that Citation No. 210032 be settled for \$90 and Citation No. 210036 be settled for \$105. These citations were originally assessed at \$180 and \$210, respectively, but Petitioner stressed that a lesser degree of negligence was involved than that which was originally considered by the Assessment Office (Tr. 363-364). These settlements were approved at the hearing and I hereby AFFIRM that decision.

Petitioner also proposed to vacate Citation No. 210039, which is the remaining citation in WILK 79-72-PM, and that the petition be dismissed as to that citation (Tr. 364-365). This action was approved at the hearing and that decision is AFFIRMED.

WILK 79-73-PM

Thereafter, the parties moved to settle in WILK 79-73-PM, Citation Nos. 210057 for \$39 (originally assessed at \$78), 210062 for \$105 (originally assessed at \$210), 210064 for \$113 (originally assessed at \$225), 210065, 210068, and 210069 for \$150 each (originally individually assessed at \$325 each). Petitioner represented that less negligence was involved than was originally considered (Tr. 365-372). Also, Petitioner moved to vacate Citation No. 210063 since the equipment involved was out of service for repair (Tr. 367-368). Decisions were rendered from the bench approving the settlements for the six citations and the vacation for the one. I hereby AFFIRM those decisions.

The summary of the dispositions in these dockets is as follows:

WILK 79-74-PM

<u>Citation No.</u>	<u>Action taken</u>
224253	settled for \$ 44
224255	settled for \$ 66
224227	settled for \$228
224254	vacated
224257	vacated

WILK 79-75-PM

<u>Citation No.</u>	<u>Action taken</u>
210406	settled for \$72
210407	settled for \$44

WILK 79-76-PM

<u>Citation No.</u>	<u>Action taken</u>
209615	settled for \$52

WILK 79-41-PM

<u>Citation No.</u>	<u>Action taken</u>
210082	vacated
210083	vacated
210084	vacated

WILK 79-72-PM

<u>Citation No.</u>	<u>Action taken</u>
210003	settled for \$ 66
210021	vacated
210007	assessment of \$ 15
210013	vacated
210019	assessment of \$150
210027	vacated
210028	assessment of \$200
210032	settled for \$ 90
210036	settled for \$105
210039	vacated

WILK 79-73-PM

Citation No.

210057	settled for \$ 39
210062	settled for \$105
210064	settled for \$113
210065	settled for \$150
210068	settled for \$150
210069	settled for \$150

ORDER

It is ORDERED that Respondent pay total penalties of \$1,839 within 30 days of the date of this decision.



Franklin P. Michels
Administrative Law Judge

Distribution:

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

OCT 26 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 79-212-M
Petitioner : A/O No. 24-00146-05003
v. :
COMINCO AMERICAN, INC., : Warm Springs Mine
Respondent :

ORDER OF DISMISSAL

On October 1, 1979, respondent Cominco American, Inc., filed a motion to dismiss the civil penalty complaint for the reason that it had not been filed within 45 days of the receipt of respondent's notice of contest as required by 29 CFR 2700.27.

Petitioner has not responded to the motion within the time allowed by our procedural rules nor has it responded at all. The motion is granted, the citation vacated and the case is DISMISSED.

In view of this disposition the parties are directed to advise me if they still intend to pursue Docket No. DENV 79-49-M.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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

OCT 29 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-217-PM
Petitioner : A.C. No. 14-00164-05001
v. :
: Kansas Falls Quarry & Mill Mine
WALKER STONE COMPANY, INC., :
Respondent : Docket No. DENV 79-367-PM
: A.C. No. 14-01200-05001
:
: P. F. Quarry and Mill

DECISION

Appearances: Keithley F. T. Lake, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
David S. Walker, President, Walker Stone Company,
Inc., for Respondent.

Before: Administrative Law Judge Michels

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). On January 15, 1979, the Mine Safety and Health Administration (MSHA) filed a petition for the assessment of civil penalties, docketed in DENV 79-217-PM, alleging that Respondent committed violations of 30 CFR 56.12-25, 56.12-8, and three separate violations of 56.5-50(a). Thereafter, on February 28, 1979, MSHA filed a second petition, docketed in DENV 79-367-PM, alleging that Respondent committed two violations of 30 CFR 56.12-1 and one violation of 56.14-1. On February 16 and March 12, 1979, Respondent filed answers contesting the violations in these dockets. A hearing was held on September 5, 1979, in Kansas City, Missouri, at which Petitioner was represented by counsel and Respondent was represented by its president, Mr. David S. Walker.

Docket No. DENV 79-217-PM

Citation No. 183004, March 22, 1978

Evidence was first received on Citation No. 183004 which alleges a violation of 30 CFR 56.12-25. After the conclusion of the parties'

presentation, a decision was made orally from the bench. It is recorded at pages 75-79 of the transcript and with certain necessary corrections and deletions reads as follows:

THE COURT: All right. That completes, then, the evidence on this particular citation; and, as I announced, I will rule, or decide, this matter from the bench unless somebody objects to that at this time.

Now, ordinarily, I would proceed and make a finding first as to the facts of the violation. However, we do have a number of alleged violations here, today; and, in order to dispose of certain criteria that would be involved in each and every one of those, if they were proved, I think that it might be orderly just to go ahead and make findings on those so that they can be applied, then, to each and every one of the citations, if any, that are found to be violations.

Number one, as to the history of past violations: No evidence was presented, so I find there is no history.

Number two, as to the size of the company: Based on the evidence presented, the acreages and the number of people working, I find that it is a small concern.

Number three, I further find that the penalties which will be assessed here, will not affect the operator's ability to continue in business.

Now, with respect to Citation No. 183004, the inspector alleged as the condition or practice the following: "Enclosures of the southside control house were not properly grounded." He alleged that this violated 30 CFR 56.12-25. That provision of the mandatory standards reads as follows: "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment."

The following is my decision as to the fact of the violation; and I'm going to preface it so that there will be no misunderstanding about my decision. I have no question or doubt about the seriousness of this condition. The matter that preceded this case [in another docket and concerning a different company] involved an exactly similar kind of condition; and the man was killed. So you simply cannot underrate, or understate, the seriousness.

* * * But I am not dealing with that in this decision.

My decision is based on the lack of sufficient specificity in the citation. I will try to explain that, if

I can. * * * The inspector pointed out that he finds where some of the "enclosures" * * * had no ground at all; and some that were grounded; but, in his view, not properly. Furthermore, he indicated that his view, as to the, as to whether a grounding was proper or not proper, was based on his reading of the Electrical Code; and I believe that he indicated he relied on the 1975 edition.

Now, having heard all of the evidence on both sides, it just seems to me that the statement made, as to the condition or practice, was such that Respondent would be hard-put to defend itself.

The rules do require that these citations be explicit. Now, then, what I mean by that is this: If we're relying here on the failure of grounding, the word "properly" should not have been used at all. In other words, not grounded, that would be one kind of a case and could be defended on that basis.

Now, if it were, and apparently is, based, at least in part, on a so-called improper grounding, then I believe that this citation should specify if it was based as I understand it was, on a standard, if that's what they're called, as set out in the Electrical Code. I think that should be indicated so that the operator, or the Respondent, will know with which, with what he is charged. It's a question of exactness.

If it, in fact, includes both these items, that, too, it seems to me, [should] have been stated. The operator did understand sufficiently to abate the problem because a new grounding system, or method, was installed; but * * * in this circumstance, I don't know that that cures the [problem].

The reason I was so careful to distinguish that I am ruling only on the basis of the exactness, or specificity, of the citation is because I don't want to get into the problems and the questions of what is involved by, indirectly at least, incorporating the Code, the Electrical Code, in such a regulation as this. I am just not addressing myself to that question whatsoever.

I hope that is clear in this record that I am basing my decision wholly on the language used in describing the citation; and since the inspector is here, I have to say that this is no criticism in any way, shape or form of his action; but I do honestly believe, in these circumstances, that is not a clear enough statement to defend. So that is my decision on this citation.

Thus, as to Citation No. 183004, it was found that there was no violation since the citation was vague and ambiguous and that it did not give sufficient notice as to the exact nature of the violation. The citation was vacated and the portion of the petition concerning that citation was dismissed (Tr. 132). I hereby AFFIRM this decision for Citation No. 183004.

Citation No. 183005, March 22, 1978

Following the above decision, Petitioner and Respondent introduced evidence on Citation No. 183005. After considering this evidence, a decision was issued from the bench. This decision found in the transcript at pages 90-93, with some corrections, is set forth below:

THE COURT: On this citation, we are here considering Citation No. 183005, the inspector charged, as a condition or practice, as follows: "Energized power conductors, entering the control switchboxes in the southside control room were not passing through insulated bushings."

This was alleged to be a violation of 30 CFR 56.12-8 which reads as follows: "Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."

This is my decision on this citation; and I should state, which I failed to state previously, that this is pursuant to 29 CFR 2700.65(a), which provides that this decision, will be reduced to writing after the filing of the transcript; and I want to specifically reserve the right to make appropriate corrections or changes; and, if necessary, I might make some additions.

My decision on the fact of the violation is as follows: The evidence here, [which] as I understand it, is practically, if not wholly, undisputed, is that power conductors were entering the control switchboxes and were not passing through insulated bushings. Now, this is directly contrary to the mandatory standard which I cited.

The defense, as I understand it in part, was that these provisions or standards do not act to give a warning to Respondent, or the operator, so that he will know specifically whether or not he is in violation. I think it should be noted that Congress, in passing this law, has

provided little or no discretion where standards are violated. The only discretion that comes into it is the amount of the penalty which is based, then, on various criteria such as gravity and negligence; and so, therefore, in appropriate cases, the penalty can be very small, if those things are taken into account. But, otherwise, the legislation, the legislative history is clear that when the standards are violated, the inspector has no alternative but to issue a citation; and, unless for some reason the Commission should find that it would be unwarranted, I believe that it also is obligated to find a violation.

So I do find that, in this case, the standard as charged was violated. My findings on the statutory criteria are as follows: I have already made findings on the prior history, size of the operator and effect on the operator's ability to continue in business.

So far as good faith compliance is concerned, my recollection is that there was no specific evidence on this point; and so I will [make no finding] on this particular criterion.

Gravity: The inspector testified as to the seriousness of it, the fact that it could cause a shock and even an electrocution; and I accept his testimony and find that it is serious.

So far as negligence is concerned, there was some testimony, I believe, that the operator should have been aware. Mr. Walker, himself, has testified, however, that this installation was made by a qualified electrician, had been there for a number of years without any problem, and that, in the circumstances, he had no particular reason to be aware of the violation. However, as pointed out I believe during the course of the testimony, there is an obligation on the part of operators to be aware of the regulations. So, in the circumstances of this case, I will find that there is some negligence. That completes the criteria.

The Office of Assessments has asked the sum of \$40 for this violation; and I believe that it is an appropriate amount in the circumstances; and I hereby assess the sum of \$40.

I hereby AFFIRM the above decision and assessment for Citation No. 183005.

Thereafter, the parties introduced evidence in a consolidated fashion on Citation Nos. 183014, 183016 and 183018 which cite separate violations of 30 CFR 56.5-50(a). The following bench decision found at pages 128-131 of the transcript, with some necessary corrections, was issued at the hearing on the merits of the three violations:

THE COURT: Both sides rest. I will make this decision pursuant to the same reservations I previously mentioned. My decision on the fact of the violation is as follows; and this concerns the following citations: 183014, 183016 and 183018. Each of these citations allege a violation of 30 CFR 56.5-50(a).

The inspector found, respectively, overexposure levels as follows: 245 percent, 319 percent and 479 percent. In terms of decibels, this has indicated noise level readings, respectively, in the three cases of 96, 101 and 94 to 97.

The standard involved, which is 56.5-50, requires that no employee shall be permitted an exposure to noise in excess of that specified in the table below. The table specifies that any employee, working 8 hours, shall be exposed to no more than 90 decibels.

In this case, the readings were made for periods of 520 minutes, 480 minutes and 500 minutes, respectively; each of which [equals or] exceeds an 8-hour period. Accordingly, at least as I understand this regulation, there has been a violation in each of the three instances. However, I recollect that the fact of the violations was tied into the failure to wear the personal protective devices; and this comes about because, under the measurements taken, if personal protective devices are worn and reduce the noise sufficiently to * * * the permissible noise exposures, * * * in these instances at least, there would be no violation.

It seems to me that the matter of wearing these personal protective devices, in this case, is more of a policy matter on the part of the enforcement agency; and does not specifically raise a question in regard to whether or not this provision is violated. As I read it, the men were not wearing the devices; and they were overexposed, as found by the dosimeter; and, accordingly, the section has been violated.

I don't understand there being a question before me as to whether or not it would be violated had they been wearing the ear protection devices because that would raise whole new questions of fact about how much those particular devices would reduce the noise or other questions. To summarize, I do find violations, in the three cases cited, as charged.

My findings on the criteria, other than history, size of operator and effect on the operator's ability to continue in business are as follows:

Good faith compliance: I understand that the miners involved were provided with protective devices which provided the abatement in this instance. There being nothing to the contrary, I find that there is good faith compliance.

So far as the gravity, or seriousness, is concerned, the inspector testified that serious ear injury could result. I accept his testimony and find that the violations are serious.

On negligence, the inspector testified that the foreman, or other supervisors, could have observed the failure to wear the ear protective devices which, in this case, would have been satisfactory to meet the standard. Mr. Walker, testifying for the operator, has suggested that, or testified that it was company policy to provide to the miners these protection devices; and that if they did not wear them, there was not much the company could do about it.

As has been brought out here in the course of the questioning, the standards are mandatory. This does create problems where you're dealing with individuals. The question of the failure of an employee to wear the proper equipment is one that, in other areas, has been raised. In the course of the negotiations, consultations, with Labor, I believe that, if this matter is properly approached and the seriousness of it impressed upon the union leadership, or the labor leadership, that they will, in most instances, comply.

If there is an instance, and it's brought to my attention, where the operator has been in absolute good faith and has done everything that you could ask that operator to do and the men still, for one reason or another, fail to respond, then I would take that into account; and in all probability would find no violation in that particular instance.

To sum it up, however, in view of all the circumstances mentioned, I would find [some] negligence in this instance. Because of the circumstances, however, in assessing a penalty, I would take into account the difficulties mentioned. The Office of Assessments has proposed a penalty of \$38 for each of the three instances; and because of the circumstances, I would cut that in half and assess a penalty of \$19 for each of the three instances. So that completes the record as far as these three citations are concerned.

I hereby AFFIRM the above decision finding violations as to Citation Nos. 183014, 183016 and 183018, and assessing separate penalties of \$19 for each violation.

Docket No. DENV 79-367-PM

Citation Nos. 183076, 183077, 183079, September 7, 1978

Following the decisions made in DENV 79-217-PM, Petitioner made the following motion to approve a settlement for all the citations in DENV 79-367-PM:

MR. LAKE: * * * At this time the Petitioner would like to present to the Honorable Judge Michels a proposed settlement for his consent and which has been reached between the Petitioner and the Respondent, Walker Stone.

As to Citation 183076, which alleged a violation of 30 CFR 56.12-I, where it was stated that the electrical circuits, originating in the control trailer, were not equipped with circuit breakers or fuses of the correct size and capacity to protect the circuits against excessive overloads or short circuits*.

The aforesaid citation was reviewed by the Office of Assessments and a penalty of [\$24] was assessed. The Petitioner and the Respondent have agreed to reduce that to \$16. It is the Petitioner's belief that the good faith exhibited by Walker Stone in removing this condition from the work premises was sufficient to warrant the reductions in that he [Mr. Walker] recognized, [and] he has rectified the condition and took immediate steps to abate it.

We think, for [this] purpose, the Act and the public policy considered in the aforementioned Act would be very well served. We also point out that the negligence involved in this citation was not of the degree that would not warrant a reduction in the fine. In view of the fact of the cooperation of the Walker Stone Company and their history of complying with the various suggestions brought

them by the Mine Safety and Health Administration, we think that a reduction in this instance would be in the best interest of the Act.

In regards to Citation No. 183077, which alleged a violation of 30 CFR 56.12-8, in which electrical control boxes and the control trailer of the stacking conveyor were not equipped with proper fittings or insulated bushings where the power conductor entered the boxes. It has been stated that the Walker Stone Company had employed an electrical contractor to do this work.

Mr. Walker stated that he was not that familiar with all the provisions of the Code as to all the fittings and the fact that he immediately took steps to insure that the proper bushings were inserted, were taken into consideration in proposing the settlement.

The Assessment Office, in this instance, assessed a fine of [\$30]. We propose that this be reduced to \$24 in view of the good faith shown by Walker Stone Company and [its effort to] rectify the condition. We feel that this would effectuate the purposes of the Act in view of the fact that the Walker Stone Company is aware of the obligation it owes to its employees and has taken immediate steps to rectify the condition.

Citation No. 183079, involving a violation of 30 CFR 56.14-1, in which it was alleged that a V-belt drive on the primary crusher conveyor was not equipped with a guard to prevent persons from contacting the pinch point of the V-belt drive. [On] this violation an assessed penalty of [\$34] was proposed by the Office of Assessments.

In reviewing this particular citation; this piece of equipment is a portable piece of equipment, transported from job site to job site; and had just been relocated at this particular facility; and the particular guard in question here was inadvertently left at a prior work site. The equipment did have a guard that was used at all times with the equipment; and it just happened to be a fortuitous circumstance. The equipment was brought on this particular work site and, in the process, the guard was left behind.

We think that, in view of the facts, the circumstances here could be described as slight negligence [since] * * * there was a guard for the equipment and it just happened that it was not transported at that particular time to this particular location.

We therefore propose to reduce the penalty to \$24 in this instance. We think, due to the circumstances in this case, the purposes of the Act would be effectuated, again stating the machine was guarded, did have a guard. It just happened that it was not transported; and the time lapse between a transportation of this piece of equipment and the inspection was very short; and I think it was just a case of slight negligence.

We therefore propose that the Judge approve the settlement as submitted by the Petitioner and agreed to by the Respondent; and we feel that this settlement * * * reflects the good faith effort of the Respondent to bring the conditions into compliance; and he has complied. We think that * * * the approval of the settlement would effectuate the purposes of the Act. Thank you.

This settlement was approved at the hearing subject to the submission of a non-admissions clause (Tr. 138). On September 14, 1979, counsel for Petitioner filed the clause set out below which is hereby incorporated as part of the settlement agreement:

Respondent's consent to the entry of a Final Order by the Commission pursuant to the Settlement Agreement shall not constitute an admission by the Respondent of any violations of the Act, in any subsequent proceedings other than proceedings brought directly under the provisions of the Mine Safety and Health Act of 1977.

The settlement for the three violations in DENV 79-367-PM is hereby AFFIRMED.

The summary of the dispositions in these two dockets is as follows:

Docket No. DENV 79-217-PM

<u>Citation No.</u>	<u>Assessment or Action Taken</u>
183004	VACATED
183005	\$40
183014	19
183016	19
183018	19

Docket No. DENV 79-367-PM

<u>Citation No.</u>	<u>Settlement Amount</u>
183076	\$16
183077	24
183079	24

ORDER

It is ORDERED that Respondent pay total penalties of \$161 within 30 days of the date of this decision.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

Distribution:

Keithley F. T. Lake, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, MO 64106 (Certified Mail)

David S. Walker, President, Walker Stone Company, Inc., Box 563, Chapman, KS 67431 (Certified Mail)

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

OCT 29 1979

PEABODY COAL COMPANY,	:	Application for Review
Applicant	:	
v.	:	Docket No. KENT 79-107-R
	:	
SECRETARY OF LABOR,	:	Order No. 795972
MINE SAFETY AND HEALTH	:	May 21, 1979
ADMINISTRATION (MSHA),	:	
Respondent	:	Ken No. 4 North Underground Mine
	:	
UNITED MINE WORKERS OF AMERICA,	:	
Respondent	:	

DECISION

Appearances: Thomas R. Gallagher, Esq., St. Louis, Missouri,
for Applicant;
Joseph M. Walsh, Esq., Office of the Solicitor,
Department of Labor, for Respondent Secretary of
Labor;
Joyce A. Hanula, Attorney, Washington, D.C., for
Respondent United Mine Workers of America.

Before: Administrative Law Judge Steffey

Pursuant to an order issued June 5, 1979, a hearing in the above-entitled proceeding was held in Evansville, Indiana, on June 13 and 14, 1979, under section 105(d) of the Federal Mine Safety and Health Act of 1977. Although evidence was submitted to support findings pertaining to the civil penalty issues which will be raised if MSHA files a Petition for Assessment of Civil Penalty with respect to the violation which was alleged in Order No. 795972 which is under review in this proceeding, this decision will dispose only of the issues raised by the Application for Review filed by applicant. The civil-penalty issues will be decided only if the parties are unable to settle those issues at a conference with the Assessment Office and counsel for MSHA subsequently files a Petition for Assessment of Civil Penalty.

Completion of the Record

During the hearing, MSHA's counsel introduced Exhibits 5 through 8 for the purpose of indicating that frequent unintentional roof

falls have occurred in applicant's Ken No. 4 North Mine. Although it had been assumed when Exhibits 5 through 8 were received in evidence, that those exhibits covered unintentional roof falls only for the years 1975 through 1978, when I examined the reports after the hearing, I found that one of the reports of unintentional roof falls pertained to one roof fall which occurred in January 1979. That is the same roof fall about which one of applicant's witnesses testified at the hearing (Tr. 443). In such circumstances, it appears appropriate to make a separate exhibit for the report of the 1979 roof fall. Consequently, there is marked for identification as Exhibit 9 a one-page report of an unintentional roof fall which occurred in January 1979. Exhibit 9 is received in evidence.

At the hearing, MSHA's counsel stated that he would submit at a subsequent time a computer printout pertaining to applicant's history of previous violations and also a copy of an order of modification which was issued by the inspector who wrote Order No. 795972 (Tr. 6-7). MSHA's counsel filed a copy of the computer printout and a copy of the modification order with me on August 22, 1979. The letter of transmittal stated that a copy of the computer printout and modification order had been sent to applicant's counsel. I have received no reply from applicant's counsel in opposition to receiving those proposed exhibits into evidence.

Consequently, there is marked for identification as Exhibit 10 a three-page computer printout showing a history of previous violations for applicant's Ken No. 4 North Mine. There is marked for identification as Exhibit 11, a one-page Modification Order No. 795972-1 dated June 15, 1979. Exhibits 10 and 11 are received in evidence.

Issue

The issue raised by the Application for Review filed in this proceeding is whether an imminent danger existed on May 21, 1979, when Order of Withdrawal No. 795972 was issued pursuant to section 107(a) of the Act. At the conclusion of the hearing, counsel for all parties waived the opportunity of filing posthearing briefs (Tr. 448).

Findings of Fact

I shall hereinafter make the findings of fact upon which my decision in this proceeding will be based. Following the findings of fact, my decision will consider the arguments which are inherent in the parties' evidentiary presentations.

1. Mr. Franklin D. Dupree, an MSHA inspector, arrived at Peabody's Ken No. 4 North Mine about 2:30 p.m. on May 21, 1979, for the purpose of making a routine spot inspection. When the inspector went to the bathhouse, he heard UMWA's representative at the mine and two roof bolters discussing what they believed to be separations in

the roof in the No. 1 Unit - ID - 004 (hereinafter referred to as the No. 1 Unit). The roof bolters had concluded that there were separations in the roof strata because the drilling bit on the roof-bolting machine would jump about 2 inches almost every time a hole was drilled for the purpose of installing roof bolts. The inspector told the miners that he would check the roof conditions in the No. 1 Unit when he went underground (Tr. 9-15).

2. The inspector was accompanied on his examination of the mine by Mr. Inman, one of Peabody's roof bolters (Tr. 14). As the inspector and Mr. Inman were about to go underground in the mantrip, Peabody's mine manager, Mr. Alton Fulton, called Mr. Ernie Brock, the second-shift foreman on the No. 1 Unit, to the mine office for a short discussion. When Mr. Brock returned to the mantrip, he remarked that he had been given instructions to pull out of the No. 1 Unit and drive some rooms off to the left of that unit, but no explanation was given for the announced intention of withdrawing from the No. 1 Unit (Tr. 16; 18; 47).

3. When the inspector arrived in the No. 1 Unit, all of the men stopped at the dinner hole for a while, except for Mr. Brock, the unit foreman, who made an inspection of the face area. The inspector and his companion, Mr. Inman, began examining conditions in the unit shortly thereafter by proceeding up the No. 4 entry toward the face. When they reached the second crosscut outby the face, the inspector noticed a broken place in the mine roof near the outby rib and water was coming through the roof in steady drops. The broken place extended the entire length of the crosscut between the Nos. 4 and 5 entries. The crack was about an inch or less in width, but it extended along the bottom of a V-shaped ridge which projected downward from the roof for a distance of about 3 inches. The legs of the V-shaped ridge were about 10 or 12 inches apart at the roof, or point of origin (Tr. 20-24; 56; 93). The inspector considered water dripping from the roof at the site of the cracked roof to be a further sign of a weakened roof because water displaces material comprising roof strata and creates voids in the roof (Tr. 39).

4. The inspector believed that the V-shaped broken place in the roof of the crosscut constituted an imminent danger which he defined as a condition which might cause injury or death before it could be corrected (Tr. 31; 57; 107). The inspector thereafter orally issued an imminent danger order under section 107(a) of the 1977 Act and advised Mr. Brock, the unit foreman, that he would determine the extent of the area covered by his order as soon as he could complete his examination of the unit (Tr. 23-24; 108).

5. The inspector then found another V-shaped crack in the roof of the second crosscut from the face between the Nos. 5 and 6 entries and still other cracks in the same crosscut between the Nos. 6 and 7 entries (Tr. 31; Exh. 2). The inspector could not divorce the cracks

in the roof from the separations he had heard described by the miners before he began his underground examination (Tr. 32). Mr. Brock granted the inspector's request that the operator of the roof-bolting machine be permitted to drill test holes to determine whether separations still existed in the roof strata in the No. 1 Unit (Tr. 24-25). The inspector had the operator of the roof-bolting machine to drill about 35 test holes. The inspector concluded that actual separations in the roof strata existed because, when the test holes were drilled, the roof-bolting machine would suddenly jump about 2 inches after the drill had penetrated the roof for a distance of from 36 to 38 inches (Tr. 25-26; 74; 90-91). Resin-grouted roof bolts were being used and the inspector believed that the roof bolts were pushing the resin into the separations which existed near the ends of the bolts. The passage of the resin into the separations was seriously eroding the effectiveness of the resin bolts by preventing the resin from hardening along the full length of the bolts so as to pin the roof strata together and provide a secure beam (Tr. 73; 76; 85-86; 98; 105).

6. The inspector found that the drill stem did not jump when test holes were drilled in the No. 4 entry at the No. 1 crosscut, nor at the crosscut between the Nos. 3 and 4 entries, nor in the No. 3 entry at the last open crosscut (Tr. 27). The inspector ultimately determined that the left side of the No. 1 Unit was the place where the roof was unsafe and Order No. 795972 specifically delineated the territory covered, namely, an area extending 175 feet outby the face in No. 7 entry, an area extending 130 feet outby the face in the No. 6 entry, an area extending 110 feet outby the face in the No. 5 entry, an area extending 80 feet outby the face in the No. 4 entry, and an area in the No. 3 entry at the second open crosscut (Tr. 141-142; Exh. 1).

7. After the inspector had orally advised Mr. Brock that an imminent-danger order had been issued, Mr. Brock responded by having the miners bring crossbars and legs into the mine (Tr. 37). The miners then completely crossbarred the crosscut between the Nos. 4 and 5 entries where the inspector had first observed a crack in the roof (Tr. 38; 103).

8. The Ken No. 4 North Mine has a history of unintentional roof falls (Tr. 33). Although the inspector did not see any roof falls in the No. 1 Unit on May 21, 1979, at the time he issued his imminent-danger order (Tr. 65), Peabody reported 10 unintentional roof falls in 1975, 16 unintentional roof falls in 1976, 20 unintentional roof falls in 1977, 14 unintentional roof falls in 1978, and 1 unintentional roof fall in 1979 up to the date of the hearing which was held on June 13 and 14, 1979 (Exhs. 5, 6, 7, and 8; Tr. 443). Additionally, Peabody has encountered places in its Ken No. 4 North Mine where the roof conditions were so adverse that it was not economically feasible to support the roof and Peabody was forced to discontinue mining in such areas (Tr. 41-44; Exh. 2).

9. Peabody's mine manager at the Ken No. 4 North Mine, Mr. Alton Fulton, refused to believe that roof conditions in the No. 1 Unit were serious enough to justify issuance of an imminent-danger order (Tr. 35). Although the miners were withdrawn from the unit in compliance with the inspector's order, the adverse roof conditions cited in the inspector's order were never abated and the coal remaining in the unit was never extracted (Tr. 255).

10. The inspector stated that Mr. Shemwell, the roof bolter who drilled the test holes, drilled the holes while exerting a steady pressure on the upthrust lever and the inspector said that he would have detected it if Mr. Shemwell had tried to manipulate the lever so as to fabricate the appearance of jumping. The inspector firmly believed that authentic jumping was occurring and that the jumping was caused by actual separations in the roof strata (Tr. 61; 64). The inspector also stated that hitting extremely hard rocks with the drill stem would have slowed the drill stem and that the speed of the drill would be restored to normal after the drill had passed through such rocks, but the inspector said that operators of roof-bolting machines are familiar with variations in types of roof strata and would not interpret reactions of the machine when rocks are encountered to be separations in roof strata (Tr. 62-64; 68-69; 81).

11. The inspector believed that if crossbars had been installed in the areas cited in his order as having separations, the No. 1 Unit would have been made safe for resumption of mining activity (Tr. 96; 109).

12. About a week before the imminent-danger order was issued, Mr. Inman told Mr. Brock about the jumping of the drill on the roof-bolting machine, but Mr. Brock did not think it was bad enough to need extra support--that is, support in addition to the 42-inch resin bolts which were being installed at the time the order was issued (Tr. 34; 149-150). Mr. Brock took his hammer and pulled down some pieces of shale and decided that he would take no further precautions until such time as the roof appeared to become more adverse than it was when Mr. Inman warned him about it (Tr. 162).

13. Mr. Charles Ford, the unit foreman in the No. 1 Unit on the day shift, stated that he had worked the day shift immediately preceding the issuance of the imminent-danger order (Tr. 167). Mr. Ford had also known about the jumps of 1 to 2 inches in the drill for about a week before the imminent-danger order was issued, but he had concluded that the drill was hitting soft places in the roof strata because the jumps occurred to within 10 inches of the working face and he felt that there would have had to have been a visible break in the roof in order for separations to have occurred that close to the face (Tr. 168).

14. Order No. 795972 was orally issued at about 3:30 p.m. on the evening shift of May 21, 1979 (Tr. 59-60). Toward the end of

Mr. Ford's day shift of May 21, 1979, an operator of a roof-bolting machine, Mr. Charles Howard, called Mr. Ford's attention to some bad roof at a breakthrough near the face of the No. 5 entry. Mr. Ford thought that the roof was too hazardous for bolts to be installed until such time as crossbars could first be erected. Since it was then close to the end of Mr. Ford's day shift, Mr. Ford told Mr. Howard that he would report the bad top to the mine manager. Mr. Ford also made an entry in the preshift book stating "All left side of unit--bad top and water" (Tr. 164; 175). When Mr. Ford reported to work on the following day, May 22, 1979, he was surprised to hear that the imminent-danger order had been issued on the evening shift because the mine superintendent, Mr. Clyde Miller, had given instructions for the men to withdraw from the No. 1 Unit and work in some rooms to the left of the No. 1 Unit. Mr. Ford said that he had expected to move back into the No. 1 Unit after the miners had "* * * made it safe to go back in there" (Tr. 171). Mr. Miller's decision to withdraw from the No. 1 Unit had been made after Mr. Ford had reported the jumping of the roof-bolting machine and the bad top in the No. 5 entry. Mr. Ford expected to go back into the No. 1 Unit after about three shifts because Mr. Ford estimated that two shifts would be required to move a pump into the No. 1 Unit and that one shift would be required to install supporting timbers. Mr. Ford would not have objected to reentering the No. 1 Unit to work after the dangerous places had been timbered (Tr. 177).

15. Mr. Alton Fulton, the mine manager, worked the day shift on May 21, 1979, and he received the aforementioned call from Mr. Ford about 2:15 p.m. The call had been made by Mr. Ford to advise Mr. Fulton that crossbars were needed at two crosscuts. Mr. Fulton advised Mr. Ford that he would check into the matter and discuss the problem with Mr. Brock before Mr. Brock began working on the evening shift. Mr. Fulton made an inspection of the No. 1 Unit. He did not see any cracks. Mr. Fulton did not observe the roof-bolting machine in operation, but he had been told that jumps were occurring (Tr. 190-191).

16. Mr. Fulton had gone home on May 21, 1979, before it was reported to him by telephone that the imminent-danger order had been issued. Mr. Fulton called Mr. Conrad Bowen, the assistant mine superintendent, and Mr. Ford and Mr. Bowen went to the mine and tried to convince the inspector that the roof in the No. 1 Unit was not bad enough to warrant the issuance of an imminent-danger order, but the inspector adhered to his original position that the top constituted an imminent danger (Tr. 193-194). On May 22, 1979, Mr. Fulton, Mr. Bowen, Mr. Miller, and Mr. French, the mine safety director, went into the No. 1 Unit and made an inspection (Tr. 195). All of them concluded that the roof was safe. Mr. Fulton said he would work under the roof if he were a union employee (Tr. 202). Mr. Miller said he would spend his vacation under the roof (Tr. 247).

17. Mr. Miller tried to get the supervisor of the inspector who wrote the imminent-danger order to make a personal examination of the roof in the No. 1 Unit, but the supervisor declined to do so, explaining that he did not want to become involved in the controversy (Tr. 252). Mr. Miller said that MSHA could force them to do almost anything, but in this instance he was in a position to make a test of MSHA's action. Therefore, he decided that he would not take any steps to abate the order because he believed that any work he might do to abate the conditions alleged in the inspector's order would be interpreted as a concession by applicant that an imminent danger actually existed (Tr. 222; 255).

18. Mr. French checked the top in the No. 1 Unit on May 23, 25, 29, and June 11 to determine if the roof was taking weight, cracking along the ribs, or breaking up. Mr. French found at the time all inspections were made that the roof was unchanged and had not as of June 11 fallen, although a period of 22 days had by then elapsed since the order was written (Tr. 221). Mr. Bowen also made additional checks of the roof in the No. 1 Unit after the order was written and Mr. Bowen authorized other personnel to make such follow-up examinations (Tr. 236). Mr. Bowen found that from 1 to 2 feet of water had accumulated in the Nos. 1 and 2 entries, but that water had stopped dripping from the roof of the No. 7 entry (Tr. 242).

19. Mr. Miller doubted that it would be economically feasible to move equipment back into the No. 4 Unit in order to extract the coal which was abandoned when Mr. Miller decided not to abate the order. Mr. Miller stated that it would take 4 days or 12 shifts for the equipment to be moved back and for the necessary timbering to be done (Tr. 257). Applicant presented testimony through an engineer and an accountant who estimated that applicant's decision not to continue mining in the No. 1 Unit resulted in a failure to produce 22,280.5 tons of coal (Tr. 332) at an estimated loss to applicant of about \$103,379 (Tr. 341).

20. Mr. Guy McDowell, respondent's roof-control specialist, presented testimony and several exhibits which show that he has considerable expertise in designing roof bolts and resin-anchoring systems for trusses. Mr. McDowell has been given credit for technical assistance rendered to persons performing research and writing scientific treatises pertaining to roof control (Tr. 271-283). Mr. McDowell examined the roof in the No. 1 Unit at the request of management and made an inspection of the roof while accompanied by Messrs. French, Miller, and Bowen. Mr. McDowell saw no signs of roof failure during his examination which was made by testing the roof with the sound and vibration method and by visual observation (Tr. 284-285). Mr. McDowell also checked 100 of the 2,800 roof bolts in the area covered by the order and found that 50 bolts had resin on them at the bottom plate. Mr. McDowell concluded that the resin roof bolts were anchoring satisfactorily and he believed that the operators of the

roof-bolting machines were inexperienced in using resin bolts and therefore did not have as much faith in the effectiveness of such bolts as the past performance of such bolts merited (Tr. 300-302).

21. Mr. McDowell was of the opinion that it would not now be possible to return to the No. 1 Unit to produce the coal left when the miners withdrew from the No. 1 Unit on May 21, 1979. The reason given by Mr. McDowell in support of that opinion was that the water dropping from the roof had caused the pillars to sink into the fire-clay with a resultant weakening of the roof which would make it unsafe to resume the mining of coal in the No. 1 Unit (Tr. 308).

22. Mr. McDowell made no checks of the roof in the No. 1 Unit by any methods which were not also used by the operators of the roof-bolting machines and by the inspector, that is, he checked the roof by the sound and vibration method and by visual observation just as the inspector and operators of the roof-bolting machines did. Mr. McDowell stated that if there really were separations in the roof at or near the extreme end of the 42-inch bolts, the resin would go into the separations and not produce a proper bond for supporting the roof. He also said that one of the signs of roof failure would be cracks in the roof. Moreover, he agreed that if the V-shaped cracks described by the inspector really existed, such cracks would be a preliminary sign of roof failure even when resin bolts are being used (Tr. 321; 324).

23. Mr. Inman, who accompanied the inspector during his examination of the No. 1 Unit, was the safety committeeman at the Ken No. 4 North Mine and he corroborated the inspector's testimony as to the fact that the drill on the roof-bolting machine was jumping about 2 inches in the Nos. 4, 5, 6, and 7 entries when the drill stem had penetrated the roof for a distance of about 36 inches (Tr. 350; 356). Mr. Inman also agreed with the inspector's description of the V-shaped crack in the second crosscut from the face (Tr. 352-354).

24. Mr. Inman was normally the operator of the cutting machine, but he had been operating a roof-bolting machine prior to the issuance of the imminent-danger order because Mr. Shemwell, who drilled the test holes for the inspector, had temporarily stopped operating the roof-bolting machine because the resin used for anchoring the bolts had adversely affected his eyes (Tr. 359). Mr. Inman did not object to installing resin bolts because he recognized that resin bolts are more effective than conventional bolts (Tr. 360)

25. Mr. Inman was afraid to work under the roof in the No. 1 Unit as it existed just prior to issuance of the imminent-danger order (Tr. 358). Mr. Inman said that resin will exude at the bottom or heads of resin bolts when no jumps or separations occur near the tops of the bolt holes, but the last night that Mr. Inman bolted before the imminent-danger order was issued, the drill stem was jumping in seven

out of eight holes drilled and resin was coming out at the bottom of only one or two bolts out of eight (Tr. 376-378). Mr. Inman did not cause the jumps by deliberately manipulating the roof-bolting machine to produce that sort of manifestation and Mr. Inman did not believe that it would be possible for anyone to operate a roof-bolting machine so as to create an artificial appearance of jumping (Tr. 366-367). Mr. Inman did not think the jumps could have been caused by the drill stem's encountering alternate soft and hard places in the roof strata (Tr. 379-380).

26. Mr. Shemwell, who operated the roof-bolting machine for drilling test holes for the inspector, agreed with Mr. Inman's and the inspector's description of the jumps occurring when holes were drilled. Mr. Shemwell was still at the dinner hole on May 21, 1979, when he heard someone say that one of the working places had been designated as an imminent danger by the inspector (Tr. 388-389). Mr. Shemwell believed that the roof in the No. 1 Unit was definitely bad and he would have been afraid to have continued working in the unit without installation of support in addition to the resin bolts they were installing at the time the imminent-danger order was issued (Tr. 390). Mr. Shemwell said that every operator of a roof-bolting machine has experienced hitting hard rocks and soft places in the roof strata and knows the difference between the slowing down of the drill and speeding up of the drill at such times, as compared with the jumps which occur when the drill hits separations between the strata as was occurring in the No. 1 Unit prior to the issuance of the imminent-danger order (Tr. 394-395). Mr. Shemwell agreed with Mr. Inman that it was very dangerous to work in the No. 1 Unit and he said he would have joined with any other miners who might have been willing to decline to work under the roof. They had the right under the union contract to refuse work in a dangerous place (Tr. 396).

27. Management had used conventional bolts in the No. 1 Unit up to May 15, 1979, but management had changed to use of resin bolts because water had been encountered and tests showed that torque was being lost on the bolts after they had been installed (Tr. 266). Mr. Shemwell did not think the resin bolts were performing their intended function with respect to water leaking through the roof because he could install resin bolts and thereafter find water dripping off the bottom of them when he came by the same bolts again during the next mining cycle. In Mr. Shemwell's opinion, if the resin bolts had been anchoring as was intended, water would not have been running off the bolt heads (Tr. 401).

28. Mr. Charles W. Howard preferred the position of a laborer even though he had been working in coal mines for 13 years (Tr. 402; 422). Among other things, he operated the roof-bolting machine and he had shortly before the imminent-danger order was issued declined to install resin bolts in the No. 5 entry because he considered the

roof unsafe. He reported the unsafe roof to Mr. Ford, the unit foreman, and Mr. Ford reported the hazardous condition to the mine manager (Tr. 407). Mr. Howard agreed with the other operators of roof-bolting machines that the drills cannot be made to jump by manipulating the upthrust lever to create such an impression (Tr. 418).

29. Mr. Jerry D. Fulton has been a coal miner for about 11 years and has been an operator of a roof-bolting machine for approximately 10 years (Tr. 424). He agreed with the other operators of roof-bolting machines that the roof was in fair to good condition in the Nos. 1, 2 and 3 entries, but he believed that the roof in the Nos. 4, 5, 6, and 7 entries was in poor condition because the drilling stem would jump in those entries. He had had to back up his roof-bolting machine in the No. 7 entry and install longer roof bolts when the conventional bolts then being used lost their torque (Tr. 425). Thereafter, management converted to using resin bolts (Tr. 426). Mr. Fulton tested the roof by using sound and vibration and visual observation and the roof appeared to be fair in the Nos. 1, 2 and 3 entries and substandard in the Nos. 4, 5, 6, and 7 entries. Mr. Fulton said that on previous occasions when the operators of the roof-bolting machines believed that they had encountered adverse conditions which warranted use of roof support in addition to roof bolts, management had provided the extra support, but for some reason, when the roof bolters encountered the jumps and the miners observed cracks in the roof in the No. 1 Unit shortly before the imminent-danger order was issued, management refused to provide the extra support the miners thought was needed (Tr. 428-429).

30. Mr. Jerry Fulton doubted that the resin bolts were anchoring firmly because he found water dripping off of them on the left side of the unit after they had been installed for one mining cycle (Tr. 432).

A. Evidentiary Support for Inspector's Finding that Imminent Danger Existed

1. Reasons Given by Inspector for Finding of Imminent Danger

Inspector Dupree issued his imminent danger order (a) because he found V-shaped cracks extending along the roof in the second crosscut outby the face (Finding No. 3, supra), (b) because the roof bolters had found separations in the roof strata (Finding No. 5, supra), (c) because water was leaking through the roof in steady drops (Finding No. 3, supra), and (d) because resin was showing at the bottom of only about one-eighth of the bolts (Finding Nos. 5 and 25, supra).

The inspector could not divorce the danger associated with the cracked roof from the fact that separations were being encountered when holes were drilled for installation of roof bolts. The inspector believed that the entire roof on the left side of the No. 1

Unit was unsafe. The water coming through the roof was eroding the stability of the roof and the lack of resin on the great majority of the bolt heads was an indication that the resin was being pushed into the separations or cavities between roof strata instead of hardening along the bolts so as to provide effective holding power.

2. UMWA's Witnesses Supported the Inspector's Finding

The inspector's views about the hazardous nature of the roof were supported by the testimony of four roof bolters who had been working in the Ken No. 4 North Mine for many years and who had been working in the No. 1 Unit for more than a week during which the separations continued to occur. The miners could not understand why management had installed crossbars on other occasions when hazardous roof conditions were encountered, but declined to do so shortly before the imminent-danger order was written on May 21, 1979 (Finding Nos. 23-30, supra) All four roof bolters believed that separations in roof strata existed and that the roof needed support in addition to the resin bolts which were then being used (Finding Nos. 23-24; 26; 28-30, supra).

B. Applicant's Counterarguments

1. Applicant's Contention that Actual Separations of Roof Strata Did Not Exist

Applicant's witnesses attempted to explain the jumps in the drill stem by claiming that the operators of the roof-bolting machines were feigning the jumping of the drill stem by applying sudden pressure on the upthrust lever (Finding No. 10, supra). The operators of the roof-bolting machines denied that the jumps were artificially created and disputed applicant's claim that the jumps could be fabricated even if the operators of the roof-bolting machines had been inclined to do so (Finding Nos. 25-26 and 28, supra). No one ever explained on the record what motive the operators of the roof-bolting machines could have had for creating a false impression that the roof was unsound. I think that the preponderance of the evidence clearly supports a rejection of applicant's contention that the operators of the roof-bolting machines were feigning the occurrence of jumps when holes were drilled for installation of roof bolts.

2. Applicant's Claim that the "Jumps" Were Caused by Drilling Through Alternate Hard and Soft Roof Strata

Applicant's supervisory witnesses agreed that the occurrence of jumping by the roof-bolting machines had been reported to them, but they claimed that the jumps had occurred when the drill stem alternately encountered very hard rocks or strata followed by very soft strata (Finding Nos. 13 and 15, supra). Applicant's witnesses believed that the high pressure under which the drill operates would cause the drill stem to jump suddenly after it had passed through

hard rocks. The inspector and the operators of the roof-bolting machines all agreed that the rate of penetration of the drill stem would be decreased when very hard materials were encountered and that the normal penetration rate would be resumed after the drill had passed through hard materials, but the operators of the roof-bolting machines were all experienced miners and knew the difference in the reaction of the roof-bolting machines when actual separations are encountered as opposed to the slowing and speeding up of the drill when alternate hard and soft materials are encountered (Finding No. 10, supra). Applicant's supervisory witnesses did not actually operate the roof-bolting machines and some of applicant's supervisors did not actually see the roof-bolting machines operating (Finding No. 15, supra; Tr. 310). Therefore, I find that the testimony of the miners who operated the roof-bolting machines is more credible than that of applicant's witnesses with respect to the question of the existence of actual separations in the roof.

3. Mr. Brock's Response

The imminent-danger order was written on May 21, 1979, on the evening shift which was supervised by Mr. Brock. The operator of the roof-bolting machine had reported the separations in the roof strata to Mr. Brock and had asked for erection of additional supports, but Mr. Brock had concluded that the roof did not need additional support. He had simply reported the matter to the mine manager without taking any action other than pulling down a few pieces of roof which he thought were loose. Although Mr. Brock testified that he was having crossbars installed at the time the imminent-danger order was verbally issued, that is inconsistent with his own testimony and that of other witnesses on his shift because they stated that Mr. Brock had gone to the face area to make an onshift examination and that the inspector had verbally issued his order to Mr. Brock at the time Mr. Brock returned from checking the face area (Finding No. 12, supra; Tr. 149-150; 159).

4. Mr. Ford's Conclusion that the Roof Was Unsafe

Mr. Ford was the supervisor of the No. 1 Unit on the day shift and his testimony shows that the operator of the roof-bolting machine on his shift on May 21, 1979, encountered such a hazardous place in the roof that Mr. Ford believed that crossbars should be erected before resin bolts could be safely installed. Mr. Ford advised the mine manager that crossbars were needed and Mr. Ford made the following entry in the preshift book: "All left side of unit--bad top and water." Moreover, Mr. Ford said that he was surprised to hear of the issuance of the imminent-danger order because the mine superintendent had given instructions for the miners to withdraw from the No. 1 Unit and Mr. Ford did not expect any more work to be done in the No. 1 Unit until enough crossbars had been installed to make it "* * * safe to go back in there" (Finding No. 14, supra).

Mr. Ford's testimony fully supports the issuance of the imminent-danger order because Mr. Ford's description of the No. 1 Unit was based on his evaluation of conditions in that unit just a few hours prior to the issuance of the inspector's withdrawal order.

5. Mr. McDowell's Testimony Was too General in Nature To Offset the Miners' and Inspector's Opinion that Imminent Danger Existed

Mr. McDowell was an impressive witness who obviously possessed considerable expertise in designing and working with resin roof bolts and trusses. Mr. McDowell inspected the roof in the No. 1 Unit after the imminent-danger order had been issued. He only checked the condition of 100 resin bolts out of a total of 2,800 in the area covered by the order. Although the inspector was criticized by applicant for failure to examine the interior of the holes drilled by the roof-bolting machine with a borescope for the purpose of determining whether separations in the roof strata existed, Mr. McDowell was not called in by management to make an evaluation by means of a borescope when the separations were first encountered and reported to the unit foremen and other supervisory personnel. Therefore, when Mr. McDowell examined the roof in the No. 1 Unit, he checked the roof by means of sound and vibration and visual observation. Since the inspector and the operators of the roof-bolting machines had used the same methods in examining the roof, Mr. McDowell's conclusions to the effect that the roof was safe does not rise to a higher level of proof than the opinions of the inspector and operators of the roof-bolting machines because the inspector and roof bolters had not only checked the roof with sound and vibration and visual observation, but had also either operated the roof-bolting machine or had watched the roof-bolting machine in operation, whereas Mr. McDowell had not observed the roof-bolting machine in operation (Finding Nos. 20-23; 29, supra).

6. The Cracks and Water Seepage Were Serious

Respondent's supervisory witnesses avoided making statements to the effect that no cracks existed in the roof. They either stated that they did not see cracks, or minimized the cracks they saw, or said that they did not examine the entries in which the cracks may have existed. Additionally, Mr. McDowell stated that if the cracks did exist, their existence would be a sign of roof failure. Inasmuch as the inspector, Mr. Inman, and Mr. Brock all agreed that the cracks existed, the inspector's conclusion that an imminent danger existed is supported by Mr. McDowell's testimony because Mr. McDowell believed that occurrence of cracks would be a preliminary sign of roof failure in a unit where resin bolts were being used (Finding Nos. 22-23, supra; Tr. 157).

The significance to be attached to the fact that water was seeping through the roof is considerable. Although some of applicant's

supervisory witnesses claimed that water had stopped dripping from the roof by June 11, Mr. Inman said that water was continuing to drip from the roof when he last made an examination just outby the area covered by the imminent-danger order (Finding No. 18, supra; Tr. 371). Regardless of whether the water had stopped dripping by June 11, 1979, it is a fact that more than a foot of water had accumulated in some places in the area covered by the order and it was Mr. McDowell's opinion that the water had allowed the pillars to sink and had weakened the roof sufficiently to make it unsafe for miners to return to the No. 1 Unit to work even if it had been economically feasible to do so (Finding No. 21, supra).

C. Legal Support for Inspector's Finding of Imminent Danger

The concept of imminent danger is fully discussed by the courts in the following decisions: Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974); Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974); and Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975). In the Old Ben opinion, supra, the court reaffirmed the holding in its prior Freeman opinion to the effect that imminent danger may be said to exist if it can be reasonably expected that injury or death would occur before the hazardous condition can be corrected if normal mining procedures are continued. The court agreed with the former Board that an imminent danger exists if a reasonable man would conclude that the feared accident is just as likely as not to occur before the condition can be corrected.

In light of the court's discussions of the definition of imminent danger, I conclude that the inspector reasonably found on May 21, 1979, that an imminent danger existed in the No. 1 Unit of the Ken No. 4 North Mine. The testimony of the inspector and of four roof bolters, who had been working for many years in the Ken No. 4 North Mine, unequivocally supports findings that the resin bolts were not anchoring thoroughly, that water was seeping through the roof strata, that resin was not appearing at the bottom of the bolts to show thorough adhesion along the full length of the bolts, and that ominous cracks had appeared in the roof of the second crosscut from the face in several locations. The aforesaid hazardous conditions, when coupled with the fact that the roof outby the area covered in the imminent-danger order had previously required rebolting with longer bolts than were normally used, support the inspector's belief that the roof could have fallen at any time. The large number of unintentional roof falls which have historically occurred in the Ken No. 4 North Mine show that the roof is generally hazardous and should be supported with the crossbars requested by the operators of the roof-bolting machines when separations, cracks, water seepage, and other signs of roof failure are encountered and reported to management by both the operators of the roof-bolting machines and by the unit foremen, especially Mr. Ford

who had made an entry in the preshift book just a few hours before the order was issued indicating that the roof was hazardous in the area covered by the order.

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, while the operator is concerned about production and profit. The court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). The court said that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d at 34). Following the court's reasoning, the MSHA inspector in this proceeding could not wait until he saw pieces of roof falling on the miners before determining that miners should be withdrawn from the No. 1 Unit until crossbars could be installed.

Applicant seemed to believe that if an imminent danger had really existed, the inspector would not have remained in the No. 1 Unit long enough for 35 test holes to be drilled for the purpose of determining the areal extent of the imminent danger (Tr. 60). The inspector hardly had any choice but to remain in the No. 1 Unit until the test holes had been drilled because section 107(a) of the Act provides that if an imminent danger is found to exist, the inspector "* * * shall determine the extent of the area of such mine throughout which the danger exists." Since neither the inspector nor anyone else could see up into the roof to determine the extent of the separations in the roof strata, the inspector could not have determined the area "throughout which the danger exists" if he had not had the test holes drilled for the purpose of determining the areal extent of the imminent danger. Cf. Old Ben, supra at 32-33.

Ultimate Findings and Conclusions

(1) Pursuant to the parties' stipulations, Applicant Peabody Coal Company is subject to the provisions of the Act and to the regulations promulgated thereunder (Tr. 6; 8-9).

(2) The preponderance of the evidence introduced in this proceeding shows that an imminent danger existed on May 21, 1979, in the No. 1 Unit of the Ken No. 4 North Mine and, consequently, Withdrawal Order No. 795972 issued May 21, 1979, should be affirmed and Peabody Coal Company's Application for Review should be denied.

(3) For the purpose of issuing this decision, all civil penalty questions are severed from the issues raised by the Application for Review; if MSHA files a Petition for Assessment of Civil Penalty with respect to the violation of section 75.200 cited in Order No. 795972, as modified June 15, 1979, that civil penalty case should be forwarded

to me for decision on the basis of the record already made in this proceeding.

WHEREFORE, it is ordered:

(A) The Application for Review filed May 29, 1979, by Peabody Coal Company in Docket No. KENT 79-107-R is denied and Withdrawal Order No. 795972 dated May 21, 1979, is affirmed.

(B) The civil penalty questions consolidated for hearing in this proceeding are severed from the issues raised by the Application for Review; if MSHA files a Petition for Assessment of Civil Penalty with respect to the alleged violation of 30 CFR 75.200 cited in Order No. 795972, as modified on June 15, 1979, that civil penalty case should be forwarded to me for decision on the basis of the record already made in this proceeding.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 23 1978

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. HOPE 78-333-P
Petitioner	:	A/O No. 46-02140-02005 S
v.	:	
	:	No. 5 Preparation Plant
BUFFALO MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
James W. St. Clair, Esq., Marshall and St. Clair,
Huntington, West Virginia, for Respondent.

Before: Judge Cook

I. Procedural Background

On April 19, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty against Buffalo Mining Company in the above-captioned proceeding. This petition, 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), alleged violations of 30 CFR 77.1401, 77.1402-1, 77.1403(a), and 77.404(a). These alleged violations are embodied in an imminent danger order of withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(a) (1970) (1969 Coal Act), against Buffalo Mining Company subsequent to a fatal injury suffered by an employee of Lester Construction Company, an independent subcontractor, during the installation of a coal stacker on mine property owned by Buffalo Mining Company.

An answer was filed by Buffalo Mining Company on May 17, 1978.

Notices of hearing were issued on May 19, 1978, and July 21, 1978. On August 3, 1978, Buffalo requested a continuance, which request was granted by an order dated August 14, 1978. The hearing was held on October 24, 1978, and October 25, 1978, in Charleston, West Virginia. Representatives of both parties were present and participated.

A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing, but a delay in the receipt of transcripts forced a revision of the schedule. Buffalo submitted its posthearing brief on February 22, 1979. MSHA submitted its posthearing brief on March 16, 1979. Buffalo submitted its reply brief on April 10, 1979. Although MSHA did not file a reply brief, it submitted a letter on April 10, 1979, wherein it addressed certain statements contained in Buffalo's reply brief.

II. Violations Charged

Order No. 6-0012 (1 BA), November 26, 1976, 30 CFR 77.1401
30 CFR 77.1402-1
30 CFR 77.1403(a)
30 CFR 77.404(a)

III. Evidence Contained in the Record

(A) Stipulations

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

(B) Witnesses

MSHA called as its witnesses James E. Davis, Jesse P. Cole, Birkie Allen, and Kennis A. Mullins, MSHA inspectors; and Tony D. Travis, a mechanical engineer for the MSHA Technical Support Group in Beckley, West Virginia.

Buffalo called as its witnesses Edgar M. Wode, the assistant sales manager at the Walker Machinery Company in Belle, West Virginia; Mayo Lester, who identified himself as the owner of Lester Construction Company; Travis Ellison, Jr., the safety director for Lester Construction Company; and W. R. Counts, a supervisor employed by Lester Construction Company.

(C) Exhibits

(1) MSHA introduced the following exhibits into evidence:

(a) M-1 is a computer printout compiled by the Office of Assessments listing Buffalo's history of paid assessments for violations occurring at the No. 5 Preparation Plant.

(b) M-2 is a copy of Order No. 6-0012 (1 BA), November 26, 1976, 30 CFR 77.1401, 77.1402-1, 77.1403(a), and 77.404(a).

(c) M-2-A is a typewritten copy of the "condition or practice" paragraph of M-2.

(d) M-3 is the "fatal machinery accident" report dated June 1, 1977.

(e) M-4 is a modification of M-2.

(f) M-5 is a termination of M-2.

(g) M-6 is a copy of a legal identity report relating to the No. 5 Preparation Plant. (Received into evidence by an order dated December 14, 1978.)

(h) M-7 is a photograph.

(i) M-8 is a two-page extract from M 11.1-1960 U.S.A. "Standard Specifications for and Use of Wire Ropes for Mines."

(j) M-9 is a wire rope analysis and tensile test report compiled by the Denver Technical Support Center.

(k) M-10 is a photograph.

(l) M-11 is a schematic of the accident scene, prepared by Buffalo at the request of the Mining Enforcement and Safety Administration (MESA) accident investigators.

(m) M-12 is a photograph.

(2) Buffalo introduced the following exhibits into evidence:

(a) O-1 is a purchase order.

(b) O-2 is a copy of Lester Construction Company's safety rules in effect on November 26, 1976.

(c) O-3 is a Lester Construction Company memorandum bearing the signatures of Lester Construction Company employees.

(d) O-4 is a copy of M 11.1-1960 U.S.A. "Standard Specifications for and Use of Wire Ropes for Mines."

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should

be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

(A) Stipulations

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

(1) The Buffalo Mining Company was the operator of the No. 5 Preparation Plant (Tr. 13).

(2) The No. 5 Preparation Plant is located near Saunders, in Logan County, West Virginia (Tr. 13-14).

(3) The crew employed by Lester Construction Company, under a subcontract with the Long-Airdox Company, and under the supervision of foreman W. R. Counts, began work at 7 a.m. on Friday, November 26, 1976 (Tr. 19).

(4) Exhibit M-8 is M 11.1-1960 U.S.A. "Standard Specifications for the Use of Wire Ropes for Mines" (Tr. 232).

(B) Motion to Dismiss

The Respondent, Buffalo Mining Company (Buffalo), moved for dismissal of the proceeding on the grounds that the owner of mine property cannot be held responsible for violations of mandatory safety standards created by independent subcontractors performing work on such mine property where the evidence fails to establish that the mine owner either caused the violations or possessed a right to direct the independent subcontractor's employees in the performance of their tasks (Tr. 431, 445-446, 557). Statements in support of this motion are contained in the Respondent's posthearing submissions (Respondent's Posthearing Brief, pp. 15-22; Respondent's Reply Brief).

Buffalo was the operator of the No. 5 Preparation Plant at all times relevant to this proceeding (Exh. M-6). The preparation plant produced approximately 5,800 tons of coal daily (Tr. 404-406, Exh. M-3). Buffalo is a West Virginia corporation (Exh. M-6). Both before and after the accident, Buffalo was a subsidiary of the Pittston Company (Exh. M-6). The legal identity report filed on April 6, 1973, lists the Pittston Company's address as 4514 Pan Am

Building, New York, N.Y. 10017 (Exh. M-6), while the change notice filed on November 2, 1977, lists Pittston's address as One Pickwick Plaza, Greenwich, Connecticut 06830 (Exh. M-6). After the coal is processed by the No. 5 Preparation Plant, it is loaded aboard Chesapeake and Ohio Railway coal cars for transportation to various points (Tr. 107).

Buffalo entered into an agreement with Long-Airdox Company for the purchase and installation of a raw coal storage and conveyor system on mine property owned by Buffalo (Exh. M-3 at p. 3, Tr. 342, 420). Long-Airdox Company subcontracted the project to build the raw coal silo or stacker to Lester Construction Company (Exhs. M-3 at p. 3, O-1, Tr. 420, 447).

A crane owned by Lester Construction Company and operated by one of Lester's employees was involved in an accident on November 26, 1976, during the course of the construction of the raw coal stacker (Tr. 123, 450). Buffalo's employees never worked on the project (Tr. 451, 523), and Buffalo had no supervisory control over the job site (Tr. 473, 523). Buffalo was cited with several alleged violations of the Code of Federal Regulations relating to mining safety in connection with the operation of the crane at the time of the accident (Exh. M-2).

The Federal Mine Safety and Health Review Commission (Commission) recently addressed the respective liabilities of both coal mine owners and independent contractors performing work on mine property in Cowin and Company, Inc., Docket No. BARB 74-259, IBMA 75-57, 1979 OSHD par. 23,456 (FMSHRC, filed April 11, 1979), and Republic Steel Corporation, Docket No. IBMA 76-28, 77-39, 1979 OSHD par. 23,455 (FMSHRC, filed April 11, 1979).

In Cowin, the Commission concluded that an independent contractor performing work on coal mine property is an "operator" 1/ of a "coal mine" 2/ under the 1969 Act for the reasons set forth in Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 861-862 (D.C. Cir. 1978), and Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d 240, 244-246 (4th Cir. 1977).

1/ Section 3(d) of the 1969 Act provides:

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

2/ Section 3(h) of the 1969 Act provides:

"'Coal mine' means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or methods, and the work of preparing the coal so extracted, and includes custom coal preparation facilities."

In Association of Bituminous Contractors v. Andrus, supra, the Court observed that under section 109(a) of the 1969 Coal Act, 30 U.S.C. § 819(a)(1) (1970), "the operator of a coal mine in which a violation occurs" is liable for civil penalties. The "operator" may be the "owner" of the mine, a "lessee" or an "other person." In this context, the term "other person" must be read ejusdem generis to refer to other similar persons "of like kind and character to the designated 'owner[s or] lessee[s] designated'." Thus, "other persons" must be similar in nature to owners or lessees, and would include independent contractors who operate, control or supervise a "coal mine," as the term "coal mine" is defined in the statute.

An "other person" does not have to supervise the entire coal mine in order to be an "operator." All that is required is that they have control or supervision over one or more of the areas or facilities designated in the statutory definition of a coal mine. Coal mine construction operations are under the "supervision" of the construction company, thus bringing the independent contractor within the scope of the phrase "other person" and thereby defining the contractor as an "operator."

The District Court had reached a contrary conclusion, holding that independent contractors could not be "operators" within the meaning of the statute because, in the District Court's view, only one party could actually be operating, controlling, or supervising the mine. The Court of Appeals, in disagreeing with this position, stated that there must be some cases where the person who operates, controls or supervises the mine is not the owner, and that in such cases, the definition of "operator" must encompass both the owner and such other person.

In Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, supra, the Court held that construction companies must observe the health and safety standards set forth in the 1969 Coal Act and the regulations implementing them. In reaching this conclusion, the Court turned to the statutory definition of a "coal mine," and stated that: "When a contractor sinks a mine shaft, excavates a tunnel, or builds a coal preparation plant, it is constructing a facility 'to be used in' the work of extracting or processing coal." 547 F.2d at 245.

Additionally, the Court observed that an independent contractor's employees are frequently subjected to the same hazards as miners, causing the Court to conclude that Congress did not implicitly exclude such employees from the 1969 Coal Act's protection.

The Court then found that independent contractors fall within the definition of an "operator," and can therefore be held liable for failing to comply with the health and safety standards.

In Republic Steel Corporation, supra, the Commission held that a mine owner can be held responsible for violations of the 1969 Coal Act created by its independent contractors even though none of the owner's employees were exposed to the violative conditions and the owner could not have prevented the violations.

Previous decisions by the Interior Board of Mine Operations Appeals (Board) had taken a different approach. The Board had recognized that both the coal mine owners and the independent contractors fell within the 1969 Coal Act's definition of an "operator," but held that only the operator responsible for the violation and the health and safety of the endangered employees could be held liable. Affinity Mining Company, 2 IBMA 57, 80 I.D. 229, 1971-1973 OSHD par. 15,546 (1973); Laurel Shaft Construction Company, Inc., 1 IBMA 217, 79 I.D. 701, 1971-1973 OSHD par. 15,387 (1972). Subsequent Board cases modified this approach by holding the mine owner liable for an independent contractor's violations of the health and safety standards where the owner's employees were endangered by the violation and the owner could have prevented the violation with a minimum degree of diligence. Armco Steel Company, 6 IBMA 64, 83 I.D. 77, 1975-1976 OSHD par. 20,512 (1976); West Freedom Mining Corporation, 5 IBMA 329, 82 I.D. 618, 1975-1976 OSHD par. 20,230 (1975); Peggs Run Coal Company, 5 IBMA 175, 82 I.D. 516, 1975-1976 OSHD par. 20,033 (1975).

This approach, described by the Commission as the "endangerment/preventability test," was reevaluated by the Commission in Republic Steel Corporation, supra, in light of the United States Court of Appeals for the District of Columbia and Fourth Circuit's decisions in Association of Bituminous Contractors v. Andrus, supra, and Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, supra.

The Commission held that, as a matter of law under the 1969 Coal Act, "an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors." The Commission was unable to find any provision in the 1969 Coal Act requiring that any consideration be given to the owner's ability to prevent the violations as a qualification for holding the owner liable for such violations.

The fact that the only employees endangered by the violation are the independent contractor's employees does not prevent the owner from being held responsible for such violations arising on mine property. According to the Commission:

The Act seeks to protect the safety and health of all individuals in a coal mine. 30 U.S.C. §§ 801(a) and 802(g). In order to achieve this goal, the Act places a duty on each operator to comply with its provisions. 30 U.S.C. § 803. The purpose of the Act is not served by interpreting these provisions to allow an operator to

limit the benefit of the protection it affords to its own employees. * * * The duty of an operator, whether owner or contractor, extends to all miners. * * *

It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.

It should be pointed out that since an independent contractor performing work on coal mine property is an "operator" of a "coal mine," as those terms are defined in the 1969 Coal Act, the employees of such contractors are "miners" within the meaning of section 3(g) of the 1969 Coal Act, 30 U.S.C. § 802(g) (1970). The term "miner" is therein defined as "any individual working in a coal mine."

Cowin and Company, Inc., supra, and Republic Steel Corporation, supra, when read together, establish a rule of law whereby either the coal mine owner or the independent contractor performing work on coal mine property, may be held liable for any health or safety violation of the 1969 Coal Act committed by the independent contractor.

Accordingly, on the facts and the law as set forth herein, the Respondent's motion to dismiss is DENIED.

(C) Occurrence of Violations

At approximately 10:20 a.m. on Friday, November 26, 1976, Mr. James D. Grant, an employee of the Lester Construction Company, sustained a fatal injury when a wire rope on a Lorain 1971 MC 30-H Moto Crane separated causing Mr. Grant to fall approximately 70 to 75 feet to the ground. The crane was owned by the Lester Construction Company and was being used to hoist two men to the top of a raw coal stacker being installed at the No. 5 Preparation Plant owned by the Buffalo Mining Company when the accident occurred. The second man, Mr. Wayne Taylor, who was also an employee of the Lester Construction Company, escaped injury. Subsequent thereto, MSHA inspectors were summoned to the scene of the accident and conducted a fatal accident investigation (Tr. 101, 121, 123, 160, 410, 524, 544, Exh. M-3). The crane involved in the accident had been obtained from the factory of the Lorain Crane Company thru the Walker Machinery Company of Belle, West Virginia (Tr. 64, 338).

MSHA inspector James E. Davis testified that Mr. Taylor was interviewed in connection with the fatal accident investigation and

that he gave a description of what had occurred (Tr. 108, 120). The statements made by Mr. Taylor, in conjunction with the testimony of the witnesses at the hearing, establish the circumstances surrounding the accident as set forth below.

The employees of the Lester Construction Company on the job site were under the supervision of Mr. W. R. Counts, a foreman employed by the Lester Construction Company (Tr. 130, 522-525). When the employees started work on the day in question, they began by installing a belt on a new conveyor trestle that had been attached to the stacker tube (Tr. 525-527). Mr. Counts testified that after the belt had been installed, he instructed Messrs. Taylor and Grant to get their bolts and belts from the tool trailer and go to the top of the stacker tube (Tr. 528, Exh. M-3). Mr. Taylor and Mr. Grant were hoisted to the top of the stacker in a basket, or cage, attached to the crane. The cage was approximately 4 feet in length and 3 feet in width. It was constructed of angle iron with a floor made from metal grating. It had no roof or cover (Tr. 127-128).

According to Inspector Davis, Mr. Taylor stated that when he and Mr. Grant observed the cage being hoisted up in close proximity to the "shed" wheel, they started shouting to the crane operator to stop. When he looked at the "overhaul" ball ^{3/} a second time, the rope was still being hoisted. Therefore, he jumped onto the platform at the top of the stacker. Simultaneously, the "overhaul" ball was pulled into the jib boom head sheave causing the rope to break. Mr. Taylor further stated that Mr. Grant jumped and thereby managed to grab hold of the end of the jib for a few moments before falling to the ground (Tr. 134-135, Exh. M-3).

Information provided to Inspector Davis by Mr. Mario Varrassi, the safety director for the Buffalo Mining Company (Tr. 393), indicated that Mr. Grant was transported to the Man Appalachin Regional Hospital where he was pronounced dead on arrival between 11 and 11:20 a.m. (Tr. 410, 423-424, Exh. M-3).

According to Inspector Davis, Mr. Dent, the crane operator, testified during the interview (Tr. 136) that the cage blocked his view and prevented him from seeing the head sheave of the crane. Mr. Dent also stated that an observer was not provided to watch the hoisting operation so as to signal him to stop the hoist when the cage had reached the top of the "shed" wheel (Tr. 138).

3/ An overhaul ball is a counterweight connected to the end of a crane rope and serves to maintain tension on the rope (Tr. 133-134). The term "overhaul ball" was used synonymously with the term "headache ball" (Tr. 134). At one point in his testimony, Inspector Davis referred to the "overhaul" or "headache" ball as a "counterweight." (Compare Tr. 134 with Tr. 135.)

The testimony reveals that when the accident occurred Mr. Counts was standing on a hill adjacent to the job site watching employees of the Buffalo Mining Company take the old belt apart (Tr. 128-130, 529-530, Exh. M-11). Mr. Counts testified that he saw Mr. Grant fall, but indicated that he did not see what had occurred prior to the fall (Tr. 530).

MSHA inspector Birkie Allen visited the job site after the accident (Tr. 212), examined the crane, and thereupon issued the subject imminent danger order of withdrawal. He cited the Respondent for violations of four sections of the Code of Federal Regulations (Exh. M-2, Tr. 213). The order states, in pertinent part, as follows:

77.1401. The Lorain 1971, MC30-H Moto Crane used for manhoisting was not equipped with an overspeed, overwind and automatic stop controls.

77.1402-1. The American National Standards Institute "Specifications for the Use of Wire Ropes for Mines M 11.1-1960 was not used as a guide in the selection and use of the wire rope used to hoist men on the Lorain MC 30-H Moto Crane.

77.1403(a). The daily examination of the Lorain MC 30-H Moto Crane used as a manhoist was not made or recorded.

77.404(a). The hoisting facilities used to transport men (Lorain MC 30-H Moto Crane) was not being maintained in a safe operating condition in that the wire rope was severely damaged beginning near the wedge socket and extending about 50 feet along the rope (Numerous broken wires).

It was a normal work procedure to ride the crane.

The construction work was being done by Lester Construction Company.

This was issued during a fatal investigation.

(Exhs. M-2, M-2-A).

30 CFR 77.1400 and 30 CFR 77.1401 provide as follows:

Subpart O - Man Hoisting

§ 77.1400 Man hoists and elevators.

The standards set forth in this Subpart O, apply only to hoists and elevators, together with their appurtenances, that are used for hoisting men.

§ 77.1401 Automatic controls and brakes.

Hoists and elevators shall be equipped with over-speed, overwind, and automatic stop controls and with brakes capable of stopping the elevator when full loaded.

The crane was being used as a manhoist when the accident occurred (Exh. M-3, Tr. 120-121, 131). In fact, the cage, or basket, in which the men were riding was constructed for the express purpose of being attached to the crane for use in manhoisting (Tr. 523). It was constructed for such purpose on instructions from Mr. Counts, Lester's foreman on the job site (Tr. 523). The evidence in the record shows that the crane had been used as a manhoist throughout the installation of the coal stacker, and that this procedure was authorized by the Lester Construction Company (Tr. 266, 462, 468, 472, 502-503, 508, 523-524).

A conflict is present in the testimony as to whether a suggestion had been made to Messrs. Taylor and Grant on November 26, 1976, expressly authorizing them to use the crane as a manhoist. According to Inspector Davis, Mr. Taylor stated that Mr. Counts suggested using the crane as an avenue of transport to the top of the stacker on the day of the accident (Tr. 131, Exh. M-3). Mr. Counts denied this at the hearing (Tr. 529). I am unable to accord great probative value to the hearsay statement of Mr. Taylor in view of the fact that Mr. Counts' testimony is in direct conflict with the statement of the hearsay declarant. However, the resolution of this conflict in the testimony in favor of the Respondent as to whether Mr. Counts specifically told Messrs. Grant and Taylor to use the cage on the day in question does not resolve the real issue as to whether the men were authorized to use the cage since the evidence in the record unmistakably points to the conclusion that the use of the crane as a manhoist was authorized by the Lester Construction Company throughout the installation of the stacker.

The Respondent's witnesses attempted to establish that this authorization was no longer in effect on November 26, 1976, because the belt line and adjacent walkway had been installed, thus providing an alternative route to the top of the stacker (Tr. 461-462, 469, 508, 524, 529). However, the various accounts given by the Respondent's witnesses contain certain inconsistencies indicating that this authorization was still in effect on November 26, 1976.

Some testimony was elicited with respect to two adjacent wooden boards used to connect the walkway to the adjacent hillside (Tr. 459-460). According to Mr. Lester, the boards had been installed on either the morning of November 26, 1976, the day of the accident, or the previous day (Tr. 460). However, he indicated that they were most likely installed on the morning of November 26, 1976 (Tr. 460). The boards were approximately 10 feet long (Tr. 460). Mr. Counts

testified that he had last observed someone riding in the cage approximately 5 days prior to the accident (Tr. 534), while Mr. Lester testified that the cage had been removed from the crane 3 days earlier, i.e., upon completion of the belt line and walkway (Tr. 461-462). But the inescapable conclusion remains that the use of the crane as a manhoist was clearly authorized at least until the morning of November 26, 1976, because, prior to the installation of the two wooden boards, it remained the sole means of access to the top of the stacker. Further, there is no indication that any of Lester's employees had been specifically informed prior to the accident that company authorization to use the crane for manhoisting had been rescinded, if it in fact had.

In fact, Mr. Counts specifically stated that he did not direct Taylor and Grant "in any manner" as to how to get to the top of the stacker (Tr. 529), a statement with overriding implications. The inferences drawn from the evidence in the record reveal, as noted above, that authorization to use the crane as a manhoist could not as a practical matter be rescinded, until the morning of November 26, 1976. Prior to the installation of the boards, there was no other means of reaching the top of the stacker except via the crane because there would have been no means of crossing the abyss separating the hillside from the walkway. There is no indication that any employee of Lester was on the job site on November 26, 1976, who possessed more authority than Mr. Counts (Tr. 523). As such, he would have been the individual most likely to inform the employees of a change in company policy with regard to using the crane as a manhoist. The fact that he did not direct Messrs. Grant and Taylor in any manner as to how to get to the top of the stacker indicates that any change in company policy, if there was any, had not been effectively communicated to those men.

Mr. Ellison, Lester's safety director, testified that individuals who violate company safety rules are subjected to company-imposed discipline (Tr. 515). First offenders are suspended for 3 days, while recidivists are fired (Tr. 515). If company authorization to use the crane as a manhoist had been rescinded, then Mr. Dent, the crane operator (Tr. 340, 450), and Mr. Taylor, the employee riding in the cage who escaped injury (Exh. M-3), should have at least been suspended for 3 days. Yet, they were not suspended (Tr. 518, 519). In fact, no consideration was given to suspending them after the accident (Tr. 521).

The existence of these disciplinary rules is highly probative for an additional reason. Statements made by Mr. Counts reveal that from his vantage point on the adjacent hill he could have seen the activities occurring on the job site if his attention had been directed there. It can be inferred that the employees could also see him. I find it highly improbable that the three employees directly involved in the accident would knowingly violate company safety rules in the

presence of the foreman and thereby intentionally subject themselves to company disciplinary proceedings.

Accordingly, it is found that Lester Construction Company not only condoned the use of the crane as a manhoist, but also authorized such use. Such authorization was either still in effect on the date of the accident, or, if it had been rescinded, the change in company policy had not been effectively communicated to Messrs. Dent, Grant and Taylor.

The evidence also establishes that the crane was not equipped with overspeed, overwind, or automatic stop controls (Tr. 214-215, 379). Furthermore, the Respondent conceded at the hearing that the crane was not so equipped (Tr. 8). Accordingly, it is found that a violation of 30 CFR 77.1401 has been established by a preponderance of the evidence.

As relates to the second alleged violation, 30 CFR 77.1402-1 provides as follows:

§ 77.1402-1 Ropes and cables; specifications.

The American National Standards Institute "Specifications for the Use of Wire Ropes for Mines," M 11.1-1960, or the latest revision thereof, shall be used as a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting.

According to inspector Birkie Allen, a specialist in hoisting, elevators, and major construction (Tr. 208), the wire rope on the crane was a five-eighths-type, 18 by 7 classification-type rope (Tr. 233-234). The M 11.1-1960 U.S.A. "Standard Specifications for the Use of Wire Ropes for Mines" (Exhs. M-8, O-4) specifies both the recommended and minimum tread diameters for sheaves and drums (Exhs. M-8, O-4, Table 36, Columns 1 and 2; Tr. 233-234). The minimum standards require the tread diameters of the sheaves and drums to be 34 times the rope diameter for an 18 by 7 classification (Exhs. M-8, O-4, Table 36, Column 2; Tr. 233-234). Therefore, according to Inspector Allen, the sheaves and drums should have had a tread diameter of approximately 22-1/4 inches in order to comply with the minimum requirements (Tr. 234). However, a recomputation based on the formula set forth in Exhibits M-8 and O-4, Table 36, Column 2, for an 18 by 7 classification reveals that the precise figure is 21-1/4 inches.

The crane's sheave had a 12-inch inside tread diameter, and its drum was approximately 14 inches in diameter (Tr. 234). Inspector Allen determined the sheave diameter by measuring it (Tr. 234). Since rope remained on the drum, the drum diameter was determined by checking the crane manufacturer's specifications (Tr. 234-235). He used a

caliper to determine that the hoist rope was five-eighths of an inch in diameter (Tr. 298). The inspector testified that the minimum standards had not been met because the sheave and the drum were smaller than 34 times the rope diameter (Tr. 234).

The Respondent stressed both at the hearing and in its posthearing brief that it does not matter whether the rope failed to meet the standards as long as the rope was safe (Tr. 229-230; Respondent's Posthearing Brief, p. 9). However, this is not material to the question of whether a violation occurred.

Accordingly, it is found that a violation of 30 CFR 77.1402-1 has been established by a preponderance of the evidence.

As relates to the third alleged violation, 30 CFR 77.1403(a) provides as follows:

§ 77.1403 Inspection and maintenance.

(a) Hoists and elevators shall be examined daily and such examination shall include, but not be limited to, the following:

(1) A visual examination of the rope for wear, broken wires, and corrosion, especially at excessive strain points;

(2) An examination of the rope fastenings for defects;

(3) An examination of the elevator for loose, missing, or defective parts;

(4) An examination of sheaves for broken flanges, defective bearings, rope alignment, and proper lubrication; and

(5) An examination of the automatic controls and brakes required under § 77.1401.

As regards the daily examinations of the crane, Mr. Lester testified that the crane operator had been instructed, via letters and posted bulletins, to examine the crane each day prior to starting the day's work (Tr. 463). Inspector Allen, who arrived on the job site shortly after the accident, asked Mr. Dent, the crane operator, whether he had made a daily examination of the crane (Tr. 263). According to Inspector Allen, Mr. Dent stated that although he normally would have made such examinations, he had not made any "since he had been on this job" (Tr. 263). Inspector Allen asked Mr. Counts whether the Lester Construction Company kept any inspection records pertaining

to the crane used for manhoisting (Tr. 263). He testified that Mr. Counts was unable to produce one (Tr. 263). According to Inspector Allen, Mr. Counts stated that the company had no such record, that he depended on the crane operator and that the crane operator had not made the inspection (Tr. 263).

Accordingly, it is found that a violation of 30 CFR 77.1403(a) has been established by a preponderance of the evidence in that the required examinations had not been made.

As relates to the fourth alleged violation, 30 CFR 77.404(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." Inspector Allen's examination of the wire rope revealed that it was damaged in several locations (Tr. 264, 309). One lay of the rope contained as many as six broken wires, and there were some randomly distributed broken wires throughout the rope for a distance of 50 feet (Tr. 264, Exhs. M-2, M-2-A). Inspector Allen stated that normally six broken wires are sufficient to cause the wire rope's removal from service (Tr. 264).

He determined that the rope was damaged by means of visual observation and through measuring some of the distortion in the rope with a caliper (Tr. 267). Although he was unable to remember the exact dimensions, the rope was somewhat flattened in areas where the wires were broken (Tr. 267).

The order of withdrawal alleges that the basis for the charge that the hoisting facility was not being maintained in a safe operating condition, is the condition relating to the broken wires. To constitute a violation upon this basis there would have to be proof that the broken wires existed prior to the accident. There does not appear to be clear cut proof to this effect in the record, although it may be argued that the description and opinions of the experts for the Petitioner infer that the broken wires may have existed prior to the accident.

There was no testimony by anyone who observed broken wires before the accident. In addition there is no actual statement of any of the Petitioner's experts which clearly states an opinion that the broken wires did exist prior to the accident.

To the contrary there is an opinion set forth in the record by the owner of Lester Construction Company that a strain on the cable enough to cause it to break would cause the breaking of strands at different intervals (Tr. 473). The owner of the construction company, Mr. Lester, may not have been shown to be as experienced an expert as the Petitioner's expert on hoisting equipment; however, Mr. Lester had operated a crane and had been in this type of construction

business for about 10 years prior to the date of his testimony (Tr. 481).

The experts for the Petitioner were of the opinion that the rope failure which occurred during the accident was due to excessive tension on the rope (Exh. M-3, p. 5, Exh. M-9, p. 5). And the evidence shows that this excessive tension occurred when the "two-blocking" took place. Therefore the possibility exists that the broken wires could have been caused by the same tension.

The Administrative Procedure Act provides that a sanction may not be imposed unless it is supported by and in accordance with the reliable, probative, and substantial evidence, 5 U.S.C. § 556(d). In this case it cannot be said that the record contains substantial, probative evidence that the broken wires actually existed before the accident took place.

Therefore it is found that Petitioner has not proved a violation of 30 CFR 77.404(a) upon a basis that the hoist was unsafe because "numerous broken wires" allegedly existed in the rope prior to the accident. It is, however, true that a violation existed under 30 CFR 77.404(a) in that the hoisting facilities were not maintained in safe operating condition since such facilities were used for hoisting men and were not equipped with overspeed, overwind, or automatic stop controls and since the type of wire rope used did not properly match the size of the sheave and drum on the crane.

However, the order does not allege a violation of 30 CFR 77.404(a) in such terms, but confines the allegations under that regulation to the subject of "broken wires." In addition, two separate violations are already alleged in the order as relates to those bases upon which the hoist was unsafe. Those are under 30 CFR 77.1401 and 30 CFR 77.1402-1. Apparently the inspector decided not to mention such bases under 30 CFR 77.404(a) since he had already covered such unsafe practices under specific regulations in the first part of his order (Exh. M-2, Exh. M-2-A).

Accordingly, findings as to violations under 30 CFR 77.1401 and 77.1402-1 are made herein but no finding will be made as to a violation of 30 CFR 77.404(a).

(D) Gravity of the Violation

Two of Lester's employees were directly exposed to the hazard. Mr. James Grant sustained a fatal injury when the wire rope separated, falling approximately 70 to 75 feet to his death (Tr. 101, 134-135, 524, 544, Exh. M-3), Mr. Wayne Taylor narrowly escaped death or serious injury by jumping to the platform at the top of the stacker (Tr. 134-135, Exh. M-3). The cable separation occurred when the crane "two-blocked," i.e., when the overhaul ball was pulled into the sheave (Tr. 360-361, 369).

The rope broke at a location 23 feet from the socket where the counterweight was attached (Tr. 296, Exh. M-3 at p. 6). The significance of this lies in the fact that 23 feet is the exact dimension of the jib on the end of the crane, indicating that the rope broke where the main boom sheaves were located (Tr. 324).

Inspector Allen explained the function of overspeed (Tr. 215, 349-350, 355), overwind (Tr. 216-218, 369), and automatic stop controls (Tr. 225), during the course of his testimony. According to Inspector Allen, the overwind control in itself would have completely prevented two-blocking. Activation of the overwind control would have caused the automatic stop to bring the hoist to a safe stop. There was no problem with overspeed in connection with the accident (Tr. 355, 369).

As relates to the physical characteristics of the wire rope, according to Inspector Allen, the 18 by 7 classification rope used on the crane at the time of the accident was a nonrotating-type rope (Tr. 233). This type of rope is of very rigid construction with a high resistance to bending (Tr. 233). A rope bending over a small diameter sheave eventually develops fatigue (Tr. 237). If the rope is bent over a small sheave, and one end of the rope is free to rotate, an immediate loss of breaking strength results (Tr. 237). The rope in question was free to rotate because no guides were present where the rope was attached to the cage (Tr. 363).

Passing a rope over small sheaves and drums over a period of time causes case hardening of the crown wires (Tr. 240). This causes the rope to attain a strength greater than the catalogue breaking strength (Tr. 240). However, it is a false strength because the hardening of the outer crown wires causes them to become brittle (Tr. 240-241). As the report (Exh. M-9) notes, the rope broke at a greater strength than the catalogue breaking strength (Tr. 240).

As regards the effect of the drum on the rope, Inspector Allen stated:

On the drum you have a secondary reason. If we had a recommended drum diameter of twenty-two and a quarter inches, if you visualize this as the drum (indicating), this rope is rigid. It resists bending due to the type of construction. As seen in the table, it requires a greater sheave size. If you intend to wind this on a drum, it will not wind.

I think we're all maybe familiar with the rod and reel. The fleet angle normally determines how it's spooled onto the drum. However, with a rope that's as rigid as this, it will not spool properly. It will tend to overlap itself. Any time that you allow slack to

come in, it acts as a spring and will tend to open up and crush and destroy itself.

(Tr. 241-242).

The inside strand wires had nicks (Exhs. M-3 at p. 5, M-9). According to Inspector Allen, this condition is normally caused by bending the rope over small diameter sheaves and drums (Tr. 311).

Accordingly, it is found that the violations of 30 CFR 77.1401, and 1402-1, were extremely serious.

A daily examination of the crane, according to the procedure outlined by Inspector Allen (Tr. 269-270), would have revealed both the noncompliance with the M 11 standards and the absence of overspeed, overwind, and automatic stop controls. Accordingly, it is found that the violation of 30 CFR 77.1403(a) was moderately serious.

(E) Negligence of the Operator

The evidence contained in the record indicates that Lester Construction Company demonstrated gross negligence with respect to each of the three violations of the mandatory safety standards. The question presented is whether the negligence of an independent contractor can be imputed to a mine owner who neither exercises control, nor possesses a contractual right of control, over the actions of the independent contractor or his employees.

One approach would be to determine whether the mine owner demonstrated actual negligence or whether the mine owner either exercised control, or possessed a contractual right of control, over the independent contractor's employees. Under the control theory, the negligence of the independent contractor would be imputed to the mine owner. This would require a specific finding that such control existed. See, e.g., Old Ben Coal Company, VINC 79-119-P (April 27, 1979).

The evidence in the record reveals that the employees of Lester Construction Company were under the exclusive supervision of Mr. Count's, Lester's foreman. There is no probative evidence in the record indicating that Buffalo Mining Company supervised Lester's employees or directed or controlled them in the performance of their tasks. Nor is there any evidence of a contract provision granting to Buffalo such a right of control.

The record is also devoid of any probative evidence as to direct negligence on Buffalo's part. There is no indication that Buffalo knew, or, through the exercise of due diligence, should have known of the conditions giving rise to the violations of the cited mandatory safety standards. Nor is there any probative evidence indicating

that Buffalo materially abetted the violations or that Buffalo was negligent in selecting Long-Airdox as an independent contractor.

Accordingly, the application of this approach to the facts presented in the case at bar would preclude a finding that Buffalo demonstrated any negligence.

Another approach is found in the concept of the independent contractor as the "statutory agent" of the mine owner. In Bituminous Coal Operators' Association, Inc. v. Secretary of the Interior, 547 F.2d 240, 247 (4th Cir. 1977), the Court recognized that a construction company may be considered the statutory agent of the mine owner. Section 3(e) of the 1969 Coal Act, 30 U.S.C. § 802(e) (1970), defines an "agent" as "any person charged with responsibility for the operation of all or a part of a coal mine or the supervision of the miners in a coal mine." As noted previously in this decision, the employees of independent contractors performing work in a "coal mine," section 3(h) of the 1969 Coal Act, 30 U.S.C. § 802(h) (1970), fall within the statute's definition of a "miner," section 3(g) of the 1969 Coal Act, 30 U.S.C. § 802(g) (1970). The Court observed that the supervision of the "miners" in their employ brings the construction company "squarely within that part of the definition of a statutory agent which embraces 'any person charged with responsibility for * * * the supervision of miners in a coal mine.'" 547 F.2d at 247. Accordingly, the court held that "operators may be held liable for construction company violations, because the construction companies are statutory agents of the owners and lessees of coal mines." 547 F.2d at 247.

The question presented is whether the concept of statutory agent, mentioned by the Court of Appeals in the context of holding the mine owner liable for the independent contractor's violations of the 1969 Coal Act, can be employed to impute the independent contractor's negligence to the mine owner when determining the appropriate civil penalty to assess.

The Commission's decision in Republic Steel Corporation, Docket No. IBMA 76-28, 77-39, 1979 OSHD par. 23,455 (FMSHRC, filed April 11, 1979), does not directly address this issue, but does set forth certain principles providing guidance. The Commission observed that the Fourth Circuit had agreed with the District Court's conclusion in Bituminous Coal Operators' Association v. Hathaway, 400 F. Supp. 371 (W.D. Va. 1975), as to the application of the statutory agent concept. However, the Commission stressed the text of the statute when it held that, as a matter of law under the 1969 Coal Act, "an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors."

However, this is less than a repudiation of the statutory agent concept. The Commission did observe that the "Act seeks to protect

the safety and health of all individuals working in a coal mine," and that the "purpose of the Act is not served by interpreting these provisions to allow an operator to limit the benefit of the protection it affords to its own employees."

The question presented must be resolved so as to promote the purposes of the 1969 Coal Act. Statements contained in the legislative history indicate that the civil penalty provisions of the 1969 Coal Act are remedial in nature, i.e., the penalty assessed should be designed to deter future violations of the mandatory health and safety standards. See HOUSE COMMITTEE ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT, 91st Cong., 2nd Sess. at 462-463 (1970). See also, Robert G. Lawson Coal Company, 1 IBMA 115, 118, 79 I.D. 657, 1971-1973 OSHD par. 15,374 (1972).

Thus, the amount of the penalty imposed should be sufficient to encourage the mine owner to insure protection for the employees of the independent contractors. This purpose is promoted by imputing the negligence of the independent contractor to the mine owner because it is only through such action that an appropriate and truly remedial civil penalty can be devised.

It should also be pointed out that in this case the attorney for the Respondent stated that he represented Lester Construction Company, the independent contractor. He made the following statement at the hearing:

In the contract there are certain provisions pertaining to the fact that we are an independent contractor and we hold Buffalo Mining harmless. As a practical matter, only through the hold harmless agreement do we represent Buffalo Mining, but we do in effect represent them because of the fact that we ultimately will be responsible for any outcome of this proceeding.

(Tr. 4, Exh. O-1).

Accordingly, it is found that the gross negligence demonstrated by Lester Construction Company can be imputed to the Respondent.

(F) Good Faith in Attempting Rapid Abatement

The order of withdrawal was issued by Inspector Allen at 3:35 p.m. on November 26, 1976 (Exh. M-2). It was terminated by inspector William S. Pauley at 4 p.m. on December 1, 1976 (Exh. M-5). Exhibit M-5 describes the action taken to abate the violation as follows:

The practice of hoisting and lowering men with the Lorain MC 30 H crane has been discontinued. Instructions which prohibit persons from being hoisted or

lowered with the crane have been posted in the cab of the crane. Also the defective hoist rope has been removed from the crane.

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

(G) History of Previous Violations

The history of violations for which penalties have been paid at the Respondent's No. 5 Preparation Plant during the 2-year period preceding the issuance of the subject order is summarized as follows (Exh. M-1):

<u>30 CFR</u> <u>Standard</u>	<u>Year 1</u> <u>11/27/74 - 11/26/75</u>	<u>Year 2</u> <u>11/27/75 - 11/26/76</u>	<u>Totals</u>
All Sections	24	9	33
77.1401	0	0	0
77.1402-1	0	0	0
77.1403(a)	0	0	0

(Note: All figures are approximations.)

No evidence was presented as to any possible history of violations as relates to Lester Construction Company.

(H) Size of the Operator's Business

The No. 5 Preparation Plant processes 5,800 tons of coal daily (Exh. M-3, p. 2). The plant is owned by the Buffalo Mining Company (Tr. 13). Buffalo Mining Company is a subsidiary of The Pittston Company (Exh. M-6). However, the record contains no evidence regarding the total annual coal production of either Buffalo Mining Company or The Pittston Company. No significant evidence as to the size of the Lester Construction Company was presented.

(I) Effect of the Assessment of a Civil Penalty on the Operator's Ability to Continue in Business

The Respondent introduced no probative evidence indicating that an assessment in this case would adversely affect the Respondent's or Lester Construction Company's ability to continue in business. The Interior Board of Mine Operations Appeals has held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find, therefore, that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

(J) Jurisdictional Issues

During the course of the hearing, the attorney for the Respondent stated that there was a question as to jurisdiction in that he took the position that the Occupational Safety and Health Administration (OSHA) rather than MSHA should have jurisdiction because he questioned whether the factual circumstances came under the 1969 Coal Act. He stated that no coal mining people were involved.

The Respondent's attorney is in error on this issue since it has already been pointed out in the prior portions of this decision that the area involved herein comes within the definition of a coal mine and that the employees of a contractor working at such mine come under the definition of miners.

All of the Respondent's attorney's arguments as relates to the jurisdictional issues revolve around the same issues argued in the motion to dismiss which was disposed of in Part V(C) of this decision wherein it was held that the Respondent could be held liable for safety violations committed by the independent contractor, Lester Construction Company.

In his reply brief, Respondent's attorney stated that Buffalo may be in interstate commerce but Lester Construction Company is not. However, the question of whether Lester is or is not in interstate commerce is immaterial since Buffalo is properly charged with the violations.

Based upon all of the findings of fact and conclusions of law previously set forth in this decision it is found that Buffalo Mining Company and its No. 5 Preparation Plant have been, during the pertinent periods involved herein, subject to the 1969 Coal Act and the 1977 Mine Act.

VI. Conclusions of Law

1. Buffalo Mining Company and its No. 5 Preparation Plant have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act during the respective periods involved in this proceeding.

2. Under the Acts, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspector Birkie Allen was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the order of withdrawal which is the subject matter of this proceeding.

4. The violations charged as to 30 CFR 77.1401, 77.1402-1, and 77.1403(a) are found to have occurred as alleged.

5. MSHA has failed to prove, by a preponderance of the evidence, a violation as to 30 CFR 77.404(a) as alleged in the subject order.

6. The Respondent's motion to dismiss is denied as contrary to the law and the facts.

7. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs. Buffalo submitted a reply brief. Subsequent thereto, MSHA submitted a letter noting its disagreement with certain statements contained in Buffalo's reply brief. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalties Assessed

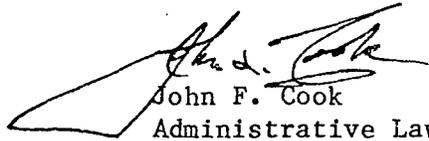
Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of penalties is warranted as follows:

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
1 BA	11/26/76	77.1401	\$6,000
		77.1402-1	1,500
		77.1403(a)	500
			<u>\$8,000</u>

ORDER

A. Respondent is ORDERED to pay a civil penalty in the amount of \$8,000 within 30 days of the date of this decision.

B. The petition is dismissed as relates to an alleged violation of 30 CFR 77.404(a).


John F. Cook
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

OCT 30 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-674-P
Petitioner : Assessment Control
: No. 15-07212-02008
v. :
: No. 10 Mine
DEBY COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Barbourville, Kentucky, on September 12, 1979, counsel for petitioner asked that I approve a settlement agreement under which respondent had already paid the full civil penalties totaling \$590 which had been proposed by the Assessment Office. The penalties proposed by the Assessment Office were derived by a proper consideration of the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

Respondent's No. 10 Mine produces approximately 31,250 tons of coal on an annual basis or about 125 tons of coal per day. Therefore, I agree that the Assessment Office appropriately found that respondent operates a small business and that any penalties which might be assessed in this proceeding should be in a low range of magnitude under the criterion of the size of respondent's business. There is no evidence in the record to show that payment of penalties would cause respondent to discontinue in business. In the absence of any evidence to the contrary, I find that payment of civil penalties will not cause respondent to discontinue in business.

All of the alleged violations involved in this proceeding were corrected within the period of time allowed by the inspector and therefore the Assessment Office correctly found that respondent demonstrated a normal good faith effort to achieve rapid compliance. The Assessment Office allowed from 10 to 12 penalty points for respondent's history of previous violations which also appears to be reasonable.

The penalties proposed by the Assessment Office are based on the Assessment Office's findings that all of the alleged violations were the result of ordinary negligence with penalty points fixed midway in the

allowance for ordinary negligence. The alleged violations were all considered to be associated with a moderate degree of gravity with the exception of two alleged violations of Section 75.202.

The Assessment Office arrived at penalties of \$58 each for six alleged violations. The first \$58 penalty was proposed for a violation of Section 75.1100-2(i)(2) alleging that respondent did not have 5 tons of rock dust which could be delivered to the mine within a period of 1 hour. The second \$58 penalty was proposed for a violation of Section 75.202-1 alleging that respondent did not have a supply of supplemental roof support materials as close as practical to the working section. The third \$58 penalty was proposed for a violation of Section 75.313 alleging that the methane monitor on the loading machine was inoperative. The fourth \$58 penalty was proposed for an alleged violation of Section 75.1704 alleging that the No. 2 designated escapeway was not properly marked. The fifth \$58 penalty was proposed for a violation of Section 75.1713-7(c) alleging that first-aid supplies were not being stored in a suitable manner. The sixth \$58 penalty was proposed for a violation of Section 75.316 alleging that respondent had failed to install a permanent stopping in the third crosscut from the working face. I find that the proposed penalties of \$58 each were appropriately determined by the Assessment Office for the above-described six alleged violations since they were correctly found to be the result of ordinary negligence and to involve a moderate degree of gravity.

The Assessment Office appropriately found that a penalty of \$46 should be assessed for an alleged violation of Section 75.512 alleging that respondent failed to record the last date on which electrical equipment was inspected. The Assessment Office found that this alleged violation of Section 75.512 was the result of ordinary negligence and was nonserious.

The Assessment Office proposed a penalty of \$86 for violation of Section 75.202 alleging that 36 posts had been dislodged along the haulage roadway where men and coal are transported daily. Although the Assessment Office classified the alleged dislodging of posts to be the result of ordinary negligence, the penalty points were increased above the mid range for the criterion of negligence and the gravity of the violation was considered to be more serious than the other violations which have been discussed above. A penalty of \$86 for dislodging 36 posts along the haulageway is acceptable for a small mine such as the one here involved.

The Assessment Office proposed a penalty of \$110 for the final violation in this proceeding. That notice of violation alleged that respondent had failed to support adequately a rock in the roof of the haulageway. The rock was about 16 feet wide and 6 feet long. The Assessment Office rated respondent's negligence in this instance to be close to the maximum for ordinary negligence and considered that the violation involved a high degree of gravity. The penalty of \$110 is acceptable for

a serious violation involving a small mine such as the one under consideration in this case.

For the reasons set forth above, I find that the settlement proposed by the parties should be approved.

WHEREFORE, it is ordered:

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

(B) If Deby Coal Company has not already done so, it shall pay civil penalties totaling \$590 within 30 days from the date of this decision. The penalties are allocated to the alleged violations as follows:

Notice No. 1 HM (8-1) 1/17/78 § 75.1100-2(i)(2)	\$ 58.00
Notice No. 4 HM (8-4) 1/17/78 § 75.202-1	58.00
Notice No. 1 HM (8-7) 1/24/78 § 75.512	46.00
Notice No. 2 HM (8-8) 1/24/78 § 75.313	58.00
Notice No. 4 HM (8-10) 1/24/78 § 75.1704	58.00
Notice No. 1 HM (8-11) 2/23/78 § 75.1713-7(c)	58.00
Notice No. 2 HM (8-12) 2/23/78 § 75.202	86.00
Notice No. 3 HM (8-13) 2/23/78 § 75.202	110.00
Notice No. 2 HM (8-15) 2/28/78 § 75.316	<u>58.00</u>
Total Settlement Penalties in This Proceeding	\$ 590.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Stephen P. Kramer, Trial Attorney, Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Deby Coal Company, Attention: James D. Sturgill, Manager, Manchester,
KY 40962 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

CONSOLIDATION COAL COMPANY, : Application for Review
Applicant :
v. : Docket No. DENV 79-59
: :
SECRETARY OF LABOR, : Order No. 389458
MINE SAFETY AND HEALTH : October 17, 1978
ADMINISTRATION (MSHA), :
Respondent : Glenharold Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for the Applicant;
Stephen P. Kramer, Esq., Office of the Solicitor,
U.S. Department of Labor, for the Respondent.

Before: Judge Cook

I. Procedural Background

On November 14, 1978, Consolidation Coal Company (Applicant) filed an application for review pursuant to section 105(d) ^{1/} of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1978) (Act).

1/ Section 105(d) provides:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals or orders issued under section 104."

The application seeks review of Order of Withdrawal No. 389458, dated October 17, 1978, issued pursuant to section 104(d)(1) 2/ of the Act. In the application for review, it was alleged:

1. At or about 1335 hours on October 17, 1978, Federal Coal Mine Inspector, Rudolph Isgler [sic] (A.R. 1639) representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter "Inspector") issued Order No. 389458 (hereinafter "Order") pursuant to the provisions contained in Section 104(d)(1) of the Act to Joel Grace, Safety Inspector, for a condition he allegedly observed during a "CAA" inspection (spot inspection) at the Glenharold Mine, Identification No. 32-00042 located in North Dakota. A copy of this Order is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.21(b).

2. Said Order under the heading captioned "Condition or Practice" alleges that:

The trailing cable for the 1250 BE Dragline is not protected against damage from falling materials at 001 pit. The loaded bucket was being swung over the cable yesterday and now although not observed by this inspector, this practice was discussed with the operator during the last inspection, 09/13/78.

2/ Section 104(d)(1) provides:

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

3. Said Order contains the allegation that the above condition or practice constituted a violation of 30 C.F.R. 77.604, a mandatory health or safety standard, but that the violation has not created an imminent danger. Further, the Inspector stated that the alleged violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and was caused by an unwarrantable failure to comply with the stated standard.

4. Said Order additionally contained the allegation that the violation was found during a subsequent inspection made within ninety (90) days after Citation No. 389434 was issued on September 13, 1978, asserting that said Citation was caused by an unwarrantable failure of the operator to comply with a mandatory standard. A copy of this Citation issued under Section 104(d)(1) of the Act is attached hereto as Exhibit "B".*

5. At or abor [sic] 1400 hours on September 13, 1978, Inspector Isgler [sic] issued a termination of said Order. A copy of this termination is attached hereto as part of Exhibit "A".

6. Consol avers that the Order is invalid and void, and in support of its position states:

(a) That it did not violate 30 C.F.R. 77.512 as alleged in the underlying 104(d)(1) Citation;

(b) That the underlying 104(d)(1) Citation did not state a condition or practice which was of such a nature as could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard; and

(c) That underlying 104(d)(1) Citation did not state a condition or practice caused by an unwarrantable failure of Consol to comply with the mandatory safety standard cited in the Citation.

7. Consol further avers that the Order is invalid and void for the additional reasons as follows:

(a) That the Order fails to cite a condition or practice which constitutes a violation of mandatory health or safety standard 30 C.F.R. 77.604.

(b) That the Order fails to state a condition or practice caused by an unwarrantable failure of Consol to comply with any mandatory health or safety standard; and

(c) That the Order fails to state a condition or practice which could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard.

* * * * *

WHEREFORE, Consol respectfully requests that its Application for Review be granted and for all of the above and other good reason; Consol additionally requests that the subject Order and underlying Citation be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

In a footnote to paragraph 4 of the application, the Applicant states:

Said Citation under the heading "Condition or Practice" alleges that:

The cover plate on the Brown and Sharpe Milling Lathe in use at the machine shop was removed by a certified Electrician about a week ago to remove a motor. It is an opening about 10 by 22 inches exposing conductors energized with 220 volts three phase power to two switches. The Electrician said it takes too long to replace cover. The machinist was aware of the condition.

On November 17, 1978, the United Mine Workers of America (UMWA) filed an answer, which states, in part, as follows:

1. The International Union, United Mine Workers of America, is the representative of the miners at the Glenharold mine for collective bargaining and safety purposes, and is therefore a party to this matter under 29 CFR § 2700.10(a).

2. Issuance of the above-noted withdrawal order is admitted, but all other allegations contained in the application for review are denied.

The answer of the Mine Safety and Health Administration (MSHA) was filed on November 24, 1978. It states, in part, as follows: "MSHA admits the issuance of order No. 384458 dated 10/17/78 and citation No. 389434 dated 9/13/78. MSHA avers that both the order and citation were in all respects properly issued under Section 104(d)(1) of the Act."

MSHA then requested dismissal of the application for review.

The hearing was held on April 10, 1979, in Bismarck, North Dakota, pursuant to a notice of hearing issued on January 25, 1979. Representatives of the Applicant and MSHA were present and participated. No representative of the UMWA was present at the hearing (Tr. 4). 3/

A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing. MSHA submitted its posthearing brief on May 23, 1979. On May 30, 1979, counsel for the Applicant requested an additional 30 days in which to file a posthearing brief, which request was granted on June 4, 1979. Under the revised schedule, the brief was due on or before June 24, 1979, and reply briefs were due on or before July 9, 1979. The Applicant did not file a posthearing brief. No reply briefs were submitted.

II. Issues

1. Whether the condition cited in Order No. 389458 existed and, if so, whether it constitutes a violation of 30 CFR 77.604. In this regard, the parties' joint statement of the issue is whether 30 CFR 77.604 requires that the trailing cable going from the substation to the dragline be protected in the area where the bucket swings over said cable to prevent damage caused by objects falling from the bucket of said dragline (Tr. 159).

2. If the condition cited in Order No. 389458 existed and constitutes a violation of 30 CFR 77.604, whether said violation was caused by the unwarrantable failure of the operator to comply with said mandatory safety standard.

3. Whether the conditions cited in Citation No. 389434, issued on September 13, 1979, existed and, if so, whether they constituted a violation of 30 CFR 77.512.

4. If the conditions cited in Citation No. 389434 existed and constituted a violation of 30 CFR 77.512, whether said violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard, and whether said violation was caused by the unwarrantable failure of the operator to comply with said mandatory safety standard.

3/ The Applicant thereupon moved to dismiss the UMWA as a party-Respondent (Tr. 4). This motion was considered in conjunction with this decision, but was disposed of in a separate order, issued immediately prior to the issuance of this decision, so that the caption on this decision would reflect only the remaining parties.

III. Evidence Contained in the Record

A. Stipulations

The parties entered into stipulations which are set forth in the findings of fact, infra.

B. Exhibits

1. MSHA introduced the following exhibits into evidence:

(a) M-1 is a copy of Citation No. 389434, September 13, 1978, 30 CFR 77.512, issued pursuant to section 104(d)(1) of the Act.

(b) M-2 through M-5 are photographs of the milling machine cited in Citation No. 389434.

(c) M-6 is a copy of Order No. 389458, October 17, 1978, 30 CFR 77.604, issued pursuant to section 104(d)(1) of the Act.

2. The Applicant introduced the following exhibits into evidence:

(a) O-1 is a photograph of the milling machine cited in Citation No. 389434.

(b) O-2 is a scale drawing of the dragline involved in Order No. 389458.

(c) O-3 is a drawing representing the arc that the boom of the dragline would follow if it were to swing over the trailing cable.

(d) O-4 is a page from MSHA's policy manual referring to 30 CFR 77.604.

C. Witnesses

MSHA called as its witness Rudolph Iszler, an MSHA inspector.

The Applicant called as its witnesses Philip Wanner, an electrical engineer and electrical foreman at the Applicant's Glenharold Mine; and Michael B. Quinn, the safety director at the Applicant's Glenharold Mine.

IV. Opinion

A. Stipulations

1. Consolidation Coal Company is the owner and operator of the Glenharold Mine located in North Dakota (Tr. 6).

2. Consolidation Coal Company and the Glenharold Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Tr. 6).

3. The Administrative Law Judge has jurisdiction of the case pursuant to section 105 of the 1977 Act (Tr. 6).

4. The inspector who issued the subject order and citation was a duly authorized representative of the Secretary of Labor (Tr. 7).

5. A true and correct copy of the subject order and citation were properly served upon the operator in accordance with section 104(a) of the 1977 Act (Tr. 7).

6. Copies of the subject order and citation 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 (Tr. 7).

7. With respect to the subject 104(d)(1) citation and section 104(d)(1) order, an imminent danger did not exist (Tr. 7).

8. As relates to Citation No. 389434, a violation of 30 CFR 77.512 existed on September 13, 1978 (Tr. 7-8).

9. As relates to the condition cited in Order No. 389458, the operator knew that the dragline was operating without the protective covering that Inspector Iszler had requested over the trailing cable (Tr. 110).

B. Findings of Fact

MSHA inspector Rudolph Iszler visited the Applicant's Glenharold Mine on October 17, 1978, to conduct a health and safety inspection (Tr. 103). He traveled to the area of the 1250 dragline, accompanied by Joel Grace, the safety director for the Glenharold Mine, and Sam Drath, the union representative (Tr. 103). As they approached the dragline from the rear, the inspector observed the loaded bucket on the end of the boom swinging over the dragline's trailing cable (Tr. 103-106). Upon examining the area, the inspector observed chunks of "hard" clay lying on and beside the trailing cable (Tr. 104-105).

Exhibit O-2 reveals that a dragline is essentially a large crane. The bucket is attached to a cable which runs from the bucket up to a pulley on the end of the boom and thereafter to the vicinity of what appears to be the dragline operator's compartment. A second cable runs from the vicinity of the bucket to what appears to be a drum located at or near the point at which the boom is attached to the main portion of the machine.

Inferences drawn from the testimony of the witnesses (Tr. 131-132, 139, 143), interpreted with reference to statements contained in the parties' joint statement as to the key issue in this proceeding (Tr. 159), indicate that the trailing cable ran from the dragline back to a substation. However, this was never stated directly by any of the witnesses. The only testimony as to the voltage passing through the trailing cable came from Inspector Iszler, who testified that he thought it was 7,200 volts (Tr. 108).

The testimony of Inspector Iszler and Exhibit O-3 reveal that at the time of the order's issuance, the dragline was being used to uncover a seam of coal (Tr. 129, 149). Thus, the material being transported in the bucket was newly dug (Tr. 129). The dragline was positioned between the coal seam and some "spoils" piles (Exh. O-3). The material was being taken from the vicinity of the areas denominated as "cut A" and "cut B" on Exhibit O-3, swung over the trailing cable, and deposited in the area labeled "spoils" on Exhibit O-3 (Tr. 104-105). The inference is that the material on or near the trailing cable had fallen from the bucket. Normally, the "cut A" material is not swung over the cable (Tr. 149).

According to Mr. Quinn, a second piece of equipment called a "loading shovel" is used to load the uncovered coal into trucks. These trucks approach their loading point by way of the coal seam level, not the level upon which the dragline is located. Mr. Quinn stated that the difference in elevation between these two levels is probably 30 to 40 feet (Tr. 151-152). Thus, the trucks could not have damaged the dragline trailing cable.

The subject order of withdrawal was issued at 1:35 p.m. (Exh. O-6), citing the following "condition or practice" as a violation of the mandatory safety standard embodied in 30 CFR 77.604:

The trailing cable for the 1250 BE dragline is not protected against damage from falling materials at 001 pit. The loaded bucket was being swung over the cable yesterday and now. Although not observed by this inspector, this practice was discussed with the operator during the last inspection, 09/13/78.

As relates to the phrase "[t]he loaded bucket was being swung over the cable yesterday and now," the inspector testified that he had not seen the bucket being swung over the cable "yesterday" (Tr. 106), but that this information was acquired from the dragline operator (Tr. 106).

As relates to the phrase "[a]lthough not observed by this inspector, this practice was discussed with the operator during the last inspection, 09/13/78," the inspector testified as follows:

Q. And this next sentence you state that "Although not observed by this inspector this practice was discussed with the operator during the last inspection--9-13-78." Now, this phrase "not observed by this inspector"--what dates were you referring to when you made that statement?

A. It had been brought to my attention that--that they were swinging a loaded bucket over the cable and dropping material on the cable occasionally, and it was also pointed out to me by a federal mine inspector who was stationed at Billings, Montana, that this was going on, and he alerted me to the fact, and he also told me that the company was notified of this during his inspection. I don't have the exact time, but it was, I believe, in May or June of 1978.

Q. And what was the name of that inspector?

A. Howard Clayton.

Q. Now, I don't believe you still quite answered my original question about dates. The statement "not observed by this inspector"--what dates does that refer to? Does that refer to some dates previous to the 17th?

A. Yes, sir, yes, sir.

Q. And what dates would those be?

A. It probably could have been the last inspection, because he mentioned this during several inspections. I asked whether they were making a practice of this here.

Q. Do you recall who you had discussions with concerning the subject during that inspection?

A. That was at a close-out conference, the one I am referring to there. That was at a close-out conference. It was a safety director, and--I am not certain, no, sir. It was a--I don't have my notes with me. I got them in Dickinson.

Q. Was this close-out conference the only time that you discussed this problem with the Management previous to the conditions of this Order?

A. No, sir. I mentioned that to the safety director previously.

Q. And this was an incident other than the close-out conference?

A. Yes.

Q. And who was that safety director? Do you recall?

A. Joel Grace.

(Tr. 106-108).

The mandatory safety standard embodied in 30 CFR 77.604 provides: "Trailing cables shall be adequately protected to prevent damage by mobile equipment." In determining whether the "condition or practice" cited in the subject order of withdrawal constitutes a violation of the mandatory standard, the parties are in agreement that the question presented is whether the regulation "requires that the trailing cable going from the substation to the dragline be protected in the area where the bucket swings over said cable to prevent damage caused by objects falling from the bucket of said dragline" (Tr. 159). For the reasons set forth below, I find that it does not. In resolving this issue, it has been necessary to interpret the regulation's requirements, determine whether the dragline was a piece of mobile equipment, and determine whether the manner in which the dragline was being used in relation to the cable is contemplated as a violation under the regulation.

At the outset, it is found that Inspector Iszler observed the dragline bucket swinging over the trailing cable on October 17, 1978, and that at the time the dragline's trailing cable was not protected so as to prevent objects falling from the bucket from damaging the cable.

A question is presented as to whether the dragline is a piece of mobile equipment. The regulations never specifically define the term "mobile equipment," perhaps because the drafters believed the definition to be self-evident. The following definition is found in Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 719: "Mobile equipment. Applied to all equipment which is self-propelled or which can be towed on its own wheels, tracks, or skids." Accordingly, it is appropriate to use this accepted definition in determining whether the piece of equipment involved is mobile.

In view of Inspector Iszler's assertion that the dragline is self-propelled (Tr. 110-111), it is found that it is mobile equipment within the meaning of the subject regulation.

Exhibit O-4, a page from an MSHA surface manual, contains a policy guide for the enforcement of 30 CFR 77.604, which states the following:

77.604 Protection of trailing cables.

* * * * *

POLICY

Trailing cables shall be placed away from roadways and haulageways where they will not be run over or damaged by mobile equipment. Where trailing cables must cross roadways and haulageways they shall be protected from damage by:

1. Suspension over the roadway or haulageway;
2. Installation under a substantial bridge capable of supporting the weight of the mobile equipment using the roadway or haulageway; or
3. An equivalent form of protection.

When mobile equipment is observed running over unprotected trailing cables a violation of Section 77.604 exists. [Emphasis added.]

The policy guide refers to two specific situations. Generally, it provides that the cables be "placed away from roadways and haulageways where they will not be run over or damaged by mobile equipment." However, where they must cross such areas, one of the three designated methods must be employed to protect them from damage.

Although the language of the regulation, when taken in context, appears to refer to damage caused solely by physical contact by mobile equipment primarily by running over the trailing cable, a question is presented as to the meaning of the phrase "run over or damaged" contained in Exhibit O-4. At first glance, it appears to reflect a recognition by MSHA that a trailing cable can be damaged by mobile equipment either by the equipment running over the cable or by some other means. This interpretation is supported by the testimony of Inspector Iszler (Tr. 114-117), who stated that the policy includes, but is not limited to, running over the cables (Tr. 115). A careful review of the policy statement, when taken as a whole, reveals that such an inference is unwarranted.

I conclude that the terms "run over" and "damaged," as contained in the policy statement are being used interchangeably to refer to the same thing, and that the damage referred to is of a type caused by mobile equipment running over the cable. Two considerations weigh heavily in this determination. First, the policy guide indicates that the trailing cables must be protected from "damage" where they must cross roadways and haulageways. The term "run over" is not specifically mentioned. Yet, the three forms of protection prescribed are

designed to prevent mobile equipment from running over, and thus from damaging, the cable. In this context, it is clear that the terms "run over" and "damaged" are being used interchangeably. Second, Exhibit O-4 states that when "mobile equipment is observed running over unprotected trailing cables a violation of Section 77.604 exists." (Emphasis added.) It does not state that when "mobile equipment is observed running over or otherwise damaging unprotected trailing cables a violation of Section 77.604 exists," or a statement to that effect. This fact, coupled with the fact that Exhibit O-4 provides no guidelines for identifying other means of damaging the cable, further indicates that the word "damage" has been interpreted by MSHA to mean "run over."

Accordingly, I conclude that MSHA's interpretation as contained in Exhibit O-4, provides that trailing cables be protected in such a manner so as to prevent damage from physical contact by mobile equipment running over the cables.

Above and beyond this policy statement by MSHA addressed to "running over" cables, it appears that the regulation does include damage caused by any physical contact of the piece of mobile equipment with the cable. This could be caused by the equipment actually running into the cable rather than over it. However, it must be recognized that MSHA's policy statement is as stated since in almost all instances the danger would be caused by the "running over" of the cable. However, it does not appear that the regulation or MSHA's policy statement ever contemplated the type of situation presented in this case which does not involve physical contact of the piece of equipment with the cable.

The question presented is whether the dragline's use in relation to the cable is the type of activity contemplated by the subject regulation. Once again, Exhibit O-4, as interpreted in context, is instructive, revealing that MSHA has interpreted the regulation to require physical contact with the cable before a violation can be found to have occurred. In the instant case, the dragline bucket did not make physical contact with the cable.

Accordingly, I conclude that the "condition or practice" cited in Order No. 389458 did not constitute a violation of 30 CFR 77.604. It is therefore unnecessary to address the issue of unwarrantable failure.

It may well be that it is desirable that a regulation be enacted to protect against any possible damage which could be caused by the falling of material from a dragline bucket as it swings over a cable, but such was not contemplated by the subject regulation and its interpretation by MSHA.

In view of the foregoing, it is unnecessary to address those issues pertaining to Citation No. 389434, the 104(d)(1) citation underlying the subject 104(d)(1) order of withdrawal. The Applicant pleaded the invalidity of Citation No. 389434 solely as an incident to the determination of the validity of the subject order of withdrawal. See, generally, Zeigler Coal Company, 3 IBMA 448, 81 I.D. 729, 1974-1975 OSHD par. 19,131 (1974), reaffirmed on reconsideration, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975).

In view of the foregoing findings of fact and conclusions of law, the application for review will be granted, and Order No. 389458 will be vacated.

V. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. Consolidation Coal Company and its Glenharold Mine have been subject to the provisions of the Federal Mine Safety and Health Act of 1977 at all times relevant to this proceeding.

3. MSHA inspector Rudolph Iszler was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The condition cited in Order No. 389458 existed, but did not constitute a violation of 30 CFR 77.604.

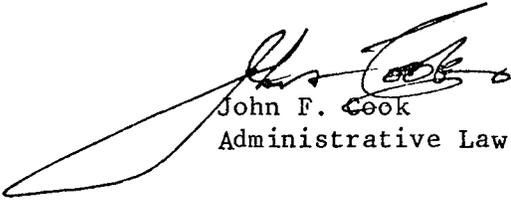
5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

MSHA submitted a posthearing brief. Counsel for the Applicant made a closing statement, but did not submit a posthearing brief. The brief and the closing statement, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

Accordingly, based on the above findings of fact and conclusions of law, the application for review is GRANTED, and Order No. 389458 is herewith VACATED.



John F. Cook
Administrative Law Judge

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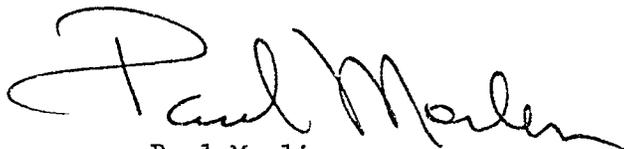
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SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 79-170
Petitioner : A/O No. 46-01383-03007
v. :
ISLAND CREEK COAL COMPANY, : Guyan No. 1 Mine
Respondent :

ORDER OF DISMISSAL

The Solicitor has filed a motion to withdraw the petition in the above-captioned proceeding. In his motion, the Solicitor advises the only citation in this petition was issued in error.

I accept the Solicitor's representations. Accordingly, the Solicitor's motion is GRANTED, and this proceeding is hereby DISMISSED.



Paul Merlin
Assistant Chief Administrative Law Judge

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