October 1983

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Commission Decisions

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

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. WEVA 82-387, (Judge Steffey, August 30, 1983).

Old Ben Coal Company v. Secretary of Labor, MSHA, Docket No. LAKE 83-50-R, (Judge Moore, August 30, 1983).

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. PENN 82-336, (Judge Broderick, September 12, 1983).

Little Sandy Coal Sales, Inc. v. Secretary of Labor, MSHA, Docket No. KENT 83-178-R, (Judge Moore, October 12, 1983).

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Co., Docket No. LAKE 83-36, (Judge Broderick, September 19, 1983).

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

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. PENN 82-321, (Judge Broderick, September 12, 1983).

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. PENN 82-337, (Judge Broderick, September 16, 1983).

Ralph Yates v. Cedar Coal Company, Docket No. WEVA 82-360-D, (Judge Broderick, September 19, 1983).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 6, 1983

KENNETH A. WIGGINS :
:
v. : Docket No. WEVA 82-300-D
:
EASTERN ASSOCIATED COAL CORP. :

ORDER

This discrimination case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1976 & Supp. V 1981). On September 6, 1983, the administrative law judge issued a "Decision on the Merits" in which he held that Eastern Associated Coal Corp. had discharged Kenneth A. Wiggins in violation of section 105(c) of the Mine Act. 30 U.S.C. §815(c). The judge did not, however, award the miner relief. Instead, "Pending a Final Order" in this case, the judge allowed the miner 15 days from the date of his decision on the merits to submit a proposed order granting relief. The judge further allowed the operator 15 days from receipt of the miner's proposed order in which to reply. On October 3, 1983, Eastern Associated filed a petition for review of the judge's September 6, 1983 decision on the merits. 1/

Section 113(d)(1) of the Mine Act (30 U.S.C. §823(d)(1)) and Commission Rule 65(a) (29 C.F.R. §2700.65(a)) require that the decision of the judge contain an order that finally disposes of the proceedings. Because the judge has not as yet issued an order granting the miner appropriate relief he has not finally disposed of the case. Thus, the issuance of his decision on the merits did not initiate the running of the statutory review period. Jurisdiction in the case remains with the judge. Campbell v. The Anaconda Co., 3 FMSHRC 2763 (December 1981); McCoy v. Crescent Coal Co., 3 FMSHRC 2475 (November 1981).

1/ The petition was styled, "Respondent's Petition for Interlocutory Review or in the Alternative for Discretionary Review." We read the petition as one for discretionary review. To the extent that it is intended as a petition for interlocutory review, it is denied.

Accordingly, the petition for review is dismissed as premature. The parties may file petitions for discretionary review in accordance with section 113 of the Mine Act and Commission Rule 70 (29 C.F.R. §2700.70) once the judge has issued an order finally disposing of this proceeding.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1983

RUSSELL COLLINS AND VIRGIL KELLEY	:	
	:	
v.	:	Docket No. EAJ 83-1
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

The motion filed by counsel for Russell Collins and Virgil Kelley for permission to withdraw their petition for discretionary review in this matter is granted. Accordingly, our direction for review issued on September 2, 1983, is hereby vacated and the administrative law judge's decision stands as the final Commission order in this proceeding.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

83-10-15

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 80-216
SOUTHWESTERN ILLINOIS COAL CORPORATION	:	

DECISION

In this civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), we are called upon to interpret the phrase "shall be required to wear ... safety belts and lines" in the surface coal protective clothing standard, 30 C.F.R. § 77.1710(g). 1/ The Department of Interior's Board of Mine Operations

1/ Section 77.1710 provides:

> 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:
>
> (a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.
>
> (b) Suitable protective clothing to cover the entire body when handling corrosive or toxic substances or other materials which might cause injury to the skin.
>
> (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.
>
> (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.
>
> (e) Suitable protective footwear.
>
> (f) Snug-fitting clothing when working around moving machinery or equipment.
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
>
> (h) Lifejackets or belts where there is danger from falling into water.
>
> (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.

(Emphasis added.)

Appeals held that the identical phrase in the underground coal protective clothing standard imposed on operators the duty to "establish a safety system designed to assure that employees wear [the clothing or equipment] on appropriate occasions" and to "enforce such system with due diligence." North American Coal Corp., 3 IBMA 93, 107 (1974). In his decision below, the Commission administrative law judge found North American analogously persuasive, concluded that the operator had satisfied the North American criteria, and vacated the citation. 3 FMSHRC 871 (April 1981)(ALJ). We approve the judge's adoption of the North American construction, but reverse his finding that the operator satisfied the North American criteria. We conclude that the facts show a violation, and remand for assessment of penalty.

On November 5, 1979, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) issued a citation to Southwestern Illinois Coal Corporation alleging a violation of section 77.1710(g) at Southwestern's Captain Strip Mine in Illinois. The inspector issued the citation when he observed a miner working alone without a safety belt and line on a large stripping shovel where the inspector believed there was a danger of falling.

The miner, assigned to work as the shovel groundman, was repairing a broken grease line on the end of one of the shovel's steering arms. He was kneeling at the place where the arm was joined at right angles to the shovel's steering cylinder. (The steering arm and cylinder functioned together to turn one of the tracked crawlers on which the shovel traveled.) The miner's immediate work location was approximately two feet wide and 12 to 15 feet off the ground. 3 FMSHRC at 873, 875, 878; Tr. 16-17, 72-75, 87, 89-90; Pet. Exh. No. 2. There were no guardrails or similar protective devices on the steering arm or cylinder. As the inspector approached, the miner walked down the steering arm to the crawler tracks and off the machine. The inspector spoke with the miner about the use of a safety belt and a line, and the miner offered no explanation as to why he had not been using them.

At the time of the citation, the shovel was not being used for stripping, although its power was on. The shovel had an automatic leveling mechanism that periodically moved the machine, including the steering arm, to level positions. Safety belts were kept on the shovel. According to Southwestern's safety director at the Captain Mine, these belts were intended for "the men to use if they are going to get in an area [on the shovel] where they think there is a danger of falling." Tr. 77.

A few days after the MSHA citation, the safety director issued the miner a safety violation for working in an "elevated work position without wearing a safety belt" in violation of federal, state, and company rules. The violation was charged to the miner pursuant to Southwestern's program of progressive discipline for violations of safety rules. This program was contained in Southwestern's safety booklet issued to all employees.

The booklet included specific rules requiring the wearing of safety belts and lines. 2/

At the hearing, the inspector testified that he believed there was a danger of falling, within the meaning of section 77.1710(g), in the area where the miner was working without a belt. The inspector based this conclusion on his observations that the work area was elevated, small, and unguarded, that grease was likely to accumulate there, and that the machine could move while the miner was working. Southwestern's overall director of safety and training testified that the decision whether to wear a belt in a particular situation was largely up to the miner himself. He agreed that, if the facts were as the inspector testified, there was a danger of falling where the miner was working and he should have been wearing a belt.

The judge adopted and applied North American, supra. He thus interpreted the phrase "shall be required to wear" to mean only that operators must require belts to be worn, not that operators must insure absolutely that they are worn. On this basis, the judge concluded that Southwestern passed the North American test. He relied on the facts that a safety belt was available on the shovel, that Southwestern had promulgated safety rules requiring miners to wear the belts, and that the company enforced its rules by disciplining violators. In light of these determinations, the judge vacated the citation.

We first construe the phrase "shall be required to wear." In North American, the Board interpreted the identical phrase in the underground coal protective clothing standard, 30 C.F.R. § 75.1720(a). 3/ Although a failure to wear safety goggles was the specific issue in that case, the more significant focus of the North American decision was on the general meaning of "shall be required to wear." The Board concluded that these words meant only that operators must (1) establish a safety system requiring the wearing of the clothing or equipment and (2) enforce

---

2/ The safety booklet contained two rules concerning safety belts and lines:

> Safety belts and lanyards shall be worn if necessary.
>
> Safety belts and lines shall be worn at all times where there is a danger of falling. If belts or lines present a greater hazard or are impractical, notify your supervisor so that alternative precautions are taken.

Res. Exh. No. 1, Section VII, Rules 8 & 9, p. 8.

From the time of the safety booklet's publication in 1978 to the hearing, Southwestern issued approximately 50 safety violations, three of which (including the one issued to the miner) involved safety belt infractions. The majority of the 50 violations were first warnings.

3/ Like the surface standard at issue in this case, section 75.1720 begins by providing that "each miner ... shall be required to wear the following protective clothing and devices" (emphasis added), and then lists the covered items in a number of subsections.

the system diligently. 3 IBMA at 107. The intended effect of this construction was that if a failure to wear the protective clothing and equipment was "entirely the result of the employee's disobedience or negligence rather than a lack of requirement by the operator to wear them, then a violation has not occurred" (emphasis added). Id. 4/ We agree with the judge that the North American construction is the natural reading of the words in issue.

The regulation does not state that the operator must guarantee that belts and safety lines are actually worn, but rather says only that each employee shall be required to wear them. The plain meaning of "require" is to ask for, call for, or demand that something be done. See Webster's Third New International Dictionary (Unabridged) 1929 (1971). Accordingly, when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation. We respectfully disagree with our dissenting colleagues that "shall be required to wear" means "shall be worn." The two phrases are not the same, and we do not find persuasive a reading that converts a duty to require into a duty to guarantee. Certainly, the purpose of the standard is to protect miners, but the standard as written provides for that protection by directing that operators require the belts to be worn.

The Secretary of Labor argues through counsel that the regulation should be read as if the words "shall be worn" are contained in the regulation. If the Secretary wanted that phrase to obtain we are constrained to ask why he did not make the appropriate changes nine years ago when North American was issued. To tell us now that "shall be required" is the same as, or stronger than, "shall be worn" is an assertion that cannot be squared with the Secretary's understanding of North American. Further, the words "shall be worn" are used in other regulations promulgated by the Secretary. 5/ In effect, the Secretary is asking us to amend the regulation, but amendment is his province, not ours. The Commission is an independent adjudicatory agency that provides trial and appellate review under the Mine Act.

Our holding is restricted to the language of this standard, and does not create an employee disobedience or negligence exception to the liability without fault structure of the Mine Act. Our concern is only with the duty of care imposed by this one regulation and, as indicated above, we hold that the duty is one of requirement diligently enforced, not guarantee.

4/ After the issuance of North American, some discerned in the decision a recognition of a general employee disobedience and negligence exception to the liability without fault structure of the 1969 Coal Act. The Board itself repudiated that reading of the decision and any such exception to the liability scheme of the 1969 Coal Act (Webster County Coal Corp., 7 IBMA 264, 267-68 (1977)), and we have done the same. Nacco Mining Co., 3 FMSHRC 848, 849 & n. 3 (April 1981).

5/ The metal and nonmetal personal protection standards dealing with safety belts and lines use the phrase, "shall be worn." 30 C.F.R. §§ 55.15-5, 56.15-5 and 57.15-5.

We also conclude, however, that the judge erred in finding that Southwestern satisfied the North American criteria. Although Southwestern had safety rules requiring the wearing of belts and provided some general training on the subject, the record does not show sufficiently specific and diligent enforcement of that requirement.

As noted in the summary of facts above, Southwestern's general director of safety and training testified that the decision whether to wear a belt was largely up to the miner himself. At oral argument before the Commission, Southwestern's counsel reinforced this point by stating that the use of a safety belt in any given situation at the mine was "optional" with the employee. The general safety director also testified that there were no signs at the mine reminding employees to wear belts, and conceded that no safety analysis had been conducted or directives issued to identify specific working situations where belts should be worn. We do not suggest that the operator necessarily had to engage in any one of these steps to satisfy its responsibilities under the standard, but we find a virtual absence of any specific guidelines and supervision on the subject of actual fall dangers.

In sum, the evidence reveals that the wearing of belts was delegated to the discretion of each employee, with only general guidance at best. As a matter of law and evidence, this falls short of demonstrating due diligence in enforcement. It is important to note in contrast, in the North American case, that the operator had a more specific program aimed at avoiding the particular hazard through prominent signs and constant verbal warnings and reinforcement of safety considerations. 3 IBMA at 107-08.

Regarding the incident that led to the citation, there is no dispute that the miner was working unsupervised on an elevated platform without a belt and line. The evidence also clearly shows that there was a danger of falling. 6/ The decision not to wear the belt was made by the miner, but

6/ The miner's work platform was only about two feet wide and 12 to 15 feet off the ground. This was an area where grease lines and fittings were located, and as the inspector testified it was likely that grease would accumulate there causing a slippery surface. The shovel's power was on, and it also had an automatic leveling device that could move the steering arm on which the miner was working. Thus, the machine could have moved during his work. Applying the analogous test we recently adopted in Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983), to assess fall dangers under a metal and nonmetal personal protection standard (30 C.F.R. § 57.15-5), we conclude that an informed, reasonably prudent person would have recognized a danger of falling under these circumstances. The mine's safety director initially testified that he had measured the work area to be about four feet wide; however, he subsequently conceded that he incorrectly made his measurements further back on the steering arm. He also testified, without explanation, that he did not believe there was a danger of falling where the miner was working. The facts summarized above do not support this opinion.

it represented an exercise of the wide discretion expressly permitted him under Southwestern's decentralized, non-specific safety belt program. Accordingly, the failure to wear the belt in this instance was attributable to the operator's failure to enforce diligently its belt requirements, and constituted a violation of the standard.

For the foregoing reasons, we approve the judge's adoption of the North American interpretation of section 77.1710(g), but conclude that Southwestern nevertheless violated the standard so construed. We remand for determination of an appropriate penalty.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

Frank F. Jestrab specially concurring in result:

I agree with the majority of the Commission that the judge should be reversed.

I understand the learned majority of the Commission to base their decision on the so-called North American defense set forth by the Board of Mine Operations Appeals wherein it was held that an "identical" phrase "shall be required to wear" required the employer to establish a safety system "requiring the wearing of clothing or equipment and enforce such system diligently." My colleagues further state that "shall be required to wear" and "shall be worn" are not the same and they "do not find persuasive a reading that converts a duty to require into a duty to guarantee." From this I apprehend that we would all agree, as we have in the past, that if the pivotal phrase was "shall be worn," North American would not apply and the operator's safety program and its efforts to enforce it would be irrelevant to the finding of a violation. U.S. Steel Corporation, 1 FMSHRC 1306, 1307 (1979).

With all deference and respect to the majority, I am not satisfied that there is any distinction in the duty imposed on the operator under the Mine Act by the phrase "shall be required to wear..." and the simple "shall be worn." However, I do not reach the question of the meaning of "shall be required to wear" in this case because as I read the regulation it is not the applicable verb phrase for the subsection which was cited for the violation. Whether the duty imposed is a duty to enforce a program (shall be required to wear) or a duty imposing liability without fault (shall be worn), we agree that the operator has not satisfied his duty in this case and that the decision of the administrative law judge should be reversed. I concur in that result, but I base my decision on narrower grounds.

It seems to me that our first assignment is to interpret the regulation at § 77.1710 1/. The initial clause of subsection (g), which

1/ § 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:

(a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

(b) Suitable protective clothing to cover the entire body when handling corrosive or toxic substances or other materials which might cause injury to the skin.

(c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

(Footnote continued)

was cited here, contains no independent verb. The appropriate verb, which must be supplied by reference is, in my view, the last preceding verb in the series, which is found not in the preamble to the regulation as the majority suggests, but rather in subsection (a). The verb phrase in subsection (a) is shall be worn. 2/ Further, a proper verb form must agree with other verbs in the same subsection and in the second clause in subsection (g), it is provided that a person shall tend the lifeline. It does not say "shall be required" to tend. If I am correct, and I believe that I am, then North American has no relevance to this case and the operator's duty here is a duty imposing liability without fault. 3/ U.S. Steel Corporation, supra, and Mid-Continent Coal and Coke Co., supra at n. 2.

Second, it is well established that the Mine Act imposes liability without fault upon operators. Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), A. H. Smith Stone Company, 5 FMSHRC 13 (1983). The authority which Congress delegated to the Secretary of Labor carries with it the responsibility to promulgate regulations which mirror the concept of

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fn. 1/ continued

> (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, non-metallic based paint shall be used.
> (e) Suitable protective footwear.
> (f) Snug-fitting clothing when working around moving machinery or equipment.
> (g) Safety belts and lines [shall be worn] where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
> (h) Lifejackets or belts where there is danger of falling into water.
> (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided. (Emphasis mine. Phrase in brackets also mine, supplied by relation back to subsection (a) to illustrate how I read (g).)

2/ Upon previous examination of subsection (a) of 30 C.F.R. § 77.1710 the Commission interpreted the phrase "shall be worn" according to its literal meaning, Mid-Continent Coal and Coke Co., 3 FMSHRC 2502, 2506 (1981). See U.S. Steel Corporation, supra.

3/ For the record, the regulation at issue here is not the same as the regulation cited in North American. That regulation is 30 C.F.R. § 75.1720, of which subsection (a) was cited. Note that there is no verb in subsection (a) and to supply one it is necessary to relate back to the last, preceding verb which is "shall be required to wear", appearing in

(Footnote continued)

liability without fault--that is, regulations with which compliance is mandatory. It seems clear to me that the regulation at issue does just that; the wearing of personal protective equipment is mandated and if it is not worn, the operator is liable. We have no power to create exceptions to liability without fault which have not been placed in the Act by Congress. U.S. v. Atchison T. & S.F.Ry Co., 156 F.2d 457 (9th Cir. 1946).

In this case the operator's employees were observed without the protective equipment required by 30 C.F.R. § 77.1710(g)--safety belts and lines--where there was a danger of falling. For the reasons set forth above, I believe this constitutes a violation of that regulation and I concur with the result reached by my colleagues in the majority that the administrative law judge should be reversed and a violation found.

Frank F. Jestrab, Commissioner

fn. 3/ continued

the preamble. Nowhere in the regulation does the verb phrase "shall be worn" appear:

> § 75.1720 Protective clothing; requirements.
> On and after the effective date of this § 75.1720 each miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:
> (a) Protective clothing or equipment and face-shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles.
> (b) Suitable protective clothing to cover those parts of the body exposed to injury when handling corrosive or toxic substances or other materials which might cause injury to the skin.
> (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.
> (d) A suitable hard hat or hard cap. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.
> (e) Suitable protective footwear.
> (Emphasis Mine)

Commissioner Lawson concurring and dissenting:

I join with my colleagues in finding a violation and that the judge below must be reversed. I disagree with their interpretation of the phrase "shall be required to wear," as set forth in 30 C.F.R. 77.1710(g). That interpretation is not only contrary to the common usage of "require," but creates an internal contradiction within section 30 C.F.R. 77.1710 itself, forestalling the application of uniform safety practices and protection in the mining industry. Indeed, their definition is significantly--and selectively--less inclusive than that found in Black's Law Dictionary (5th ed.) (p. 1172), which defines "require," inter alia. to mean "compel ... command," certainly not precatory terms.

Subsections (a) and (c) of this standard delineate which protective clothing "shall be worn," or "shall not be worn." There is no indication that creation of a third category of protective clothing, which "shall be worn if directed to do so by the operator," is or was intended. It is evident that the only purpose of 77.1710(g) is to insure or guarantee that safety belts must be worn "where there is danger of falling." The miner is not protected when there is a danger of falling unless he is actually wearing a safety belt; the wearing of that belt is therefore what the standard requires.

This interpretation is confirmed by the language of regulation 30 C.F.R. 77.403a(g), to cite but one example. The Secretary has construed "shall be required to wear" to mean "shall be worn" in 30 C.F.R. 77.403a(g). That standard provides that:

> Seat belts required by 77.1710(i) shall be worn by the operator of mobile equipment required to be equipped by ROPS (roll over protection structures) by 77.403(a). (Emphasis supplied.)

The core sense of "require" is to mandate, not exhort--that which is required, shall be done. See Mississippi River Fuel Corp. v. Slayton et al, 359 F.2d 106, 119 (8th Cir. 1966): "Required" implies something mandatory, not something permitted by agreement."

As the Secretary persuasively points out, the phrase, "shall be required," emphasizes that it is the duty of the operator to insure the wearing of safety belts and lines, and that breaching that duty is a violation of the Act. This construction carries out the purpose of the Act by expressing the standard's sole purpose: to protect miners from the danger of falls. Although it appears unnecessary of repetition, regardless of the existence of even a diligently enforced company rule, a miner is not protected from the danger of falling unless he is actually wearing a safety belt. There is no meaningful, nor even semantically persuasive distinction, between "shall be required to wear" and "shall be worn."

Moreover, to find that "required" means only "direct" would effectively vitiate not only this standard, but a multitude of other regulations. The word "require" or "required" is used no less than thirty-nine times in part 77 of 30 C.F.R. alone. 1/ If "required" means only to "direct," as contended by the majority, then the commands of Part 77, as well as several other sections of 30 C.F.R., would be rendered nugatory, rather than compelling that a named protection or action is to be taken to assure miners' health and safety.

Pursuing the majority's reasoning would result in ridiculous constructions. See for example, 30 C.F.R. 75.313, which states that "the Secretary shall require such monitor to deenergize automatically...." Substituting "direct" for "require," as does the majority here, would necessitate direction being given to an inanimate object--an absurd result. The word "require" or "required" is a mandate to the operator to guarantee that a methane monitor will deenergize automatically, as in section 75.313, and that safety belts shall be worn, as set forth in section 77.1710. 2/

Adopting the majority's test would thus be an invitation to an operator, despite the fact that its miners are being subjected to safety and health hazards, to avoid responsibility merely by demonstrating that it has established a safety and health program under which miners are told to wear safety belts. Uniform safety practices and protection throughout the mining industry, 3/ absent clearly defined exceptions, are the obvious goal of the Act and these regulations.

This interpretation is congruent with those final--and absolute--responsibilities placed upon the operator by the Act to prevent safety and health hazards to miners, including forestalling employees from engaging in unsafe and unhealthful activities. 30 U.S.C. § 801(e) and 30 U.S.C. § 811(a)(7).

1/ A complete review of all of the six hundred eighty-eight pages of 30 C.F.R. (Part 0-199) has not been made.

2/ Section 77.1710 is titled: "Protective Clothing, Requirements." (Emphasis supplied) Certainly this title does not suggest "directions" to miners. To the contrary, it means requirements imposed on the operator.

3/ I agree with my colleague Commissioner Jestrab, for the reasons he stated, that the authority which Congress delegated to the Secretary of Labor carries with it the responsibility to promulgate regulations which mirror the concept of liability without fault. Neither the Secretary nor this Commission has any authority to interject exceptions. Slip op. at 8-9. As is well established, if a miner, despite an operator's best efforts, negligently or disobediently fails to wear a belt, the operator's efforts toward enforcement, or lack of negligence can be considered in assessment of a penalty. Nacco Mining Co., 3 FMSHRC 848, 850 (1981).

The Secretary's safety belt standards for other than coal mining operations all use the phrase "shall be worn." 4/ There is no indication, nor any reason to suppose, the Secretary intended a dichotomous scheme of protection from dangerous falls for coal miners and other miners. It is difficult, to understate the case considerably, to meaningfully distinguish between a fall in a coal mine, and one occurring in a noncoal mine. To the contrary, uniform regulation of such common safety problems best serves the interests of the miner and the industry.

Finally, the majority's construction of applicable precedent is also deficient. The dicta relied upon from North American represents the views only of the Board of Mine Operations Appeals (BMOA), (a non-independent body subordinate to the Secretary of the Interior) then charged with the contradictory responsibilities of maximizing coal production, and enforcing mine safety. Legis. Hist. 998, 1011, 1154-55. Moreover, even the BMOA, in Webster County Coal Corp., 7 IBMA 264, 267-68 (1977) retreated from, if indeed it did not invalidate, its prior North American dicta. Nor has the Secretary of Labor, since passage of the Mine Act, taken other than a consistent position, as advanced by him in this case.

More relevantly, and more recently, this Commission held--unanimously--that "to the extent that these dicta suggest an exception to the liability without fault structure of the 1969 Coal Act, they are out of line with, and do not survive, the well established precedents cited above." Nacco Mining Co., supra, 849, n.3. See also Pocahontas Coal Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979); El Paso Rock Quarries, 3 FMSHRC 35, 38-39 (1981); Ace Drilling Coal Co., Inc., 2 FMSHRC 790 (1980); aff'd mem., (3rd Cir. No. 80-1750, Jan. 23, 1981); Peabody Coal Co., 1 FMSHRC 1494, 1495 (1979); United States Steel Corp., 1 FMSHRC 1306, 1307 (1979); Ruston Mining Co., 8 IBMA 255, 259-60 (1978), and Valley Camp Coal Co., 1 IBMA 196 (1972).

In summary, there is no exception to the present liability without fault mandate of the Mine Act, nor it would appear did any survive, even as dicta, the passing of the Board of Mine Operations Appeals. The economic incentive provided by this keystone of the 1977 Act would obviously be undercut, if, as the majority now proposes, the law is to be changed, and only if the operator is negligent in monitoring his "safety program", is liability to be imposed. As has been often noted, both under this Act and elsewhere, this Commission must be "guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." Tcherepnin v. Knight 389 U.S. 332, 336 (1967). The Mine Act and the safety standards promulgated under the Act clearly constitute remedial legislation. As the United States Court of Appeals for the Third Circuit stated:

4/ 30 C.F.R. §§ 55.15-5 (metal open pit), 56-15-5 (sand and gravel), and 57.15-5 (metal underground), provide that "Safety belts and lines shall be worn when men work where there is a danger of falling."

> The statute we are called upon to interpret is the out-growth of a long history of major disasters in * * * mines * * *. [I]n construing safety or remedial legislation narrow or limited construction is to be eschewed. Rather, in this field liberal construction in light of the prime purpose of the legislation is to be employed. [Citations omitted.]

St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959).

I agree with the majority that the evidence clearly shows that the miner was not wearing a safety belt, and that there was a danger of falling. Accordingly, for the reasons stated above, I conclude that Southwestern violated 30 C.F.R. § 1710(g) and would remand for determination of an appropriate penalty.

A. E. Lawson, Commissioner

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 3 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 82-20-M A.C. No. 08-00551-05009
v.	:	Port Sutton
INTERNATIONAL MINERALS & CHEMICAL CORP., Respondent	:	

DECISION

Appearances: Ken W. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
William B. deMeza, Esq., Holland & Knight, Bradenton, Florida, and Howard E. Post., Esq., International Minerals Corporation, Northbrook, Illinois, for Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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), seeking civil penalty assessments for two alleged violations of the mandatory noise standards found at 30 CFR 55.50(b). Respondent filed a timely answer and a hearing was convened in Tampa, Florida, on June 7, 1983. The posthearing arguments and proposed findings and conclusions filed by the parties have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and the implementing regulatory standard as alleged in the proposal for assessment of civil penalties, and, if so, (2) the appropriate civil penalties to be assessed against the respondent for the

alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues concerning engineering or administrative feasibility for compliance are identified and discussed herein.

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

Applicable Statutory and Regulatory Provisions

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

2. Mandatory standard 30 CFR 55.5-50, provides as follows:

> 55.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971. "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

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

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

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

If the sum

$$(C_1/T_1) + (C_2/T_2) + \ldots (C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\log T = 6.322 - 0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

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

Stipulations

The parties stipulated to the following (Tr. 7-9):

1. Respondent's products affect commerce and respondent is subject to the Act.

2. Respondent's gross business revenues for the fiscal year 1982 were in excess of one billion dollars, and the penalties proposed for the citations in question will not affect the respondent's ability to remain in business.

3. Respondent's history of prior citations is that stated in MSHA's computer print-out, exhibit P-1.

Discussion

Section 104(a) Citation No. 094927, November 26, 1980, cites an alleged violation of 30 CFR 55.5-50, and the condition or practice described by MSHA Inspector Arthur McLaughlin states:

> The car unloader was exposed to 2.01 times the permissible limit for noise for a full shift. Hearing protection was not being worn and all feasible engineering or administrative controls were not being utilized.

The inspector fixed the initial abatement time as December 1, 1980, and on December 3, 1980, he extended the abatement time to January 2, 1981, and noted as follows:

> Ear protection was being worn. Citation No. 094927 is modified from 55.5-50 to 55.5-50(b), which requires the development and installation of feasible engineering controls. The citation termination due date is also extended to 1-2-81 to allow time to implement control measures. Hearing protection shall be worn until the noise levels are reduced to permissible limits.

On January 13, 1981, the inspector extended the abatement further to February 13, 1981, and he noted as follows:

> Various noise control measures have been tried, but were not satisfactory. The problem had been referred to the engineering dept. The extension is granted to allow time for the engineering dept. to develop a control measure.

On March 9, 1981, the inspector extended the abatement time to May 15, 1981, and he noted the following:

> Citation 0094927 is extended to May 15, 1981 to allow MSHA's Pittsburgh Technical Support Center ample time to evaluate the noise problem and make a determination as to whether or not feasible engineering controls are available.

On May 27, 1981, the abatement time was further extended, and Inspector Charles D. Cox noted the following:

> This citation is extended as additional time is needed for feasible engineering studies by MSHA technical support group.

The abatement time was further extended by Inspector Cox on July 7, 1981, to August 10, 1981, for the reasons stated immediately above. Thereafter, on September 1, 1981 he terminated the citation for the following reasons:

> This citation is terminated pending development of additional means of noise attenuation on this equipment which may be required at a later date. In the meantime, suitable protective hearing equipment shall be worn when persons are exposed to this noise source.

Inspector McLaughlin issued a second section 104(a) Citation No. 094928, on November 26, 1980, citing a violation of 30 CFR 55.5-50, and the condition or practice is described as follows:

> The car unloader was exposed to 2.03 times the permissible limit for noise for a full shift. Hearing protection was not being worn and all feasible engineering or administrative controls were not being utilized.

Inspector McLaughlin modified the citation to reflect a citation to section 55.5-50(b), and both he and Inspector Cox extended the abatement times to and including August 1, 1981, and the reasons for these actions are the same as those noted above in connection with Citation No. 094927. On September 1, 1981, Inspector Cox terminated Citation No. 094928, for the same reasons that he terminated the previous citation.

Petitioner's proposal for assessment of civil penalties in this case was filed on December 21, 1981, and it asserts that respondent operates a mine at Hillsborough County, Florida, "which produces phosphate and its miners handle or otherwise work with and on goods, materials, supplies and equipment produced at or destined for points outside the State of Florida".

Respondent's answer was filed on January 18, 1982, and respondent does not dispute MSHA's jurisdictional assertion. With regard to the alleged violations, respondent's answer states the following defenses:

> a) there are no feasible administrative or engineering controls to reduce the noise level in the area referred to in the citations;
>
> b) the conduct described in the Citation is not in violation of the cited standard in

that Respondent has utilized several methods to reduce the noise level but they have all proved ineffective and, in compliance with the cited standard, Respondent provides and requires miners to wear personal protective equipment when working in the area referred to in the Citation;

c) the conduct described in the Citation was the result of unpreventable employee misconduct;

d) the condition described in the Citation is not such that it would significantly and substantially contribute to the cause and effect of a mine safety and health hazard;

e) the existence of the alleged condition was not the result of an unwarranted failure to comply with the cited standard.

MSHA's testimony and evidence

MSHA Inspector Arthur McLaughlin confirmed that he conducted an inspection at the respondent's phosphate plant on November 25, 1980, and he was accompanied by union and company representatives. He also confirmed that he issued two noise citations after determining that the noise exposure for two employees working in the plant railroad dumping building exceeded the required levels. He described the cited work location as an open-ended building about 100 feet long and 40 feet wide with a railroad track down the middle and an open grated floor below for the dumping of the mined materials which are transported to the building by railroad cars and dumped below and through the grated floor to a conveyor belt (Tr 12-17).

Mr. McLaughlin stated that the two workmen stationed in the work area use pneumatic wrenches to open the gates located at the bottom of the railroad cars, and that the men are on opposite sides of the car during the dumping process. He observed that the men were not wearing ear protection devices, and since the work area was loud, he concluded that the men were probably over-exposed to noise and he confirmed this preliminary "noise screening" by use of a sound millimeter. He returned to the plant the next day, November 26, 1980, to conduct a full noise compliance survey. He confirmed that he calibrated and checked his noise and sound level dosimeters, which he described as a General Radio Type 2, 1954, sound level meter, and installed the dosimeters on the two workmen. He sampled them for a little over seven hours and found that they were both over-exposed, and both were exposed to 95

decibles. His sound level meter readings were 103 for one man and 102 for the other, and neither man was wearing any ear protection on November 26. Mr. McLaughlin believed that the primary noise source was the pneumatic wrench when it was engaged to the railroad car door opening fitting (Tr. 17-23).

On cross-examination, Mr. McLaughlin stated that he performed no tests to differentiate the various noise sources present in the loading area in question, and he confirmed that he could not have made such tests with the equipment he had on the day of the inspection. He also confirmed that when he conducted the noise tests he did not have the two employees under continuous observation and he could not state whether the dosimeters were tampered with during the testing period (Tr. 23-26).

In response to bench questions, Mr. McLaughlin confirmed that had the cited workers worked only four hours they would have been in compliance, and he indicated that the dosimeter only registers noise levels in excess of 90 dBA's. He also confirmed that it was respondent's policy to make ear protection available to employees, but he did not know whether the cited employees were ever supplied with such ear protection, and he did not ask them (Tr. 27-28).

Mr. McLaughlin was of the view that in order to comply with section 55.5-50, a mine operator should conduct noise surveys, locate any problems, and then attempt to solve them. He believes that a 90 dBA noise limit is workable, and that for every 3 decibles of noise reduction, sound pressure diminishes by 50%. He confirmed that he would have issued the citations even if the two men had been wearing ear protection, and he would have cited the respondent for not using engineering controls to reduce the noise levels (Tr. 32).

Mr. McLaughlin stated that he recommended to the respondent that a barrier or acoustical wrapping with sound absorption materials be used to reduce the wrench noise. His recommendation that personal ear protection be supplied immediately was followed by the respondent (Tr. 33). He confirmed that the wrench operators work on both sides of the cars simultaneously, that they are exposed to the noise from each other's wrench, and when there is no unloading going on they would simply sit in the car unloading area (Tr. 34-35).

Mr. McLaughlin indicated that while the car shaker is another noise source, it is operated from a control booth and is insulated from noise level above 90 dBA's. He confirmed that the workers at the car unloading area worked eight hour shifts, three shifts a day, seven days a week, and that two

persons worked each shift. He did not sample other car unloader workers, and indicated that noncompliance on one shift would be inferred as noncompliance on the other shifts (Tr. 36). He estimated that 50 cars were unloaded on any given day and he had no reason to suspect that the pneumatic wrenches were out of compliance prior to the day of his inspection. He confirmed that the noise problems at the plant were isolated to the car unloading area, and he believed that the fact that the respondent installed insulation and a control booth to reduce the car shaker noise levels indicated that the respondent was aware of the fact that a noise problem existed (Tr. 38). Mr. McLaughlin indicated that he did not return to the plant after the citations were issued except for the purpose of extending the abatement times, and he believed that the wrenches in question were still being used (Tr. 39).

In response to further questions, Mr. McLaughlin stated that he saw no noise controls installed on the wrenches during the time he was at the plant and he did not observe the car shaker in operation. He had no actual knowledge of the number of daily car trips to the plant, and believed that all of the cars were of uniform size and construction. He was not aware of any additional noise citations at the plant since 1980 (Tr. 40-41).

Jerry W. Antel, Engineering Technician, MSHA's Physical Agents Branch, testified as to his background and experience in the field of noise and noise surveys, and he indicated that the purposes of such surveys is to identify noise sources and to make recommendations for noise reductions. He confirmed that he visited the respondent's Port Sutton Plant in April 1981 and May 1982, and that he did so at the request of MSHA's local field office. He confirmed that he conducted his noise survey at the metal building where the locomotive cars enter on a rail line to be unloaded onto a belt system which conveys the mined materials into the plant, and his mission was to investigate the cited pneumatic wrench noise and to make recommendations for improvements. During his April visit he observed two workers in the unloading area, and the locomotive operator was also present (Tr. 42-47).

Mr. Antel stated that during the April visit he observed dust collectors on one side if the unloading building, and car shakers mounted on the other. After calibrating the dosimeters, he placed them on the two workers, and he explained the procedures and the results of his survey (Tr. 47-51). He confirmed that the primary noise source was the pneumatic wrench which was used during the loading and unloading of the railroad cars (Tr. 51). He stated that the sound level meter readings during the opening of the cars was in the range

of 107 to 108 dBA, and 108 to 109 dBA during closing. The tape recordings revealed 104 to 105 dBA during opening, and 106 dBA in closing. The recordings also showed that when the wrench was running disengaged there were definite peaks in the mid-frequency, speech range of 500 hertz, 1000 hertz, 200 hertz. However, when the wrench was engaged, other areas came into play which flattened off this spectrum. There were no primary peaks. He identified exhibit no. 6 as the report he prepared on the first visit in April and he suggested an enclosure be constructed around the body of the wrench to muffle both the exhaust noise and the noise radiating from the wrench body. He also recommended a flat box be fitted over the chuck to deflect noise downward. In addition, he recommended three administrative controls. One, that the men should usually leave the area when cars came through; two, that the tram whistle should not be blown unless necessary; and three, that the flagmen generally avoid riding in the locomotive cab (Tr. 52-55).

Mr. Antel identified exhibit P-7 as some instructions for the construction of a wraparound muffler for the reduction of noise on the wrench in question, and he confirmed that this was part of his recommendations for reducing the noise on the wrench. He also indicated that the wraparound device was commercially available from the EAR Corporation in Indianapolis, and he believed that the use of this device would lead to a minimum 5 db reduction in noise, and that the device would cost about $65 in material and installation, and could be installed by one man in one day (Tr. 57). He also was of the view that the installation of this wraparound device would not lead to any maintenance or utilization problems, and he stated that he had installed the device on other pneumatic drills (Tr. 58-59).

With regard to his second visit in May 1982, Mr. Antel confirmed that he took note of the noise controls which the respondent installed on the wrenches in question. These included modifications to the wrenches by the installation of sheet steel barrier lines with acoustical foam to shield the wrench operators from the noise and a hose muffler attached at the exhaust end of the wrench to cut down the noise (Tr. 59-60). Mr. Antel identified certain photographs which he took during both of his visits, and they include the wrench before and after the acoustical treatment or improvements (exhibits P-5 and P-8).

Mr. Antel stated that the noise control improvements made by the respondent did not correspond to those which he had recommended, and using the same sample equipment he used during his April 1981

visit, he sampled the worker using the treated wrench and read an exposure of 192%, or 95 dBA over an eight hour sampling cycle, and an exposure of 453%, or 101 dBA, from the worker using such a wrench. The sound level meter indicated readings of 104, 106 dBA's for the untreated wrench, and 102 and 104 dba's for the treated wrench (Tr. 65).

Mr. Antel stated that he observed the utilization of the modified wrench for the entire shift on the second day of the visit. He estimated the noise controls reduced exposure by 5 dB's and noticed that the operator experienced minor difficulties in engagging the wrench because of the flap. He neither noticed nor was informed of any resulting maintenance problems. He approximated the material cost of IMC's improvements at $95 to $100, and the installation time to be one day. He considered the 5 dB reduction significant because it could increase the operation time of the equipment by two fold, and represented nearly 75% of the sound tolerance. Mr. Antel also related that MSHA's offer that a wrench be shiped to MSHA in Pittsburgh, to be modified and tested at MSHA's expense, with the respondent responsible for shipping, was rejected by the respondent (Tr. 66-69).

On cross examination, Mr. Antel conceded that some additional noise generated from the chucks engaged in the car and from the car itself, but that he did not "isolate or quantify" these other noise sources. He also conceded that the railroad cars were of varying sizes and construction, and he did not believe he had tested the treated and untreated wrenches on the same car door. Thus, the testing would not reflect variations between the wrenches nor between different types of cars. Of an estimated 50 cars that were opened and closed, he took measurements of ten to fifteen (Tr. 69-72).

Mr. Antel confirmed that the noise exposure indices for the two untreated wrenches for the full shift noted in the citations were 201% and 203%, and he noted that in his report of July 12, 1982 (exhibit P-9), he found under a similar situation that the untreated wrench generated noise at a level 453% of the permissible dosage. He explained the discrepancy in the test results as follows (Tr. 73-74):

> A. I believe that can be accounted for due to the variables, not only in the types of cars, but also in the number of cars that, in which the wrench is used. If I could refer back to my first visit, we witnessed about fifty cars, fifty-two cars that were being unloaded that day, but only on about half of these the wrench was used. And the other

half, they were used, the bar was used to open it. So certainly that would influence the exposures, the number of times the wrench was used.

Q. Then you are suggesting that to compare those two numbers is improper?

A. I am saying that one day might vary from another day, depending on the number of cars they are opening.

Q. You are suggesting then that those figures are invalid?

A. No, I am saying that those figures were valid for that day.

Q. You only tested them one day? On the follow-up visit?

A. The follow-up visit we did one full shift, sir.

Mr. Antel did not know how many days per month cars were normally unloaded, nor how many hours employees were exposed to the wrench noise, and therefore could not give a professional estimate as to the magnitude of potential harm to the employees. He agreed that a hypothetical wrench flap which obscured the operator's view of the connection points, or which had to be kicked into position, or an exhaust muffler which, because of severe working conditions, led to the wrench being repaired two or three times more than usual, would not be a feasible device. He also said that it was possible for the treated wrench to be used in compliance with the noise standards depending upon the amount of exposure received over varying periods of time (Tr. 76-77).

In response to further questions, Mr. Antel explained that because of the design of certain car doors, a bar was used to manually open the doors, and that this procedure produced no noise problem. He further stated that he did not know who owned or controlled the cars. He understood that the respondent's reluctance to ship a wrench to MSHA stemmed from that fact that there were normally three wrenches operating and two in the shop. Also, he had never heard of a device such as the wrench being used anywhere else. He conceded that one could not guarantee that once modifications were made on the wrench it would forever remain in compliance (Tr. 81-83).

Mr. Antel was of the opinion that a new wrench would cost $4400 or $4500, and he estimated that wrench modifications either through MSHA's recommendations or through the respondent's own techniques, would result in a noise reduction of five dB's. He confirmed that there was less noise during the opening of the locomotive car doors than there was during closing because the materials in the car tended to dampen the noise. He conceded that he did not know the labor costs incurred in maintaining the wrenches in their improved form (Tr. 95). He also explained that the two to three day installation time referred to in the answers to interrogatories included five or six hours of "curing time" needed for the molten urethane material to dry (Tr. 98). He confirmed that no recommendations have ever been made to do anything with the locomotive cars in terms of noise controls, and he conceded that if part of the noise problems came from the cars someone would need to address that problem, but that the respondent does not own the cars (Tr. 101-102). He conceded that the noise from the cars doors was a contributing factor (Tr. 102).

Respondent's testimony and evidence

Donald R. Erickson, plant maintenance supervisor, testified that he has tested the wrench in question and supervised the installation of various noise suppression devices on the wrench. These "treatments" consisted of a steel plate which was added to the frame of the machine extending to the toe plate, a box fitted over the wrench bit cover, and a hose muffler adapted to the exhaust port. Because of the differences between the wrenches used at the plant, any modifications would have to be specially fabricated to fit each individual machine. He confirmed that the respondent did not modify all of the five wrenches used at the plant, and he estimated that it took 32 man hours to treat one wrench. He also estimated the cost of materials and labor for one wrench to be approximately $750. He also stated that increased maintenance costs would result after each wrench was modified because such modifications would result in the wrench being required to be serviced two or three times more than normal because of the modifications. Specifically, he cited the hose adapter for the exhaust muffler on the modified wrench, and he estimated that it would have to be replaced nine times a year at a cost of $50 for each replacement installation. He also stated that the rear housing on each of the wrenches would have to be replaced three times a year at a cost of $650 each time it was replaced on a single wrench. He concluded that the total costs in labor and materials for the five modified wrenches would approximate $19,500 a year (Tr. 105-119).

On cross examination, Mr. Erickson confirmed that only one wrench had actually been modified, and that he supervised

the work, but did not know who had made the actual modification design or recommendation (Tr. 120). He conceded that with the exception of the wrench muffler, the material used to modify the one wrench was available in the plant shop or was borrowed from another job. He also confirmed that routine maintenance work on the wrenches was performed by a contract maintenance vendor. He also confirmed that the labor and maintenance costs which he testified to concerning the one wrench which was modified was based on his experience with the wrench which was modified for test purposes, but he could not state how long the testing period lasted (Tr. 130).

In response to further questions, Mr. Erickson stated that the modified wrench was tested on four different operational occasions, and that during these tests the wrench operators expressed a desire to have the bit cover shroud and the bottom deflector removed from the wrench because it got in their way while they were operatint it. Conceding that he had no knowledge of the actual test results, he did confirm that the employees who operated the wrench expressed a preference to use the wrench in its original untreated form (Tr. 135-138).

Mr. Erickson stated that the wrench supplier was asked to inquire of the manufacturer as to whether or not muffler or other noise controls could be installed on the machine, but that the response was negative (Tr. 142). He speculated that if one wrench were shipped to MSHA for prolonged testing, this would affect production because the initial dumping process by use of the wrenches was a critical part of the plant's production process. This was particularly true when one or more of the wrenches are down for maintenance (Tr. 152). He confirmed that the wrenches were sent to the maintenance vendor at least once a month for routine maintenance and would remain there for a week to a month. All of the wrenches in use at the plant are approximately two to four years old. Although Mr. Erickson could not state a routine maintenance estimate for an untreated wrench, he did indicate that the vendor's bills rarely were for less than $175 to $200 for each trip to the shop (Tr. 154). He agreed that each new wrench probably cost in the area of $4500 each (Tr. 156). He confirmed that he was not present when the treated wrench was tested at the work site, and had no knowledge of any of the test procedures (Tr. 157).

Eugene I. Rowell, respondent's safety supervisor, testified as to his background and eight to nine years' experience in industrial safety and hygiene, including conducting noise surveys and using sound level meters and dosimeters (Tr. 159-161). He stated that shipments of rock to Port Sutton came in so

erratically that he was unable to guess at how many days per month unloading took place. However, he did estimate that an average of 18 to 20 cars per day were unloaded during the first shifts, and the cars were of varying size and design. Some could only be opened manually with a bar, and others had lower hoppers. In a full day, the workers might spend four to six hours unloading fifty to sixty cars. Only when the cars doors were being opened were the pneumatic wrenches utilized (TR. 164).

Mr. Rowell stated that the lead flagman had radio contact with the train engineer and was responsible for the recovery of cars which needed to be dumped, storing them after unloading, and opening the car doors on his side of the track. If time allowed, crew members were often assigned to other duties until a new shipment arrived. At times, three days passed without a single car being unloaded, and he added that he had never seen the shaker used in the rock unloading during his three years at the plant (Tr. 166).

Mr. Rowell described the employees' hearing conservation program at the Port Sutton facility. All workers involved in the unloading process were required to wear hearing protection, and they received some training in noise hazards as part of a mandatory MSHA course. Mr. Rowell approximated the weight of one pneumatic wrench to be 130 pounds. However, any sound treatment equipment would add 20 to 30 pounds extra weight to each wrench (Tr. 169). He further indicated that this additional weight would enhance the likelihood of back injury among the operators, and that the modifications would also obscure a worker's view of the wrench bit when he tried to insert it into the car door. An employee's attempt to operate the wrench without a secure connection could lead to the bit flying off and injuring someone (Tr. 170).

Mr. Rowell recalled that, in response to the MSHA citations, plant management conducted noise tests on four or five occasions, and he briefly described some of the testing. He reiterated the potential hazards which would result from decreased visibility on a treated wrench due to the flap covering the coupling. With regard to administrative controls for noise reduction, he stated that the existing union contract would frustrate any plan for personnel rotation, and that it would cost more money to add a part-time crew. The company does not own the railroad cars, and therefore it lacked the ability to modify their design. Mr. Rowell also discussed the dangers of using the car bar as an alternative to the pneumatic wrench, and indicated that one reason for the adoption of the wrench was to avoid the frequency of bar related accidents (Tr. 182-187).

Mr. Rowell estimated that the ear plugs supplied to the employees reduced the sound level 188 by 15 or 20 dBA. The annual cost for plugs would be about $20 or $30, while ear muffs sold for fourteen or fifteen dollars a pair. When asked if the company had consulted the manufacturers on the

subject of noise control, he replied that the manufacturer had actually requested the company to pass along its findings as they did not have any answers. Mr. Rowell also confirmed that he was unaware of any feasible engineering or administrative solutions for ameliorating the noise problem (Tr. 188).

On cross examination, Mr. Rowell denied that either he or his supervisor had been aware of the noise problem in the unloading area, and he could recall no noise surveys being conducted prior to the MSHA inspection. The employees were instructed in their training classes that whenever they felt a need for hearing protection or sound tests in their work area, they were to notify their supervisor or the safety department, who would then supply the protection and conduct the tests. Although he did not know of any other sections with noise problems, he stated that there were some workers who did choose to wear hearing protection (Tr. 189-190).

With regard to the company noise surveys, (exhibits R-8 and R-9), Mr. Rowell confirmed that he used a Quest Type 2 sound level meter, but that no dosimeters were used. He confirmed that he was not familiar with the error factor on the particular sound level meter used. He also confirmed that he accompanied Mr. Antel on both surveys, and in the 1982 testing took samples at the same time as the MSHA personnel. He agreed that there was about a five dBA reduction on the treated wrench, but was not sure if that was reflected in the company survey report, exhibit R-8. Nor was he sure how that figure was arrived at, and he admitted not knowing exactly how much weight would be added to the wrench because of the noise controls. He conceded that not all of the controls installed on the wrench corresponded to those suggested by MSHA. Mr. Rowell confirmed that he took the readings for the May 26, 1982, survey which was incorporated as respondent's exhibit no. 9, but he was unable to explain why Car. No. 5 emitted less noise with an untreated wrench then with a treated one (Tr. 193-203).

In response to further questions, Mr. Rowell stated that the company had at one time considered purchasing a hydraulic torque wrench to keep the work environment quieter, but did not do so because of certain safety factors. He agreed that the claimed 20 dBA noise reduction through the use of ear plugs was simply the manufacturer's claim, and that this reduction may not be accurate at the actual work locations (Tr. 212-217).

Richard Gullickson, Industrial Hygienist, testified that he has been in the respondent's employ for almost 15 years, 12 of which were as a professionally certified industrial hygienist.

He testified as to his professional background, and confirmed that he held a college B.S. Degree in chemistry and that he had participated in noise surveys and testing (Tr. 235-240). He was aware of the events surrounding the issuance of the citations in question and confirmed that he was familiar with the design, operation, and uses made of the cited pneumatic wrenches, including the modifications which were made during the past two years. Although he personally did not test the treated and untreated wrenches, he was familiar with the tests and the results, and in most cases the testing was done under his direction (Tr. 240).

Mr. Gullickson disagreed with MSHA Inspector McLaughlin's position that the pneumatic wrench was the primary noise source in the unloading facility. He did not believe that his measurements revealed the degree of noise reduction on the treated wrench as indicated by the MSHA inspector. Although he lacked supportive data, he advanced the notion that the longer a wrench was used, the quieter it became due to wear and refurbishing and he believed that this was why the wrenches seemed quieter after they were treated. Also, he claimed that MSHA tested different wrenches without determining what their individual noise levels were with the same treatment. Because of a possible ten decibel, or ten-fold, difference between various cars, he focused his experiments on only two cars. In some cases the treated wrench was higher in noise intensity than the untreated wrench, but he did not regard it as noisier, and thought that the contrast reflected two different wrenches with different intensities (Tr. 242-245).

With regard to MSHA's testing in May 1982, Mr. Gullickson expressed no quarrel with the scientific validity of MSHA's testing methods. However, he did express concern over the fact that the noise level measurements were made on two different untreated wrenches which were not of the same noise levels. As an example, he cited the April 1981, test results where the lead flagman averaged 90.2 decibles and the flagman averaged 95.4, both from untreated wrenches. He believed that it was critical to test the same wrench on the same car because the cars had up to ten decibel differences in their noise, which translated to a ten-fold difference in noise energy (Tr. 249).

Mr. Gullickson rejected MSHA's contention that scientifically valid conclusions could be drawn from an experiment in which a number of wrenches were tested with a certain number of cars and then simply averaged out. He also doubted the validity of MSHA's reading of 453% with the noise dosimeter in May 1982, because measurements taken on other occasions indicated that the noise exposure index of the untreated wrenches should be higher than 200% (Tr. 251-252). With regard to the four decibel variation detected between the treated versus the untreated wrench,

Mr. Gullickson pointed out differences in noise intensity ranging as high as ten-fold, which he attributed to disparate car designs. He believed that, with a small enough sample, it was conceivable that differences between rail cars would override the four dBA disparity. He regarded the vibration of the rail cars as the only significant source of noise, and therefore, wrench modification would be ineffective to reduce noise. In his opinion, noise reduction down to the 90 dBA time-weighted average was not feasible using MSHA's recommendations or through any other engineering innovation. Even if all the wrenches were treated, he believed that employees would still need to wear hearing protection (Tr. 260-261).

On cross examination, Mr. Gullickson reiterated that if properly fitted and worn, personal ear protection would reduce excessive noise exposure (Tr. 265). He confirmed that ear plugs and muffs are available at the plant, and he generally discussed the noise survey studies conducted at the plant, the results of which are recorded in the reports, exhibits R-8 and R-9 (Tr. 269). In response to a hypothetical, he stated that if there were two equivalent noise sources and one was reduced by 12 dBA, the overall noise exposure would be diminished by 3 decibels, or fifty percent (Tr. 272). Even if a totally silent wrench could theoretically be designed, he believed the noise problem would not be significantly affected due to the fact that the car doors were the major source of noise (Tr. 273). He also stated that the noise exposure would be less if a car bar was used because its impact would be less than that of a wrench, but he conceded that the pneumatic wrenches did contribute to the noise level. He further testified that the 114 decibel locomotive whistle would have to sound for 15 minutes a day to be out of compliance, as opposed to an isolated ten second blast (Tr. 274-277).

Procedural ruling

As part of his post-hearing brief, petitioner's counsel included as an "Exhibit A" certain tabular compilations purportedly reporting the results of certain noise test data not previously made a part of the evidentiary hearing record. By letter filed September 9, 1983, respondent's counsel objected to the document and moved that it not be considered by me as part of my decision in this case. Subsequently, by letter filed September 23, 1983, in response to the respondent's objections, petitioner's counsel withdrew the exhibit and requested that it not be considered in my decision in this case. Under the circumstances, petitioner's request to withdraw the document IS GRANTED, and I have not considered it in the course of this decision.

Findings and Conclusions

Respondent's Port Sutton facility unloads phosphate rock from its various mine sites for processing, storage, or shipment to customers, and the facility employs approximately 83 employees. The phosphate rock is unloaded from railroad hopper cars at the "dumping shed", an open-ended metal fabricated building approximately 100 feet long by 40 feet wide with a railroad track running through the center. The railroad cars are pulled through the building by a locomotive. After each car is placed at the unloading point, the material is unloaded from the bottom of the car and it drops through a grate in the floor under the cars to a belt conveyor system underneath the grate for transportation to the main plant for drying and storage.

The crew involved in the dumping or unloading process consists of three employees. The locomotive engineer is responsible for operating the locomotive to pull the railroad hopper cars into position over the dumping grates. The lead flagman assists in positioning the railroad cars over the grates, through radio communications with the engineer, and opens the hopper car doors on one side of the dumping shed. The flagman opens the railroad hopper car doors on the opposite side of the dumping shed. The flagman opens the railroad hopper car doors on the opposite side of the dumping shed opposite from the lead flagman. There are three crews available for working three shifts, seven days a week. The number of cars dumped on any given shift vary. On the day of the inspection, the inspector stated approximately 50 cars were dumped on one shift, and respondent's witnesses estimated that on a yearly average approximately 18 to 20 cars per shift are dumped.

The lead flagman and flagman use pneumatic impact wrenches to open and close the hopper car doors having rack-and-pinion mechanisms. A square "bit" on the end of a pneumatic wrench is engaged with the socket on the hopper car door pinion and the impact wrench is activated, causing the bit and pinion assembly to rotate and move the hopper car door which is attached to the rack. The doors can be opened or closed by adjusting the pneumatic wrench to rotate the bit and pinion assembly either clockwise or counter-clockwise. On some cars, a bar has to be used because the doors are not adapted for the pneumatic wrench.

The dumping shed must normally have three pneumatic wrenches in operating condition at all times. One wrench is located at the lead flagman's work station on one side of the shed and tracks; that wrench can be moved along the

railroad tracks the entire length of the dumping shed. Two wrenches are necessary on the opposite flagman's side of the shed, because a concrete partition perpendicular to the railroad track prohibits movement of a single wrench along the entire length of the dumping shed. Any of the wrenches can open any railroad car's rack-and-pinion mechanisms.

Each of the pneumatic wrenches is approximately four feet high, two feet wide, and four feet long (including the bit). The pneumatic impact motor, contained in a cylindrical housing approximately two feet in length, is mounted between two rubber-tired wheels that give the wrenches their mobility. A bit-directional control rod (allowing the operator to select clockwise or counter-clockwise rotation of the bit) extends directly upward from the top of the pneumatic motor housing. The power control for the pneumatic wrench is located on the right handlebar assembly. The wrenches have approximately four inches ground clearance. Each wrench weighs approximately 130 pounds and is connected by a long hose to an air compressor which is located outside the dumping shed. The bit of the pneumatic wrench rotates at approximately 1500 rpm when unconnected to a railroad car; under "load" conditions, that is, when connected to a railroad car door pinion socket, the wrench bit rotates at approximately 10 rpm. The wrenches do not have noise-suppression devices supplied by the manufacturer. (Photographs of the wrench are included as part of the record).

Inspector McLaughlin visited the Port Sutton facility on November 25 and 26, 1980. The first day was devoted to a general scheduled inspection, and after determining that the unloading area may have a noise problem, Mr. McLaughlin returned to the facility the next day and conducted a complete noise survey using dosimeters and a sound level meter. (A dosimeter measures accumulated exposure to noise over a measured period of time, while a sound level meter measures noise at any instant in time). Mr. McLaughlin calibrated the dosimeters, and properly placed them on the lead flagman and flagman who were working in the unloading shed area. The dosimeters were used to measure the noise exposure of the two employees for a full working shift, and during the course of the shift Mr. McLaughlin returned to the shed area four times to take noise level readings with the sound level meter during the opening and closing of the car doors.

The two employees sampled by dosimeter by Mr. McLaughlin on November 26, were found to be exposed to 95 dBA, which is equivalent to 201% and 203% of the allowable regulatory maximum noise exposure, or 2.01 and 2.03 times the allowable noise exposure. Mandatory standard section 55.5-50 limits employee exposure to less than 90 dBA for an eight hour duration, and

for employees exposed to 95 dBA, the standard limits the duration of exposure to four hours. At the time of the inspection, the employees were not wearing any hearing protection and Mr. McLaughlin observed no noise controls on the pneumatic wrenches operated by the sampled employees.

As a result of the November 26, noise sampling at the unloading area, Mr. McLaughlin issued two section 104(a) citations citing the respondent with violations of section 55.5-50(b), and as noted earlier in this decision the abatement times were extended several times and the citations finally terminated on September 1, 1981.

The respondent concedes that the two cited employees were not wearing personal hearing protection when the citations were issued, and that on that particular day, the cited employees working at the dumping operation were exposed to noise in excess of the regulatory maximum. Respondent also admits that it is appropriate for me to find it liable for civil penalties for the two violations, and that it cannot contest the citations nor a proposed penalty assessment insofar as petitioner seeks sanctions only for failure to wear personal hearing protection on November 26, 1980.

On the question of whether feasible engineering or administrative controls exist for the abatement of the noise levels described in the citations, respondent takes the position that neither the noise controls that it has implemented or those recommended by the petitioner are "feasible" as that term has been statutorily and judicially defined. Respondent maintains that none of the controls (whether implemented or merely recommended) have been proved effective in reducing the total noise of the unloading operation, have been shown to be economically feasible, or have survived a cost-benefit analysis.

The dispute in this case arises on the question as to whether the petitioner has established that feasible engineering controls are available to bring the respondent within compliance, and whether or not the respondent has implemented these controls in good faith so as to come within the requirements of the standard. Respondent takes the position that it has acted in good faith, and that it has made an attempt to implement MSHA's recommendations, as well as its own, but that they are not feasible to achieve compliance. On the other hand, petitioner takes the position that even though its recommendations, as well as the actions taken by the respondent acting on its own initiative, do not achieve total compliance with the standard, respondent is nonetheless obligated to implement them.

Citing Judge Morris' decision in MSHA v. N.A. Degerstrom, 5 FMSHRC 637, April 5, 1983, petitioner submits that in order to establish a violation of section 55.5-50, it must show that (1) the respondent's employees are exposed to noise levels in excess of those permitted by the standard; (2) there are, in general, technologically feasible engineering or administrative controls available which will reduce the noise; and (3) provide a rough estimate as to the cost of implementing the controls. Petitioner submits that it has made out a prima facie case.

Assuming that it can establish that the noise exposure measured by the inspector exceeded the allowable limits, petitioner asserts that the gravamen of the violations was that the respondent failed to institute or to attempt to institute any "feasible administrative or engineering controls to reduce noise exposure in the unloading area". Other than requiring employees to wear hearing protection, which was not done at the time of the citations, petitioner asserts that the respondent has still not instituted any controls to reduce the noise exposure. Although conceding that the respondent had modified one of its wrenches and conducted some tests, petitioner maintains that the modifications were not adopted. Petitioner advances the notion that since its studies have shown that some noise reduction has been achieved, respondent is obligated to implement them, even though they may not result in enough noise abatement to bring the respondent within the requirements of the cited standard.

At page 17 of its post-hearing brief, petitioner cites Judge Morris' decision in MSHA v. N.A. Degerstrom, 5 FMSHRC 637, April 5, 1983, in support of its argument that any feasibility consideration of noise controls to reduce employee exposure to excessive noise precludes the weighing of costs and benefits, and that the phrase "feasible" should be construed to mean "capable of being done" or "achievable" without regard to whether or not any recommended controls will reduce the noise to within the permissible limits. All that is required, suggests petitioner, is that some significant reduction is achieved, regardless of whether such reduction results in total and full compliance with the requirements of section 55.5-50. In support of its argument, petitioner states that the consideration of whether the cost of a control is wholly disproportionate to the benefits does not involve a cost-benefit analysis or the kind of weighing of costs and benefits involved in such an analysis. Petitioner suggests there is no need to calculate and quantify all the conveivable costs and benefits to determine where the balance lies. Instead, it is only

necessary to arrive at a general estimate of the cost and to ascertain that some measurable benefits can be expected to result. In considering the benefits, it is not necessary to prove that the results to be achieved by the control will, in fact, promote the purposes of the regulation or statute; the regulation or statute itself embodies that determination. Petitioner asserts that the question is whether the control can be expected to achieve any significant results and whether the costs are so great that it would be irrational to require the use of the control to achieve those results.

Aside from the fact that Judge Morris' decision in N.A. Degerstrom is not binding on me, I take note of the fact that he relied on several cases decided under the Occupational Safety and Health Act, as well as the legislative history of that statute in determining the meaning and application of the phrase "feasible". He also noted that "the law on this point continues in a state of flux". In short, he relies on an interpretation by OSHRC, as further refined by the Courts, to support his findings and conclusions in N.A. Degerstrom. This I decline to do.

Petitioner also relies on Judge Morris' decision in Jet Asphalt and Rock Co., 3 FMSHRC 940, April 14, 1981, where he construed section 55.5-50 as requiring the implementation of feasible controls in the event of excessive exposure regardless of whether such implementation would guarantee reduction of the noise to within the permissible levels. After review of Judge Morris' decision, my conclusion is that he simply held that a companion mandatory standard (56.5-50) requires an operator to explore the feasibility of administrative or engineering noise controls before relying on personal protective equipment, and that the mere use of ear plugs is not an absolute defense. I agree with Judge Morris' conclusion that "what I'm trying to say is that the first thing to be considered is administrative or engineering controls", 4 FMSHRC 945. However, I reject petitioner's attempts to read anything else into his decision, and I reject any notion that section 56.5-50 permits anything less than full compliance with the clear language of the standard. The second sentence of section 56.5-50, clearly permits the use of personal protection equipment in the event feasible administrative or engineering controls fail to reduce any noise exposure to within permissible levels. The permissible levels are those stated in the standard, and the standard makes no allowances or provisions for so-called "improvements" or "near" or "close to" compliance with the required noise levels. If the Secretary wishes to change or alter the standard he is free to do so through proper rule making, but I reject his attempts to do so in this proceeding.

With regard to any adverse economic impact on the respondent, I cannot conclude that the cost factors discussed on the record in this case would have any adverse impact on the respondent. Assuming that the engineering noise suppression methods advanced by both the respondent and MSHA are proved workable, I seriously doubt that the respondent would suffer economically. As a matter of fact, at page five of its posthearing arguments, respondent states that "Although MSHA's recommended noise controls are neither harmful nor costly, neither are they especially effective". Thus, the question presented is whether the engineering recommendations are cost effective. In other words, if it cannot be established through credible evidence that the implementation of the engineering methods explored in this case are feasible and realistically achievable, then respondent need not go through needless expenditures to implement them. On the facts of this case, I believe the critical question presented is whether respondent has explored all available feasible engineering and administrative noise controls to bring it into compliance with the requirements of the cited standard. As part of that determination, I cannot conclude that the estimated costs of "treating" each of the five wrenches which respondent has available at any given time is all that critical. What is critical is whether the "treated" wrench will do the job. Petitioner suggests that it has established that the results of the "treated" wrench tests clearly establish a reduction in noise exposure and that respondent should not be allowed to abandon this partial solution to the problem simply because it does not believe that total abatement can be achieved.

The thrust of the petitioner's case is the assertion that the May 1982, tests conducted by Mr. Antel (exhibit P-9), conclusively demonstrates an average noise reduction with the treated wrench of 4.5 dBA in closing and 5.1 dBA in opening the railroad car doors. Petitioner relies on Mr. Antel's testimony that this average reduction in the noise level was shown from tests on 10 to 15 railroad cars (Tr. 72), and that dosimeter readings he took for the employee's full shift showed a reduction of 6 dBA when using the treated wrench (Tr. 64). However, a closer examination of Mr. Antel's testimony reflects that some 50 cars passed through the unloading area at the time of the testing, that they varied in size and construction, that the treated and untreated wrenches were never tested on the same car doors, that measurements were only taken from 10 to 15 cars, and that the wrenches were not compared, one to the other on the same railroad car. In short, Mr. Antel conceded that his testing procedures would not attract any individual variations between the wrenches (Tr. 71-72). Further, when asked to explain and

reconcile Mr. McLaughlin's full shift test results showing noise exposure of 201% and 203% above the permitted limits for the untreated wrench, and his test results of 453% above the permitted limits for an untreated wrench, Mr. Antel replied as follows (Tr. 73-74):

> Q. In your July 12, 1982 report, Petitioner's Exhibit 9, you found under similar situation that the untreated wrench generated noise 453% of the permissible dosage; is that not correct?
>
> A. Yes.
>
> Q. Under similar circumstances, MSHA employees obtained readings of 201, 203 and 453%. That appears to be a rather large discrepancy. Can you account for that?
>
> A. I believe that can be accounted for due to the variables, not only in the types of cars, but also in the number of cars that, in which the wrench is used.
>
> If I could refer back to my first visit, we witnessed about fifty cars, fifty-two cars that were being unloaded that day, but only on about half of these the wrench was used. And the other half, they were used, the bar was used to open it. So certainly that would influence the exposures, the number of times the wrench was used.
>
> Q. Then you are suggesting that to compare those two numbers is improper?
>
> A. I am saying that one day might vary from another day, depending on the number of cars they are opening.
>
> Q. You are suggesting then that those figures are invalid?
>
> A. No, I am saying that those figures were valid for that day.
>
> Q. You only tested them one day? On the follow-up visit?
>
> A. The follow-up visit we did one full shift, sir.

Q. Could you tell me the, the activities of the employees working in the dry rock unloading area in the shed that we have been discussing?

A. My observation, I noticed the operators, besides unloading the cars with the pneumatic wrenches, between strings of cars they would go down into the rail yard -- and I am not sure what they were doing there -- but they would come up with another string of cars.

Q. Do you know how many days per month railroad cars are normally unloaded there at Port Sutton in the shed?

A. How many days per month?

Q. Yes.

A. No, I don't.

Q. Do you know how many hours per month the employees in the dry rock unloading area are exposed to that wrench noise?

A. No.

Q. Doesn't the potential harm from any loud noise source depend on the duration of employee exposure to that noise source?

A. Yeah, I guess that would be true.

Q. Since you don't know the activities of the employees in that area, either on a daily or a monthly basis, you cannot accurately testify as to any potential harm they may suffer as a result of their exposure to the wrench noise, can you?

A. I can only testify to the findings that I observed that day.

Q. But you can't give any professional estimate as to the magnitude of potential harm to the employees, can you?

A. No, I can't.

One major flaw in the petitioner's case is that its enforcement efforts are concentrated on the pneumatic wrench used to open and close the locomotive cars. In its post-hearing brief, petitioner maintains that both Inspector McLaughlin and Mr. Antel were of the opinion that the wrench was the primary source of the noise. However, as correctly pointed out by the respondent in its post-hearing arguments, the excessive noise levels which prompted the issuance of the citations emanate from the total dumping operation at the shed, and unless this total environment is considered, concentrating on one particular piece of equipment, which may or may not be significant, would be fruitless.

While it is true that Inspector McLaughlin testified that he considered the primary source of noise exposure as "the noise being generated by the pneumatic wrench while it was engaged with the car fitting" (Tr. 22), he conceded that he performed no noise measurements to differentiate and quantify the noise produced by the wrench from noises produced by the railroad car, and he explained as follows (Tr. 23-24):

> Q. Mr. McLaughlin, you just testified that the primary noise source during the unloading operation was the pneumatic wrench. But isn't it true that you never performed tests to quantify the various noise sources?
>
> A. Explain that. What do you mean quantify?
>
> Q. You never performed any tests when you were there on that day to differentiate various noise sources in the dry rock and loading area, did you?
>
> A. Well, I did use a sound level meter while the equipment was operating, and I guess that would be a quantified measurement, would it not?
>
> Q. But you never performed a test to distinguish the noise generated by the wrench from the noise generated by the railroad car or by the fans or employees dropping lunchboxes in the shed itself, did you?
>
> A. Well, I wouldn't be interested in that.
>
> Q. Isn't it true that you cannot perform such a test using the equipment that you had there on that day?
>
> A. Yes.

And, at Tr. 28-29:

> Q. Now, Mr. deMeza asked you a question about whether or not you actually tested all of the available noise sources there. Do I take it that the noise levels that you found to be out of compliance would be what? A composite or a totality of all the noise that these two fellows were engaged -- were exposed to during the course of a given shift?
>
> A. Yeah, as a, as the inspector -- I am not really concerned that much which piece of equipment is making the noise, because you, in this particular case, you have got a wrench making noise, you have got steel rattling on the cars, you have got all kinds of noise. What I am interested in is what the man is being exposed to. And so it is, it is the total noise in the area.
>
> Q. So I take it if you tested all of the available noise sources and you found that one in particular was the culprit, if I can use that word, in other words, if you were to take that particular piece of equipment out of the workers' environment and theoretically if that would bring them into compliance, that they would know what the particular noise source would be, wouldn't they?
>
> A. Yes. If they were not using a pneumatic wrench there wouldn't be, you know, hardly any noise.
>
> Q. Do you feel that that was the principle noise source there that was causing the problem?
>
> A. Uh-huh.
>
> Q. That was causing the problem?
>
> A. It was the pneumatic wrench opening the car doors. You see, it is a combination. You have two things. You have noise from the wrench and you also have noise when it is engaged.

While it is true that Mr. Antel testified that based on his April 1981, noise survey, it was his opinion that the primary noise source "was the wrench and operating during loading and unloading of the cars" (Tr. 51). He qualified his statement by readily conceding the existence of dumping operation noise sources other than the pneumatic wrenches, and his testimony in this regard is as follows:

Q. (Mr. deMeza) Why does the noise level increase when doors are being closed? The rail car doors?

A. Because the cars are being emptied at that time and the reverberation condition.

Q. Reverberation condition?

A. From the cars themeslves.

. . . .

So, in closing [the hopper doors], that damping of the rock is, is absent, but the walls are pretty [sic] vibrating and shake in sympathy, I suppose, to the wrench?

A. Yes. (Tr. 94-95).

* * * *

Q. (The Court) Okay, now, with that flap device over there what, what kind of noise would come from that coupling and uncoupling?

A. It was a very loose fitting on some of these cars from, I suppose, continual opening and closing, where the bit or this part of the wrench would engage and sometimes it tended to rattle and jump around (Tr. 99).

* * * *

Q. (Mr. DeMeza) Did you attempt to identify and regulate those other noise sources?

A. There was no way that, that I was able to do that, since the wrench was not operating, certainly would not excite the car and there was no other means of generating the noise from the car, other than the wrench. (Tr. 69).

Q. And when he is opening the doors, that particular wrench generates noises?

A. Yes, sir.

Q. At that point and at what other point?

A. Closing. Opening and closing.

Q. So, if, if part of the noise problem is the, the doors clanging and that, I would think that somebody would want to address that, too, That would be a contributing factor, wouldn't it?

A. Yes. (Tr. 99-102).

Mr. Antel's April 1981, noise survey report (exhibit P-6), contain certain conclusions which recognize noise sources other than the wrench during the dumping operation, and these are as follows:

--- increased noise levels when car doors are closed due to the reverberant condition of the cars after the material has been removed.

--- the car shaker.

--- locomotive tramming through the building, including the whistle.

Mr. Antel's report also states that at times, two or three cars may be emptying simultaneously, and that on occasion it may be necessary to utilize a car shaker in emptying the car. Although he did not consider the car shaker to be a major noise source at the time of his survey, he conceded that in the event the shaker operating time is increased it "should be regarded as a potential problem and should be investigated". Mr. Antel notes that the shaker operated two times during his survey, and no data was collected from the locomotive cab.

In view of the foregoing, it would appear to me that Mr. Antel's noise survey included factors which were not present during the survey taken by Mr. McLaughlin to support the citations. It would seem to me that if two or three cars are being dumped simultaneously while one or more car shakers is in operation, significant noise sources other than the wrenches would be present. Yet, none of these variables are explained. The parties go through great lengths to try and explain their respective engineering methodology in support of their respective positions in this case, but it occurs to me that when one is dealing with such extremely complex matters as the noise suppression standards in issue what may work theoretically on paper may not work in the actual mine working environment.

In his report of the May 1982, noise evaluations, Mr. Antel again recognizes the fact that noises other than the wrench

contribute to the overall employee exposures. He takes note of the fact that there are differences in the noise levels when the wrench is coupled and uncoupled from the locomotive car doors. Although he notes that when the wrench is coupled to the car, "another noise source is activated", he speculated as to where these sources were located and concluded that the exact location could not be determined at the time of his survey. He also took note of the fact that the noise levels generated while opening the car doors are lower than the levels generated while closing the car doors. This fact lends support to the respondent's claim that the cars themselves contribute significantly to the overall noise exposure.

Feasible Engineering Controls

Respondent concedes that it did not follow MSHA's precise recommendations concerning the noise control measures described in the 1981 Antel Report. However, respondent has established that its tests included the use of a foam-lined metal shroud, a rubber flap extending over the wrench bit, and an exhaust muffler. Therefore, as correctly pointed out by the respondent, its attempted engineering controls were close to those recommended by MSHA and presented no significant operational differences, and Mr. Antel believed that one could expect approximately the same results from the noise controls measures implemented by the respondent as those recommended by MSHA (Tr. 93). Further, as pointed out by the respondent at page 20 of its post-hearing brief, during the abatement process MSHA never took issue with the respondent's testing (Tr. 213). As previously noted, the compliance time for both citations was extended for some ten months while both the respondent and MSHA were attempting to come up with some feasible engineering controls. The citations were then terminated "pending development of additional means of noise attenuation on this equipment which may be required at a later date". In the meantime, MSHA permitted the use of personal hearing protection, and when the inspector observed that the employees were not wearing such devices the citations followed.

With regard to the petitioner's assertion that respondent failed to accept MSHA's offer to test one of the wrenches in its laboratory, respondent explained that it could not afford to relinquish a wrench because it was required to be located at the loading site as a back-up in the event the other wrenches were down for maintenance. In the circumstances, respondent's reluctance to send one of its wrenches to MSHA's laboratory for testing seems reasonable. Aside from the fact that laboratory testing is significantly different than

operating such a wrench in the actual mine environment, I cannot conclude that on the circumstances here presented respondent's reluctance to take one of its wrenches out of commission was unreasonable.

Respondent's maintenance supervisor Erickson confirmed that one of the wrenches was "treated" with certain devices, including a muffler, in order to test the noise reduction (Exhibit R-3). He explained the modifications in great detail (Tr. 107-11), and aside from the fact that the particular modifications had to be "customized" to the particular wrench, he encountered no particular difficulties in making the modifications (Tr. 112). However, he did speculate on certain operational and maintenance problems which he believed would be encountered, and he estimated that the total additional labor and materials to maintain five treated wrenches would amount to $19,500 annually (Tr. 119). Mr. Erickson alluded to certain complaints made by the wrench operator after it was modified (Tr. 135-136; 138), and while he confirmed that testing was conducted before and after the modifications, he had no knowledge of the test results or whether the modifications resulted in any noise improvements (Tr. 138). Mr. Erickson's concern over the increased costs for the modified wrench stemmed from the fact that it would impact on his particular budget (Tr. 142).

Mr. Antel's testimony that he had previously constructed a wrap-around muffler for use on large pneumatic drills, that the cost would be approximately $65, and that no significant maintenance or employee problems would result is not persuasive. To begin with, the wrench in question is not a drill. With regard to Mr. Antel's assertion that he would expect a noise reduction of 5 dBA in the unloading area if his "wrap around" recommendations were followed, I take note of the fact that based on the results of testing as advanced by the parties, respondent would still not be in compliance. More importantly, on the facts of this case, it seems clear to me that MSHA's preoccupation with the wrench focuses only one part of the overall noise problems which result from the total unloading operation to which the two cited employees were exposed.

Safety supervisor Rowell indicated that the railroad owns the cars, and while the respondent leases some of them, it has no control over which cars appear at the unloading facility (Tr. 183). He discounted the use of car bars to open the car doors because the use of such bars has resulted in numerous accidents (Tr. 184-187). Petitioner's counsel agreed that the respondent has no control over the cars and cannot readily modify them (Tr. 230).

Mr. Rowell believed that the fully-treated wrench presented serious safety problems due to the lack of visibility during the insertion of the wrench chuck into the car due to the presence of the flap (Tr. 182). He also confirmed that the respondent considered purchasing a hydraulic torque-type wrench, which is quieter, but decided not to after determining that it was hazardous to the operator (Tr. 212). He also indicated that an untreated wrench weighs approximately 130 pounds, and that the modifications added an additional 20 to 25 pounds (Tr. 168). He also testified that the addition of the flap as shown on exhibit R-3 presented a visibility problem which has resulted in a misplaced wrench bit flying off and that this is hazardous to the wrench operator (Tr. 170-172).

Petitioner's suggestion at Tr. 231 that one cannot test the noise levels with the wrench attached to the car so as to determine the amount of noise given off by the car and the amount of noise given off by the wrench is simply not so. The record here establishes when respondent tested the treated wrench with and without a chuck while not coupled to the car, the sound level meter indicated noise in the range of 88 to 92 dBA (exhibit R-8). The test results for the treated wrench while opening and closing the car doors reflected significant increases in the noise levels. As a matter of fact, Mr. Antel's May 1982, tests indicated the approximate same results for the treated uncoupled wrench as well as for the treated wrench while coupled and used in the opening and closing of the car doors. Thus, I conclude that these test results support the respondent's assertions that the wrench in question is but one part of the noise problem.

Petitioner's counsel candidly admitted during the course of the hearing in this case that the parties "came away from those tests back in May of 1982 with a different interpretation of the results" (Tr. 209). While it may be true that the testing conducted by the parties reflect a reduction in the noise levels as between the treated and treated wrenches, it seems clear to me that in the actual mine working environment, compliance will not be achieved until such time as the total noise sources are addressed. Petitioner's counsel conceded that even if MSHA were to independently test the wrench, and its recommendations did not result in noise reduction, it would consider that there are no feasible engineering controls available, and the respondent would then be permitted to continue providing personal ear protection to its employees. This would be considered as compliance (Tr. 228-229). During a bench colloquy, counsel elaborated further as follows (Tr. 229-230):

JUDGE KOUTRAS: Once they operate under this standard and made a reasonable effort to comply with the feasible engineering controls -- and that's always the guts of the cases; right?

MR. WELSCH: Yes, sir.

JUDGE KOUTRAS: There is always a difference of opinion as to what is feasible and what is not?

MR. WELSCH: Yes, sir.

JUDGE KOUTRAS: But theoretically, assuming that they did all that, that was necessary and that MSHA agreed that they did all that was really necessary to bring the noise level on this particular wrench down into compliance, you could isolate that from all the other noise and find that they were in compliance.

And once they put that modified wrench back into production, it could very well be that other noise sources -- let's just take the empty cars --

MR. WELSCH: Yes, sir.

JUDGE KOUTRAS: That would put them back out of compliance again? Theoretically, that could happen?

MR. WELSCH: Yes, sir.

JUDGE KOUTRAS: And then I suppose MSHA could come back and say, "Okay, listen. We have eliminated the wrench now. What we want you to do now is take these cars that you are producing and buy some rubber ones."

MR. WELSCH: I, I don't think MSHA would --

JUDGE KOUTRAS: Theoretically?

MR. WELSCH: Theoretically, yes, Your Honor. In this case, though, it is my understanding that these are the controls that MSHA recommends and at this point in time this is probably all the controls that we can recommend to abate this noise.

On the basis of the preponderance of the evidence adduced in this case, I conclude that the petitioner has not established that feasible engineering controls are available to reduce the noise of the dumping operation in question to within the allowable levels mandated by section 55.5-50(b). I conclude further that the petitioner has failed to establish through any credible evidence that its recommended wrench engineering noise controls will reduce the dumping crew's noise exposure so as to bring the respondent into compliance. I reject the petitioner's suggestion that while the engineering controls tested by MSHA and the respondent may not reduce employee exposure below the permissible limits, the respondent must nonetheless implement them.

With respect to the question of economic feasibility, based on the record here presented, I cannot conclude that the estimated costs for the treated wrenches in question would place the respondent in dire financial need. Based on its overall resources, I cannot conclude that the expenditures testified to in this case are economically burdensome. However, since there is no dispute over the fact that the respondent was out of compliance and was in violation because the cited employees were not wearing personal hearing protection, and in view of my conclusions that the petitioner has not prevailed on the question of feasible engineering controls, the particular question of cost feasibility is not a critical factor in this case.

I further find and conclude that the respondent here acted in good faith in attempting to achieve engineering compliance through the testing of certain noise control measures similar to those suggested by MSHA, but that unless the total operational noise environment at the dumping location is addressed by both MSHA and the respondent, "piecemeal" consideration of the wrench in question will not achieve compliance. I also find that the respondent has established through credible testimony that its own modifications to the wrench presented safety problems to the operator which outweighed any resultant noise reductions.

Feasible administrative controls

In this case, MSHA recommended the following administrative controls:

1. Having the lead flagman and flagman leave the dumping shed when a trip of cars is being moved through.

2. Eliminating any unnecessary use of the locomotive whistle while the locomitive is passing through the shed.

3. Keeping the lead flagman and flagman outside the locomotive cab unless uncessary in the performance of their duties.

Although respondent on the one hand states that MSHA's administrative controls are not significant, it nonetheless at page 37 of its post-hearing brief "does not disagree with the wisdom of those recommendations". At page 31 of its post-hearing brief, respondent concedes further that MSHA's suggested administrative controls will, to some small degree, be effective in reducing the dumping crew's noise exposure, and that if MSHA's recommendations are followed the crew will occasionally be exposed to significant noise levels.

In addition to those administrative controls suggested by MSHA, the respondent states that one of the more common administrative noise controls, rotation of employees among various work stations of varying noise exposures to minimize the total daily noise dose, was never recommended by MSHA. Respondent assumes that MSHA accurately perceived that respondent could not implement such measures at the Port Sutton terminal because the facility's employees are solidly unionized and dumping crew jobs are subject to the "bid" system. Respondent states that any assignment of a less-senior employee to a preferred position on the unloading crew would result in union grievance proceedings or double payment of employees (i.e., payment of both the senior employee who was "bumped" by rotating off the dumping crew as well as the junior employee who actually performed the work) (Tr. 166-167).

Respondent's safety supervisor Rowell testified that since the citations were issued all employees working in the unloading area are required to wear personal ear protection as a condition of continued employment (Tr. 190). He also confirmed that on any given day, employees in the unloading area would spend from 4 to 6 hours per shift in that location, and that during this time the wrenches are in operation only when the car doors are opened (Tr. 164). He confirmed further that the respondent supplies all employees with ear plugs, that any employee working in the car unloading area is required to wear them as a matter of company policy, and that the annual training for all employees includes a portion devoted to noise (Tr. 168, 187). Although Mr. Rowell alluded to the possibility of bringing in additional part-time shifts to relieve the regular unloading crews, he did not believe this would be feasible due to the added costs (Tr. 183). However, no further details or evidence was offered with respect to this suggestion.

At hearing, respondent's counsel conceded that section 55.5-50(b) requires the respondent to implement feasible engineering or administrative controls to achieve compliance (Tr. 222). When asked whether he believed MSHA's recommended administrative controls to be unduly burdensome, counsel replied as follows (Tr. 224):

> JUDGE KOUTRAS: At any rate, I don't see anything in these three paragraphs that would, that would be an undue burden on the, on the Respondent in this case to comply with; wouldn't that be true? Do you agree or disagree with that? Counselor?
>
> MR. deMEZA: It would seem so, Your Honor, although I have not discussed it with the client.

I cannot conclude from the record in this case that the respondent has established that the recommended administrative controls are not feasible. By the same token, I cannot conclude that the parties have established that such controls will, or have had any significant impact in reducing the noise exposure. Quite frankly, I believe that the parties have concentrated on engineering controls, and have not fully considered the impact of any possible administrative solutions to the problem. Under the circumstances, I believe that the respondent has a continuing obligation to continue to explore feasible administrative controls, including those suggested during the hearing, in order to achieve full compliance with the noise requirements.

The parties are reminded that while the result of my decision in this case is to permit the respondent to use personal ear protection, as correctly stated by the petitioner, the use of such devices is not an absolute defense. My decision in this case focused on the pneumatic wrench, and my feasibility findings are in connection with that particular piece of equipment. Respondent may not sit idly by without making any further attempts to address its noise problems at the dumping location in question, and it has a positive duty to make good faith future efforts at achieving total noise compliance at the operation in question.

Fact of Violations

There is not dispute on the question of violation and the record supports a conclusion that the respondent is in violation of mandatory safety standard 30 CFR 55.5-50(b). Accordingly, the citations ARE AFFIRMED.

History of Prior Violations

The computer print-out submitted by the petitioner (Ex. P-1), reveals a moderate history of prior violations by the respondent with no previous violations of the cited standard herein, and I have considered this in the course of my penalty assessments in this case.

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

I conclude that the respondent is a large mine operator, and the parties agree that the payment of the proposed civil penalties will not adversely affect its ability to remain in business.

Negligence

Although respondent suggests that it was unaware of any noise problems at its unloading operation, and relied on its employees to bring such problems to its attention, since it did conduct noise tests on certain other equipment, I believe it had an obligation to insure that tests were made at the unloading area as well, particularly when its own safety supervisor (Rowell) candidly admitted that the unloading area was the only real source of any potential excessive noise. In these circumstances, I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

Although there is no evidence of any specific damage to any employee as a result of excessive noise exposure, the fact is that in this case the employees were not wearing personal protective devices. Since the respondent concedes that it was out of compliance and that the two cited employees were not wearing such protective devices, they were exposed to noise above the regulatory limits. Accordingly, I conclude that the conditions cited posed a potential source of harm to the employees, and that the violations were serious.

Good Faith Compliance

I conclude that the respondent made a good faith effort to achieve compliance after the cited conditions were brought to its attention, and I have considered this in the penalties assessed by me for the two violations in question.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 CFR Section	Assessment
094927	11/26/80	55.5-50(b)	$180
094928	11/26/80	55.5-50(b)	180
			$360

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me in the amounts shown above within thirty (30) days of this decision and order, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 4 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-3
	:	A.C. No. 36-05018-03503
v.	:	
	:	Cumberland Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This proceeding involves a single citation issued June 16, 1982, alleging a violation of a safeguard notice issued August 12, 1980, requiring that all track haulage switches be provided with reflector lights or some other means to show the direction of the switch throw. The subject citation charges a violation of 30 C.F.R. § 75.1403. Respondent concedes that the violation occurred but denies that it was significant and substantial and contests the amount of the penalty. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on June 21, 1983. Clarence D. Moats, Robert W. Newhouse and Eugene W. Beck testified on behalf of Petitioner; Don Laurie and Mark Skiles testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Cumberland Mine.

2. Respondent is a large operator and the subject mine is a large mine.

3. The imposition of a penalty in this case will not affect Respondent's ability to continue in business.

4. Between August, 1980 and August, 1982, Respondent had 50 violations of 30 C.F.R. § 75.1403 at the subject mine. The nature of these violations is not shown in the record. This history of prior violations is not such that a penalty otherwise appropriate should be increased because of it.

5. On August 12, 1980, a notice to Provide Safeguards was issued under 30 C.F.R. § 75.1403 requiring that at the subject mine all track haulage switches shall be provided with reflectors, lights, or some other means to indicate the direction of the switch throw.

6. The subject mine utilizes battery operated haulage equipment, including 5-ton and 10-ton locomotives (carrying men or supplies), and smaller vehicles called jeeps or crickets. The locomotives have a maximum speed of about 14 miles per hour.

7. On June 16, 1982, a reflector or other suitable means to indicate the alignment of the track haulage switch was not provided at the switch at the number 9 crosscut 12 butt East 17 Face South section of the subject mine. Citation No. 1146098 was issued for a violation of the notice to provide safeguards.

8. The track in the area cited continues beyond the switch for a distance of about 200 feet. There is a battery charging station about 140 feet from the switch.

9. The violation cited was abated promptly and in good faith.

ISSUES

1. Was the violation of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

2. The condition cited by the Federal Mine Inspector on June 16, 1982, described in Finding of Fact No. 7 was a violation of the safeguard notice issued August 12, 1980, and therefore, a violation of 30 C.F.R. § 75.1403.

3. The violation found above was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

The hazard caused by the absence of a reflector on a switch is that the operator of a haulage vehicle might mistake the position of the switch, and by going in the "wrong" direction, jostle the occupants in the vehicle or derail the vehicle. Because low-speed haulage equipment was in use in the subject mine, the injuries would not be nearly as serious as would be the case where high speed haulage equipment was involved. This limits the weight to be accorded Government's Exhibit No. 2, the Report of a Fatal Coal Mine (Haulage) Accident, which involved high speed haulage. Nevertheless, a derailment could result in injuries of a reasonably serious nature.

Respondent contends that its haulage operators rely on observing the switches rather than the reflectors, that absent reflectors were sometimes not cited by inspectors, that reflectors were often removed by employees, and that the haulage equipment travelled so slowly that an injury was improbable even if a vehicle operator mistook the position of the switch.

With regard to the first contention, it is self-evident that a reflector or light is visible for a greater distance than the switch and its absence clearly could contribute to an accident. The second and third contentions are irrelevant to this issue. With respect to the last contention, I accept the judgment of the government inspectors that a derailment even at low speed could result in injuries to occupants of haulage cars.

4. The violation was moderately serious.

5. The condition cited was known or should have been known to Respondent. It resulted from Respondent's negligence.

6. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $100.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED

1. The Citation No. 1146098 including its designation as significant and substantial is AFFIRMED.

2. Respondent shall within 30 days of the date of this order pay the sum of $100 for the violation found herein to have occurred.

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 4 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-39
	:	A.C. No. 36-05018-03505
v.	:	
	:	Cumberland Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In the above proceeding the Secretary seeks civil penalties for nine alleged violations of mandatory safety standards. Each violation was cited as significant and substantial. However, with respect to Citation No. 2011904, alleging a violation of 30 C.F.R. § 75.1722, the Secretary in open court deleted the significant and substantial designation and proposed that the violation be settled. With respect to Citation No. 2012075, alleging a violation of 30 C.F.R. § 75.606, the Secretary in open court deleted the significant and substantial designation. With respect to Citation No. 2011908, alleging a violation of 30 C.F.R. § 75.903, the Secretary moved that the citation be vacated and no penalty be imposed for the cited condition. Respondent admits that the remaining violations occurred, but denies that they were significant and substantial, and contests the penalties proposed. Pursuant to notice, the case was heard in Uniontown, Pennsylvania on June 21 and June 22, 1983. Robert W. Newhouse and Clarence D. Moats testified on behalf of Petitioner; Robert Alan Bohach, Mark Skiles, and Chuck Lemunyon testified on behalf of Respondent. Each party was afforded the opportunity to file a posthearing brief. Respondent filed such a brief. Based on the entire record and considering the contentions of the parties, I make the following decision.

ISSUES

1. Whether the violations are of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

2. What is the appropriate penalty for each violation?

FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS

1. Respondent is the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Cumberland Mine.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the subject mine and I have jurisdiction over the parties and subject matter of this proceeding.

3. Respondent is a large operator and the subject mine is a large mine.

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

5. Between August 1980 and August 1982, Respondent had a history of 50 paid violations of 30 C.F.R. § 75.1403, 2 violations of 30 C.F.R. § 75.601, 66 violations of 30 C.F.R. § 75.400, no violations of 30 C.F.R. § 75.1106-4, 8 violations of 30 C.F.R. § 75.606, and 11 violations of 30 C.F.R. § 75.1722(a). This is a moderate history of previous violations and penalties otherwise appropriate should not be increased because of it.

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

8. All of the contested violations were abated promptly and in good faith.

9. The subject mine is a gassy mine and liberates over one million cubic feet of methane in a 24-hour period. Methane ignitions have occurred at the subject mine.

Each of the above citations charged a violation of 30 C.F.R. § 75.1403 (notice to provide safeguards) because of inoperative or empty sanding devices on haulage equipment in the subject mine. On September 14, 1978, a notice was issued requiring that each self propelled personnel carrier should be provided with well maintained sanding devices. On April 30, 1980, a notice was issued requiring that all track mounted self-propelled personnel carriers and locomotives be equipped with properly installed and well-maintained sanding devices, except that personnel carriers (Jitneys) which transport not more than 5 persons need not be so equipped.

Citation No. 2012062, issued August 4, 1982, charges that on a mantrip, three sanders were empty and one was plugged with wet sand. (There are four sanders on the mantrip - one for each wheel). The mantrip had been used to transport the nine person crew into the section prior to the citation being issued. The rails were damp in some places, there was a slight grade in some areas, and people were working on the haulage. At times the rails may be wet. The mantrip had a maximum speed of 12 to 14 miles per hour. It has a hand operated mechanical brake, and can also be stopped by reversing the directional controller.

Citation No. 2012064, also issued on August 4, 1982, charges that the sanders on another mantrip were inoperative. This mantrip had been operated on wet track for about 400 feet because of a broken water line. Seven miners were transported on this mantrip.

Citation No. 2012073, issued on August 5, 1982, charges that sanders in a seven person mantrip were empty. Although different mantrips were involved, the section foreman in charge of the crew being transported was the same section foreman involved in Citation No. 2012062.

The purpose of requiring operating sanding devices on haulage vehicles is to give better traction to facilitate stopping and to round curves and climb grades at a safe speed. Although the equipment is operated a low speed, a sudden stop may be necessary for many reasons, e.g., persons or objects on the track, a switch with a defective reflector signal. Wet tracks or ascending or descending grades may require sand for proper traction. The failure to have operative sanding equipment is likely to result in injuries of a reasonably serious nature. The violations are significant and substantial. The violations were serious and resulted from Respondent's negligence. The violation charged in Citation No. 2012073 was the result of aggravated negligence. Based on the criteria in section 110(i) of the Act, I conclude that appropriate penalties for the violations are $200, $200, and $300.

CITATION NO. 2012065

This citation, issued August 4, 1982, charges a violation of 30 C.F.R. § 75.601 because the disconnecting devices for the trailing cables on a shuttle car and a continuous miner were not properly identified or tagged to correspond with the receptacles at the load center. The mandatory standard, which is a statutory provision, requires that "disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected." The hazard resulting from the violation is that someone could contact an energized cable thinking it was disconnected, or could inadvertently plug in the wrong cable. The plugs for the continuous miner cable and the shuttle car cable are very different in size and appearance, and could not be confused with one another. However, there were other shuttle cars and the disconnecting device for the shuttle car cables could be confused if one was not properly marked and identified. The load center at the subject mine has a keying system which is a physical means to prevent a plug from being inserted in the wrong receptacle. However, the keys are often taken off the cables, and it is not known whether keys were present on the day the citation was issued. Mechanics who work on cables are instructed to lock out the cable. If a break occurs in a power lead, the power would be cut by the ground continuity check. However, it is possible to have a bare wire not cut, without interrupting the continuity.

The question whether this violation is significant and substantial is a close one, but considering the large number of cables and power conductors in the mine, and the severe consequences which might ensue (electrocution), I conclude that the violation was significant and substantial. It was a serious violation, and should have been known to Respondent. Therefore, Respondent was negligent. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $250.

CITATION NO. 2012066

This citation, issued August 4, 1982, charges a violation of 30 C.F.R. § 75.400 because of an accumulation of dry coal, float coal dust, oil and grease in the operator's compartment, behind the electric motors for the cutting head and around the electric cables on a continuous mining machine. The machine was being trammed into a working place in the No. 4 entry at the time the citation was issued. The hazard created by this violation is that these accumulations are combustible and could propagate a mine fire. The methane monitor and the water sprays on the miner were working properly. However, the coal that was packed around the

motors would prevent the water sprays from reaching the motors in case of a fire. The accumulation in the operator's compartment was approximately 3 inches deep. The accumulation around the motor was packed and not easily measured. It would have taken several shifts to accumulate. The area of the mine in which the citation was issued recorded a maximum of 0.2 percent methane on the day in question. The continuous miner motor is water cooled and has thermal strips designed to shut off the motor if it overheats.

Accumulation of combustible materials in a coal mine is likely to contribute to a mine fire or explosion in a mine that liberates methane. The violation was significant and substantial. It was a serious violation and resulted from Respondent's negligence. I conclude that an appropriate penalty for this violation is $300.

CITATION NO. 2012074

This citation, issued August 9, 1982, charges a violation of 30 C.F.R. § 75.1106-4 because two compressed gas cylinders were standing along the shuttle car roadway without being secured from falling.

The hazard created by this violation is that the valve could be broken or the cylinders ruptured, releasing the compressed gas causing the cylinders to become as missiles. The section was preparing to begin a new shift. Both cylinders were in bags. The oxygen cylinder was capped and the acetylene cylinder had a recessed valve. I conclude that the cylinders could have been knocked over by a shuttle car, or other force, and could have been ruptured. If one or both were ruptured, serious injuries would likely occur. I conclude that the violation was significant and substantial. It was a serious violation and was caused by Respondent's negligence since it was evident to visual inspection. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $200.

CITATION NO. 2012075

This citation, issued August 9, 1982, charges a violation of 30 C.F.R. § 75.606 because the trailing cable for a construction miner was not adequately protected to prevent damage by mobile equipment. There was evidence that the cable had been run over, but there was no visual evidence of damage to the cable and a continuity check showed no damage to the power conductors. The cable was not energized. The cable had apparently fallen from hangers along the rib.

Petitioner stated that the violation was not significant and substantial. I conclude that it was not serious. It should have been observed by Respondent, however, on a preshift examination. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $50.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED

1. Citation Nos. 2012062, 2012064, 2012073, 2012065, 2012066, 2012074 are AFFIRMED as properly charging significant and substantial violations.

2. Citation Nos. 2011904 and 2012075 charge violations not properly designated as significant and substantial.

3. Citation No. 2011908 is VACATED and the penalty petition is dismissed with respect to it.

4. Respondent shall within 30 days of the date of this order pay the following penalties for violations found herein to have occurred:

Citation		Penalty
2011904		$ 20
2012062		200
2012064		200
2012073		300
2012065		250
2012066		300
2012074		200
2012075		50
	Total	$1,520

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 4 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-224 A.C. No. 42-00165-03051
v.	:	Price River No. 3 Mine
PRICE RIVER COAL COMPANY, formerly BRAZTAH CORPORATION, Respondent	:	

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado, for Petitioner;
Stanley V. Litizzette, Esq., Price River Coal Company, formerly Braztah Corporation, Helper, Utah, for Respondent.

Before: Judge Vail

Procedural History

This case is before me upon petition for assessment of a civil penalty by the Secretary of Labor pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). Respondent (formerly the Braztah Corporation, and now the Price River Coal Company) is charged with violation of a mandatory underground coal mine safety standard, for which a citation was issued pursuant to section 104(a) of the Act. In conjunction with the citation, a withdrawal order for failure to properly abate was issued pursuant to section 104(b) of the Act. Respondent duly contested the proposed penalty for the alleged violation of the safety standard. Upon notice to the parties, a hearing on the merits was held in Salt Lake City, Utah. Both parties filed post-hearing briefs.

Issues

The principal issues presented in this proceeding are: (1) whether respondent was properly charged with a mine safety violation, and if so, what civil penalty is appropriate based upon the criteria set forth in section 110(i) of the Act; and (2) whether respondent may now challenge a withdrawal order for respondent's alleged failure to abate the violative condition. Additional issues raised during the proceeding are identified and disposed of where appropriate in the course of this decision.

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

Stipulations

At the outset of the hearing, the parties stipulated to the jurisdiction of the Mine Safety and Health Review Commission to hear this case, and to several facts relevant to the assessment of penalties. It was agreed that: (1) respondent produces 3,200 tons of coal daily and employs 269 miners at the Price River No. 3 Mine; (2) respondent would stipulate to the admissibility of a computer printout (Exhibit P-7) to show the number of cited violations occurring over a 24 month period ending on February 5, 1981, the day that the citation involved in this proceeding was issued; and (3) respondent's payment of a penalty would not impair its ability to continue in business.

Findings of Fact

1) Respondent owns and operates a coal mine known as the Price River No. 3 Mine near Helper, Utah.

2) On February 2, 1981, Fred Lupo, president of the Local 8303 of the United Mine Workers of America (UMWA) at the Price River No. 3 Mine, attended a safety meeting at the mine, and afterward informed the mine superintendent of his concern with dirty mine belts. Upon being informed by the mine superintendent that when the mine's manpower was "built-up then they could spread out and do more jobs," Lupo advised the superintendent that he believed that the dirty belts had existed for a long period of time and that he intended to notify the Mine Safety and Health Administration (MSHA) and request an inspection (Tr. 75, 76).

3) On February 2, 1981, Lupo sent a letter on behalf of the UMWA to MSHA complaining of dirty belt lines in the mine, and requesting an inspection pursuant to section 103(g) of the Act. 1/ The letter was received by MSHA on February 3, 1981 (Tr. 76, Exhibit P-8).

4) Upon receipt of Lupo's letter, MSHA assigned Jerry Lemon to inspect the mine's belt lines. Lemon commenced his inspection on February 5, 1981 and was accompanied by Lupo and Victor Stuart, the mine's safety inspector.

5) Upon arriving at the No. 1 belt at the mine's Castle Gate portal on February 5, 1981, Lemon observed accumulations of both loose coal and float coal dust in the area of the belt's second set of air-lock doors, about 500 feet inby the mine portal. The coal accumulations extended a distance of 20 feet and were six inches to two feet in depth. Black deposits of float coal dust had accumulated on the floor and ribs of the same area (Tr. 29, 30, Exhibit P-6). Upon proceeding down the No. 1 belt to the area of the belt tail-piece, Lemon observed three belt drive rollers and the idler roller running in loose coal accumulations which measured 13 to 32 inches in depth and extended over a distance of 20 feet. In addition, black float coal dust accumulations were again evident and extended approximately 120 feet from the tail piece in the direction of the portal (Tr. 28, 31, 48, Exhibit P-6).

1/ Section 103(g) provides in pertinent part as follows:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

6) Lemon issued citation No. 1021163 at 4:40 p.m. on February 5, 1981, charging violation of 30 C.F.R. § 75.400. The citation listed the conditions in the area of the No. 1 belt described above in Finding No. 5 (Exhibit P-6).

7) After discussing the amount of time necessary for abatement of the cited conditions with the mine safety inspector, Lemon allowed two hour and 40 minutes for completion of the abatement work (Tr. 35, 80, Exhibit P-6).

8) Upon returning to the site four and a half hours later, Lemon determined that the abatement was incomplete. No rock dusting had been performed, and only 80 percent of the loose coal accumulations had been removed. Lemon then issued withdrawal order No. 1021164 pursuant to section 104(b) of the Act (Tr. 60, 62, Exhibit P-6). 2/

9) Four miners, a mine foreman, and Lupo completed the required abatement work within one hour, whereupon the withdrawal order was terminated at 10:25 p.m. on February 5, 1981 (Tr. 38, Exhibit P-6).

10) On May 26, 1981, the Secretary filed a petition for the assessment of a civil penalty against the respondent predicated upon the issuance of citation No. 1021163 for a violation of 75.400 and proposed a penalty of $470.00. Respondent filed an answer on June 16, 1981, admitting the above citation was issued on the date indicated but denying that a violation occurred. Respondent had not

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2/ Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

filed a notice of contest to the withdrawal order No. 1021164 issued on the day of the inspection, pursuant to section 105(d) of the Act. 3/

Discussion

Citation No. 1021163 charges respondent with violation of safety standard 30 C.F.R. § 75.400, which provides as follows:

> Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Lemon's description (both in the citation and at the hearing) of coal and float coal dust accumulations in the area of the mine's No. 1 belt was corroborated at the hearing by Fred Lupo.

Lemon testified that it was unlikely that the coal accumulations he observed occurred during only one shift, but instead had been there for at least five days. Lemon further stated that where a belt and its rollers run in loose coal, frictional heat can provide an ignition source and result in fire. In turn, the fire may set off an explosion where float coal dust has been allowed to accumulate. Both fire and mine explosions pose the threat of serious or fatal injury to miners (Tr. 32, 34, 35). In light of such alleged safety hazards, petitioner seeks to have citation No. 1021163 affirmed, and a civil penalty imposed.

In contrast, respondent urges that a civil penalty be disallowed. However, while respondent generally denied petitioner's allegation of a safety violation in its "Answer to Petition for

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3/ Section 105(d) of the Act provides in pertinent part as follows:

> 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 other 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 ... 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.

Assessment of Civil Penalty," it failed to make any arguments at the hearing or in its post-hearing brief rebutting the cited conditions of coal and float coal accumulations. Witnesses Stuart and Robert Lindsey (safety inspector and belt foreman respectively at the mine) did testify that the accumulations were damp. However, I find the credibility of such testimony to be weak since Lindsey also testified that he could not directly controvert Lemon's testimony that overall, the areas cited were dry (Tr. 114, 125). In view of such testimony, and upon careful review of the evidence, I find that accumulations of coal and float coal dust existed in respondent's mine and that such accumulations posed a hazard of a fire and explosion occurring. Accordingly, I affirm the issuance of citation No. 1021163.

Respondent further argued both at the hearing and in its post trial brief that the abatement period set by Lemon to correct the cited condition was unreasonable. Respondent therefore reasons that withdrawal order No. 1021164 was wrongfully issued, and that as a consequence the proposed penalty at issue in this case should not be assessed. In making such arguments, respondent confuses the function of this civil penalty proceeding with that involved in a "contest of order" proceeding. Section 105(d) of the Act allows a challenge of withdrawal orders, but only if the contest is filed within 30 days of the receipt of the order. 30 U.S.C. § 815(d). See Black Diamond Coal Mining Co, 5 FMSHRC 764 (April 1983)(ALJ) at 766-767. Based on the facts in the present case, the withdrawal order was issued and served on respondent by inspector Lemon on February 5, 1981, and there is no evidence that respondent filed its notice of contest challenging the order within the 30 day period as provided in section 105(d). Respondent's "contest" was initiated when it was served with a copy of MSHA's proposed civil penalty for the violation of standard 75.400 and informed MSHA on April 6, 1981 that it wished to contest citation No. 1021163 and the associated proposed penalty. Accordingly, I will not rule on the validity of the withdrawal order in the instant civil penalty case. Instead, I will decide only the affect of the withdrawal order on considerations of good faith abatement when addressing the issue of assessment of an appropriate penalty for respondent's violation of safety standards 75.400.

Penalty

Mine History, Size, and Financial Status

The evidence in this case shows that respondent had a history of approximately 114 violations at the Price River No. 3 Mine over a two year period ending on February 5, 1981 (Exhibit P-7). Respondent stipulated that the mine employed 269 miners, produced 3,200 tons of coal daily, and that payment would not effect its ability to continue in business (Tr. 5, 6). I find that the mine is of a medium size and that the number of prior violations indicates a moderate history of violations.

Negligence

I accept Lupo's unrebutted testimony that he informed a mine superintendent on February 2, 1981 of his concern with dirty mine belts. In view of such testimony, I conclude that respondent had notice of a potentially hazardous condition and yet failed to correct it. Furthermore, the evidence shows the respondent had been cited previously for violations of the same regulatory standard and was aware of application of the standard to conditions in its mine (Tr. 41). I therefore find that respondent's failure to maintain clean belt lines and correct hazardous conditions, although provided with notice of their existence, amounts to gross negligence.

Gravity

I find that the action of the respondent in this case constitutes a serious hazard. The accumulations of coal under the No. 1 belt, in combination with significant accumulations of float coal dust, created a serious hazard of fire and explosion and consequently the threat of serious or fatal injury to miners.

Good Faith

In addressing the issue of good faith abatement of a violative condition, petitioner contends that respondent's lack of good faith is demonstrated by the respondent's failure to timely abate the cited safety violations. The evidence of record establishes that upon issuance of citation No. 1021163, Lemon allowed two hours and 40 minutes for abatement of the hazardous conditions (Exhibit P-6). Upon returning to the site four and a half hours later, he discovered that while the coal belt continued in operation, only 80% of the loose coal accumulations had been removed and placed in the travelway adjacent to the belt. In addition, no rock dusting had been performed (Tr. 60). Lemon therefore issued a withdrawal order, and shut down the belt (Exhibit P-6). The abatement work was subsequently completed by four miners and the mine foreman, with the assistance of Lupo, within one hour, whereupon the order was terminated (Tr. 64).

Respondent contends that it used diligence and good faith in an attempt to abate the alleged violation. It rejects petitioner's claim that Lemon established the abatement period following a discussion with Stuart (the mine's safety inspector), during which Stuart allegedly indicated that two hours would be sufficient time to abate the cited conditions (Tr. 35, 80). Respondent denies that such a conversation took place (Tr. 126). It further contends that the abatement period was unreasonable due to Lemon's issuance of further citations for conditions which also required abatement, and the need to allow miners performing the abatement work a lunch break.

Upon careful review of the evidence, I find that respondent is unconvincing in its attempt to establish that Lemon was unreasonable in issuing the withdrawal order and refusing to extend the abatement period. Respondent offers no evidence that an extension of the abatement period was requested. Nor does the abatement period seem unreasonable in relation to activities required for the abatement of other cited violations. Lemon testified that while he later issued four other citations, the abatement deadline on at least two of them was set for the following day or later (Tr. 142). While Lemon established an abatement period of two hours and 40 minutes, he actually allowed four and a half hours to abate before returning to inspect such activities. At that time, Lemon discovered that necessary abatement work was incomplete although the necessary manpower was apparently available to perform such duties, since upon issuance of the withdrawal order, the abatement work was completed within one hour. Similar facts exist in U. S. Steel Corporation, 2 FMSHRC 832, 844 (April 1980)(ALJ), involving contest of a citation and 104(b) withdrawal order. In that case, Administrative Law Judge Koutras found that mine management was less than diligent in achieving abatement where manpower required for abatement work was available and yet had been assigned to other duties. Again, upon issuance of a withdrawal order, abatement of a safety violation was rapidly achieved. In light of the foregoing, and the credible evidence in this case, I find that respondent failed to make a diligent and good faith effort to achieve abatement.

Conclusions of Law

Based upon the entire record in this case, and consistent with my findings in the narrative portion of this decision, the following conclusions of law are made:

1) Respondent violated 30 C.F.R. § 75.400 as alleged by the Secretary of Labor, and accordingly citation No. 1021163 is affirmed.

2) Respondent failed to file a timely challenge to withdrawal order No. 1021164 and therefore is estopped from attacking its validity in this proceeding.

3) Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation charged in citation No. 1021163 is $470.

ORDER

WHEREFORE IT IS ORDERED that citation No. 1021163 is affirmed and respondent shall pay the above assessed penalty of $470.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 5 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 81-157 A.C. No. 36-00917-03092 Lucerne No. 6 Mine
v.	:	
HELVETIA COAL COMPANY, Respondent	:	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner

William M. Darr, Esq., Helvetia Coal Company, Indiana, Pennsylvania, for Respondent

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor under Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of a civil penalty for an alleged violation of a mandatory safety standard. The case was heard at Pittsburgh, Pennsylvania.

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

FINDINGS OF FACT

1. At all pertinent times Helvetia Coal Company (Respondent) operated an underground coal mine known as Lucerne No. 6 Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On February 27, 1981, MSHA Inspector William R. Collingsworth and his supervisor, John L. Daisley, conducted an inspection at Lucerne No. 6 Mine. As they prepared to go underground, Inspector Collingsworth noticed a discrepancy between the lamps in the lamp rack and the metal tags on the check-in board used to indicate who was underground. After an investigation, the inspector and his supervisor determined that twelve miners were underground although the check-in tags corresponding to their lamp numbers were still on the check-out board. They also found that twenty miners were not present on the mine property although check-in tags on the check-in board indicated they were underground.

3. The inspector determined that the check-in/out boards constituted the established check-in, check-out system.

4. He also determined that mine management knew or should have known of the errors in the check-in/out boards system because they were readily observable and he observed six mine foreman enter or leave the mine without using the boards.

5. The inspector issued an order of withdrawal under section 104(d) (2) of the Act, charging the operator with a violation of 30 CFR 75.1715, alleging that:

> The posted established check-in check-out system was not being properly used to provide a positive identification of every person underground.

The order was terminated on March 5, 1981, after the individuals who were listed in the order were reinstructed as to the proper use of the check-in, check-out system.

DISCUSSION WITH FURTHER FINDINGS

The main issue is whether the check-in, check-out boards were subject to the requirements of 30 CFR 75.1715, which states:

> Each operator of a coal mine shall establish a check-in and check-out system which will provide positive identification of every person underground and will provide an accurate record of the persons in the mine kept

on the surface in a place chosen to minimize the danger of destruction by fire or other hazard.

Respondent contends the lamp records were the primary check-in/out system and that the check-in, check-out boards were merely a backup for the records kept by the lamp man and, as such, were not subject to the above regulation. This contention is not supported by the evidence. The inspector observed at least six signs in the lamp house, each signed by the mine foreman, which stated: "All employees, be sure to use the check-in and check-out board before you enter the mine and after you arrive outside." The evidence shows that the check-in, check-out boards and metal tags were the primary means of identifying miners who were underground.

The lamp records might have served as a partial check-in/out system, but its primary purpose was to keep an accurate account of the miners for payroll purposes. The abbreviation "A" was written on the lamp records to indicate that a miner was "absent" for the day, and not to indicate that he was not underground. If the lamp records had been the primary identification system, the system would have been in violation of 30 CFR 75.1715, since these records did not identify all of the individuals who were underground. The lamp records dealt only with miners who reported at the beginning of a shift; they did not record individuals who entered or left the mine after a shift began. Also, the lamp records did not record management personnel who exited the mine.

I hold that Respondent violated 30 CFR 75.1715 by its improper use of the check-in, check-out boards and metal tags. A civil penalty of $370.00 is proper in light of the statutory criteria set forth in Section 110(i), including Respondent's size and compliance history and the factors of negligence, gravity and abatement. Respondent was negligent in that the violation could have been prevented by the exercise of reasonable care. The gravity of the violation is serious. Improper use of the check-in, check-out boards and tags could result in unnecessary delays and confusion in a mine rescue attempt and contribute to death or injury to mine rescuers or persons caught in a mine disaster. Respondent showed good faith in promptly abating the condition after notice of the violation by MSHA.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over this proceeding.

2. At all pertinent times, Respondent's Lucerne No. 6 Mine was subject to the provisions of the Act.

3. Respondent violated 30 CFR 75.1715 as alleged in Order No. 1042037.

Proposed findings and conclusions inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of $370.00 within 30 days from the date of this decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 5, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-118
	:	A.C. No. 36-06100-03506
v.	:	
	:	Solar No. 9 Mine
SOLAR FUEL COMPANY, Respondent	:	

ORDER OF DISMISSAL

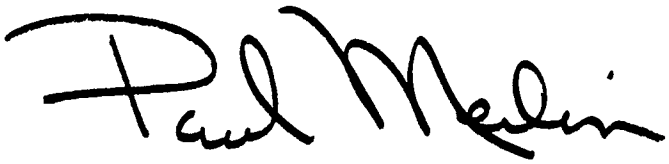
Before: Judge Merlin

In this case, the notice of contest card was signed by the operator and mailed to MSHA on March 14, 1983. On July 25, 1983, the Secretary of Labor mailed a motion for leave to file late petition and a petition for assessment of civil penalty. On August 4, 1983, the operator mailed a motion for dismissal on the basis of untimely filing of the petition.

A civil penalty petition should be filed within 45 days of receipt of a timely notice of contest of a penalty. 29 C.F.R. § 2700.27(a). The Commission has held that the late filing of a petition will be accepted where the Secretary demonstrates adequate cause and where there is no showing of prejudice to the operator. Salt Lake County Road Department, 3 FMSHRC 1714 (July 28, 1981) In his motion for leave to file late petition, the Secretary states: "The assessments information and all administrative records pertaining to the case were forwarded to the Solicitor's Office by Assessments. However, the file was misplaced inadvertently and the civil penalty petition was not filed in a timely manner."

The Secretary took over four months to file a petition which should have been filed within 45 days. The only proferred excuse in this case is that the file was misplaced. This bare assertion does not constitute adequate cause. The question of whether the operator was prejudiced by the delay does not arise here because there is no showing of adequate cause. A dismissal here is unfortunate for the enforcement of the Act but I see no alternative. Hopefully, the Solicitor will exercise greater care in the future.

Accordingly, the operator's motion is Granted and this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

October 6, 1983

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of SHELBY EPERSON, Complainant	:	DISCRIMINATION PROCEEDINGS Docket No. KENT 83-38-D Jolene No. 1 Mine
v.	:	
JOLENE, INC., Respondent	:	

CORRECTIVE ORDER

Pursuant to Commission Rule 65(c), 29 CFR § 2700.65(c), the decision in this case issued September 30, 1983, is hereby corrected as follows:

1. Page 4, paragraph 3, line 1:
The word "February" is hereby corrected to read "September".

2. Page 7, paragraph 1, line 4:
The date "September 6, 1983" is hereby corrected to read "September 6, 1982".

3. Page 7, paragraph 2, line 11:
The date, "May 28, 1983" is hereby corrected to read "May 18, 1983".

Gary Melick
Assistant Chief Administrative Law Judge

Distribution (by certified mail):

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nsw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 6 1983

MONTEREY COAL COMPANY, Contestant	:	Contest of Citation Docket No: LAKE 80-413-R Citation No. 775259; 9/11/80
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Monterey No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: LAKE 81-59 A/O No: 11-00726-03060
v.	:	No. 1 Mine
MONTEREY COAL COMPANY, Respondent	:	

DECISION

Before: Judge Moore

The above cases have been remanded to me for the purpose of assessing a penalty. Inasmuch as the Commission has already affirmed the citation, only Docket No: LAKE 81-59 is actually before me.

The parties have stipulated as to Monterey's size, history of violation, negligence, good faith and gravity. As to gravity, it is interesting to note that despite the government appellate counsel's representations to the Commission as to the safety concerns of MSHA, the assessment office assessed only $100 with no points for gravity. In my opinion a penalty of $50 is appropriate.

Monterey is accordingly ORDERED to pay MSHA, within 30 days, a civil penalty in the amount of $50.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, 1100 Connecticut Avenue, NW., Washington, D.C. 20036 (Certified Mail)

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OCT 6 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 82-299
	:	A.C. No. 36-00970-03502
v.	:	
	:	Maple Creek No. 1 Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Thomas A. Brown, Esq., and Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This proceeding involves six alleged violations of mandatory safety standards. Each of the citations alleging the violations was denominated significant and substantial. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on June 22, 1983. William R. Brown, James L. Potiseck, and Alvin R. Shade testified for Petitioner; Dan Basile, John Pacsko, Walter J. Franczyk, and Joseph Ritz testified for Respondent. Petitioner made a motion on the record to withdraw Citation No. 1250103 after testimony was taken concerning it. I ordered the citation vacated and will dismiss the penalty petition with respect to that citation. Petitioner also moved to vacate Citation No. 1250106 because of insufficient evidence to establish the violation charged. I ordered the citation vacated and will dismiss the penalty petition with respect to that citation. Each party has filed a posthearing brief. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS

1. Respondent is the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 1 Mine.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

3. The subject mine produces 541,835 tons of coal annually. Respondent produces 15,000,000 tons of coal annually. Respondent is a large operator.

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

5. In the 24-month period prior to the issuance of the citations involved herein, Respondent had a total of 673 assessed violations. Of these, 11 were violations of 30 C.F.R. § 75.515, 5 of 75.1003, 3 of 75.302 and 13 of 75.516. This history is not such that penalties otherwise appropriate should be increased because of it.

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. The subject mine is classified as a gassy mine. It liberates more than one million cubic feet of methane in a 24-hour period.

8. Whether a cited violation is properly labelled as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

CITATION NO. 1250104

This citation, charging a violation of 30 C.F.R. § 75.511, was issued when the inspector observed a shuttle car operator changing a light bulb on his shuttle car. The citation alleges that the shuttle car operator was not qualified to perform electrical work and that he failed to lock out and tag the disconnecting device when performing the work. Changing the bulb required the removal of the lens and the insertion of the bulb having two prongs into a socket having two holes. This seems to be a rather elementary task, but it clearly is electrical work. The inspector (and apparently

the shuttle car operator) interpret the term "qualified person" to mean one who has had electrical training and has obtained his "electrical papers." This interpretation was not rebutted by Respondent's witnesses. It is clear that the disconnecting device was not locked out and tagged. The power switch on the shuttle car was turned off however. No bare wires were exposed when the lens was removed. The system carries 32 volts, AC. I conclude that a violation was shown. I further conclude, however, that an injury was not likely to occur, and that a serious injury was extremely unlikely. Following the test in the National Gypsum decision, I conclude that the violation was not significant and substantial. The violation was not serious. There is no evidence that Respondent was aware of the violation as it occurred, or that it was deficient in its training program. Therefore, the violation was not the result of negligence. I conclude that an appropriate penalty for this violation is $30.

CITATION NO. 1205105

This citation, charging a violation of 30 C.F.R. § 75.1003, was issued because a mantrip stopped and discharged miners at an area beyond the station where the trolley bar and wire were not guarded. The trolley wire was about 6-1/2 feet above the floor. The standard requires that trolley wires be guarded at man-trip stations. The inspector stated that the mantrip went approximately 100 feet past the regular station before stopping. Respondent's assistant mine foreman testified that it did not go beyond the station, but did admit that the mantrip may have gone "a foot or two, the length of the portal bus" beyond the station, but "I don't think the operator himself went beyond the unguarded portion." (Tr. 92). I accept the testimony of the inspector that the mantrip stopped beyond the regular mantrip station to discharge miners. I conclude that the standard is intended to prohibit such an occurrence. The hazard posed by this violation is that the trolley operator was likely to contact the energized uninsulated trolley wire. The operator had to stand to "dog" the pole, and the wire was head high. The violation was reasonably likely to result in a serious injury. Therefore, the violation was significant and substantial. It was a serious violation. The evidence does not show that the violation was the result of Respondent's negligence. I conclude that an appropriate penalty for the violation is $150.

CITATION NO. 1249389

This citation, charging a violation of 30 C.F.R. § 75.302-1(a), was issued because Respondent mined a full cut of coal - 15 feet - without extending the line curtain. The standard requires that line brattice be installed at a distance of no greater than 10 feet from the area of deepest penetration. Respondent was conducting retreat mining at the time. The methane monitor on the continuous miner was working properly as were the water sprays. The area was well rockdusted. The inspector found 6,200 cubic feet of air at the face, 1,200 more than the minimum required by the ventilation plan.

The failure to advance the line curtain to within 10 feet of the face causes inadequate face ventilation. In the event of a methane liberation, an ignition and mine explosion could occur. In a gassy mine, such an event is reasonably likely. The violation was significant and substantial. The inspector testified that the mining machine operator told him that it was Respondent's practice when the last cut was involved to go 12 feet inby the curtain. The assistant mine foreman testified that the machine operator told him that he misjudged the position of the curtain. I conclude that moderate negligence was involved. I conclude that $250 is an appropriate penalty for this violation.

CITATION NO. 1249546

This citation, charging a violation of 30 C.F.R. § 75.516, was issued because an energized power wire was hung on a wire nail affixed to a wooden post. The wire was insulated. There was no tension on the wire, and the insulation did not appear to be damaged. The wire carried 560 to 600 volts of direct current. The inspector stated that vibrations could damage the insulation and bare the wire, which could cause a short circuit. I find, however, that there was little or no tension on the wire and that damage to the insulation where the wire rested on the nail was unlikely. I conclude that there was a violation, but it was not significant and substantial. The inspector had cited Respondent for similar conditions previously. Therefore, I conclude that the violation, while not serious, was the result of Respondent's negligence. An appropriate penalty for this violation is $75.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED

1. Citation Nos. 1250103 and 1250106 are VACATED, and the penalty petition is DISMISSED with respect to such citations.

2. Citation Nos. 1250104 and 1249546 are AFFIRMED but the violations were not significant and substantial.

3. Citation Nos. 1205105 and 1249389 are AFFIRMED as issued and the violations were significant and substantial.

4. Respondent shall, within 30 days of the date of this decision, pay the following civil penalties for the violations found herein to have occurred:

Citation		Penalty
1250104		$ 30
1250105		150
1249389		250
1249546		75
	Total	$505

James A. Broderick
Administrative Law Judge

Distribution:

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OCT 6 1983

UNITED MINE WORKERS OF AMERICA ON BEHALF OF LOUIS MAHOLIC, Complainant	:	DISCRIMINATION COMPLAINT
	:	Docket No. PENN 83-112-D
v.	:	Russellton Mine
ANDY ONFICER AND BCNR MINING CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This case involves a discrimination complaint filed on March 9, 1983 by the complainant against the respondents pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The respondents contested the allegations, and the matter was scheduled for a hearing in Washington, Pennsylvania, Wednesday, August 24, 1983 at 9:30 a.m. However, on the representations by complainant's counsel on August 22, 1983, that the parties had reached a settlement of the dispute, the hearing was cancelled and continued. The UMWA now files a motion to approve the settlement.

The complainant, president of Local Union 3506, avers that he was a representative of the miners for purposes of section 103(f) of the Act, and he alleges that he was suspended by the respondent for insisting on being permitted to exercise his walkaround rights during a MSHA inspection on September 24, 1982. Although he was later allowed to return to work, he further alleges that he was threatened with suspension if he refused to work at any later date. He further states that a complaint was filed with MSHA on November 1, 1983, and that by letter dated February 7, 1983, MSHA informed him that on the basis of their investigation, no violation of the anti-discrimination provisions of section 105(c) had occurred.

Discussion

In seeking dismissal of this complaint, the UMWA states Mr. Maholic has informed them that all references to the events of September 24, 1982, which triggered the filing of this case have been removed from his personnel file. In addition, the UMWA has submitted a copy of a draft letter from mine management to Mr. Maholic informing him of this action, as well as the assurance by mine management that it intends to provide authorized miners' representatives with the opportunity to accompany the Secretary or his authorized representative during physical inspections of the mine.

Conclusion and Order

It would appear to me that this dispute has now been resolved to the mutual satisfaction of the parties. Accordingly, the UMWA's motion to approve the settlement IS GRANTED, and IT IS ORDERED that this case be DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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/slk

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OCT 6 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. PENN 83-86 A.C. No. 36-04596-03503
v.	:	Bark Camp Strip
GLEN IRVAN CORPORATION, Respondent	:	Docket No. PENN 83-87 A.C. No. 36-02391-03507
	:	Bark Camp No. 1

DECISIONS

Appearances: David Bush, Office of the Solicitor, U.S. Department of Labor, Philidelphia, Pennsylvania, for Petitioner;
Robert M. Hanak, Esq., Reynoldsville, Pennsylvania, for 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 14 alleged violations of certain mandatory safety standards found in Parts 50, 75, and 77, Title 30, Code of Federal Regulations. Respondent filed timely answers and the cases were heard in Pittsburgh, Pennsylvania on July 27, 1983, along with two other cases involving these same parties which were heard that day.

Issues

The principal issue presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent

for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the cases, that the respondent has a good history of prior citations, and that it is a small operator (Tr. 5; 134-137).

Discussion

During a colloquy on the record with counsel for the parties in these proceedings, it was made clear to counsel that the Secretary's Part 100 Civil Penalty Assessment regulations are not binding on the Commission or its Judges. It is also clear to me that under the Act all civil penalty proceedings docketed with the Commission and its Judges are de novo and that any penalty assessment to be levied by the Judge is a de novo determination based upon the six statutory criteria found in section 110(i) of the Act, and the evidence and information placed before him during the adjudication of the case. Sellersburg Stone Company, 5 FMSHRC 287, March 1983.

The fact that the petitioner may have determined that some of the violations in issue in these proceedings are not "significant and substantial", and therefore qualify for the so-called "single penalty" assessment of $20 pursuant to section 100.4, and are not to be considered by the petitioner as part of the respondent's history of prior violations pursuant

to section 100.3(c), is not controlling or even relevant in these proceedings. Regardless of the Secretary's regulations, once Commission jurisdiction attaches, I am bound to follow and apply the clear mandate of section 110(i) in determining the civil penalty to be assessed for a proven violation after due consideration of all of the criteria enumerated therein. The fact that Congress chose to include language in section 110(i) which arguably authorizes the Secretary not to make findings on the penalty criteria clearly is inapplicable to the Commission.

Section 110(i) of the Act requires Commission consideration of all six penalty criteria, and the fact that the Secretary chooses to ignore $20 citations as part of a mine operator's compliance record is not controlling when the case is before a Commission Judge. Accordingly, for civil penalty assessment purposes, I will take into consideration all previously paid citations by the respondent, including any "single penalty" $20 citations which have been paid.

In the course of the hearings in these cases, the parties advised me that they agreed to a proposed settlement for all of the citations which were originally disputed. However, with respect to one of the citations in PENN 83-66, No. 2000776, December 7, 1982, citing a violation of mandatory standard 77.1710(i), the parties advised that the alleged fact of violation is in dispute and testimony from the inspector who issued the citation and the respondent's safety director was offered for the record.

With regard to Docket PENN 83-87, the parties presented their arguments in support of the proposed settlement on the record (Tr. 88-108), including information concerning the six statutory criteria found in section 110(1). After consideration of the arguments presented in support of the proposed settlement, and pursuant to Commission Rule 30, 29 CFR 2700.30, the settlement was approved, and the citations, initial assessments, and the settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
2016781	11/15/82	75.1702	$ 20	$ 20
2016783	11/15/82	75.200	46	46
2016784	11/15/82	75.503	20	20
2016785	11/16/82	75.517	79	79
2016787	11/17/82	75.1100-3	20	20
2016789	11/18/82	75.517	112	90
2016791	11/19/82	75.326	20	20
			$ 317	$ 295

In Docket No. PENN 83-86, the parties proposed a reduction of $20 in the penalty assessed for Citation No. 2000774. However, after considering the circumstances concerning this violation, the proposed settlement reduction was rejected and I approved payment for the full amount of the $58 penalty assessment (Tr. 75-84; 86).

With regard to Citation Nos. 2000773, 2000696, 2000775, 2000777, and 2000778, after consideration of the arguments presented by the parties in support of their settlement proposals, including information concerning the six statutory criteria found in section 110(i), I approved the proposed settlements requiring the respondent to pay the full amount of the proposed civil penalty assessments (Tr. 41-57). The MSHA inspector who issued the citations and the respondent's safety director were both present in the courtroom and were in agreement with the disposition made of these citations. The citations, initial assessments, and the approved settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
2000773	12/2/82	77.409(a)	$ 20	$ 20
2000774	12/2/82	77.1710(i)	58	58
2000696	12/3/82	50.30	20	20
2000775	12/7/82	77.410	20	20
2000777	12/7/82	77.1605(a)	20	20
2000778	12/10/82	77.208(d)	20	20
			$ 158	$ 158

With regard to citation no. 2000776 charging a violation of mandatory safety standard 77.1710(i), there is a dispute as to whether or not the facts and circumstances support a violation of the cited standard. The condition or practice is described by the inspector is as follows:

> A functional set of seat belts were not provided for the Caterpiller model D9H bulldozer SN 90 V 5229 on which roll-over protection was provided. The seat belts were not functional in that the right seat belt was not provided. The dozer was operating in pit 008 on terrain where a danger of overturning existed. The bulldozer was operating under the supervision of Orland Gray. (Emphasis added).

Section 77.1710(i) provides in pertinent part as follows:

> 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:

* * * *

(i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.

MSHA Inspector John Brighenti confirmed that he issued the citation in question and he explained that at 9:30 a.m. when he inspected the cited bulldozer he told the operator, Merle Stewart that he wished to check the seat belts. The left part of the belt was visible, but he could not see the right part which contained the buckle. After Mr. Stewart advised him that the buckle end of the belt which was not visible was probably wedged under the seat, he and Mr. Stewart pulled up the seat, and while they both observed the remaining portion of the left side of the belt, they could not find the buckle end and Mr. Stewart exclaimed that "it is not here" (Tr. 59-60). Mr. Brighenti then advised foreman Orland Gray that he was going to issue a citation because he could not see or find the missing end of the seat belt. At approximately 10:55 a.m., Mr. Gray shut the bulldozer down, and he and Mr. Stewart proceeded to work on the seat belts. Later, at 11:30 a.m., Mr. Gray approached Mr. Brighenti and advised him that "That's not a violation because the right strap was in there also" (Tr. 61). Mr. Brighenti advised Mr. Gray that since he couldn't find the missing portion of the belt when he first inspected and observed the bulldozer, as far as he was concerned the belt was not "provided" as required by section 77.1710(i), and that the violation would stand (Tr. 59-61).

In explaining why he refused to change his mind after Mr. Gray had advised him that the missing portion of the belt was finally discovered, Mr. Brighenti stated that it was probably wedged down under the seat between the final machine drives and the vehicle frame. Since he and Mr. Stewart could not see or find it after the seat was raised, and since it obviously took Mr. Gray and Mr. Stewart approximately 35 minutes to locate it, Mr. Brighenti was of the view that it was not "provided", was not functional, and was not available to the driver who should have been wearing it (Tr. 62-64). The bulldozer was provided with rollover protection.

Respondent's defense is that the seat belt portion which was not visible to the inspector was in fact "provided" and on the cited bulldozer, albeit it was discovered wedged under the seat after the foreman and the operator made a search for it (Tr. 65). Since the inspector accepted the foreman's word that the missing portion of the belt was later discovered, and since there is no contention or evidence that the respondent

here installed a new seat belt to achieve abatement, respondent takes the position that the belt was provided and that it complied with the cited section (Tr. 68). Respondent presented no testimony on the violation.

Findings and Conclusions

Respondent's defense to Citation No. 2000776 IS REJECTED. On the facts of this case I conclude that the inspector acted reasonably in the circumstances. Since he and the driver could not find the buckle end of the seat belt after lifting the seat and looking for it, the inspector simply concluded that it was missing and issued the citation. Section 77.1710(i) requires the driver to wear the belt while he is operating the bulldozer, and since the driver couldn't locate one end of it after the vehicle was stopped for inspection it seems obvious to me that he was not buckled into the belt while the vehicle was being operated. Accordingly, the citation IS AFFIRMED.

The lack of a totally functional seat belt at the time the citation issued presented a reasonably serious situation which could have been avoided by the exercise of reasonable care on the part of the driver or a supervisor who should have checked the equipment out before placing it in operation. Accordingly, I conclude that the violation was serious and that it resulted from ordinary negligence. I also conclude that the respondent demonstrated good faith compliance and that the payment of a civil penalty in the amount of $58 as proposed by the petitioner will have no adverse impact on the respondent's ability to continue in business.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in Docket Nos. PENN 83-86 and PENN 83-87. Respondent is also ORDERED to pay an additional civil penalty in the amount of $58 for Citation No. 2000776 which I have affirmed in Docket No. PENN 83-86. Payment for all of the assessed violations shall be made to the petitioner within thirty (30) days of the date of these decisions, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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/slk

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OCT 7 1983

SECRETARY OF LABOR. MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: KENT 83-62 A/O No: 15-10062-03501
v.	:	Coal Carriers Mine
COAL CARRIERS, INC., Respondent	:	

DECISION

Before: Judge Moore

By letter of September 29, 1983 the Solicitor has advised that respondent has filed for bankruptcy and is no longer interested in contesting the citations and penalties. A copy of a letter from respondent's attorney confirms this.

This is not a settlement. It is more like a default in that respondent has announced, in effect, that it would not show up at a hearing. I am therefore treating the case as I would an actual default, but without the issuance of a useless show cause order.

The citations are affirmed and respondent is ordered to pay to MSHA, within 30 days, a civil penalty of $336.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution:

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Mr. Byron B. Terry, Mine Consultants, Inc., P.O. Box 431, Beaver Dam, KY 42320 (Certified Mail)

Mr. William Nestor, Vice President & General Manager, Coal Carriers, Inc., P.O. Box 956, Bowling Green, KY

/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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OCT 7 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 80-83
	:	A.C. No. 42-01202-03021 V
	:	Docket No. WEST 80-135
	:	A.C. No. 42-01202-03024
v.	:	
	:	Price River No. 5 Mine
PRICE RIVER COAL COMPANY, formerly BRAZTAH CORPORATION, Respondent	:	(formerly Braztah No. 5 Mine)

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado, for Petitioner;
Stanley V. Litizzette, Esq., Price River Coal Company formerly Braztah Corporation, Helper, Utah, for Respondent.

Before: Judge Vail

Statement of the Cases

These cases are before me upon petition for assessment of civil penalties by the Secretary of Labor pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). In Docket No. WEST 80-83, captioned above, respondent (Price River Coal Company, formerly Braztah Corporation) is charged with violation of safety standard 30 C.F.R. § 75.400 in citation No. 789581. The citation alleged that the violation at respondent's Price River Coal Co. No. 5 Mine (formerly Braztah No. 5 Mine) was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard and that there was an unwarrantable failure on the part of respondent justifying action pursuant to section 104(d)(1) of the Act. Within 90 days of the issuance of that citation, respondent was charged with an unwarrantable failure to comply with 30 C.F.R. § 75.200 in withdrawal order No. 789596, also issued pursuant to section 104(d)(1) of the Act.

In Docket No. WEST 80-135, captioned above, respondent was charged in citation No. 789961 with a safety violation pursuant to section 104(a) of the Act and 30 C.F.R. 75.1403.

Upon agreement by the parties, the cases were consolidated for hearing and decision. Following notice to the parties, a hearing on the merits was held in Salt Lake City, Utah. No jurisdictional issues were raised. Both parties filed post-hearing briefs.

Issues

1) Did respondent violate safety standard 75.400, and if so, is a review of special findings related to the citation appropriate? If the alleged violation occurred, what civil penalty should be assessed?

2) Was respondent properly charged with a violation of safety standard 75.200 in a withdrawal order, and if so, may the special findings issued in conjunction with the charged violation also be reviewed? If the alleged violation occurred, what civil penalty may properly be assessed?

3) Was respondent properly charged with violation of safety standard 75.1403, and if so, what civil penalty should be assessed?

Additional issues raised during the proceeding are identified and disposed of where appropriate in the course of this decision.

STIPULATIONS

At the outset of the hearing, the parties stipulated to several facts relevant to the assessment of penalties. It was agreed that: (1) respondent's Price River No. 5 mine is a large operation; (2) the total number of assessed violations for the mine in the 24 months prior to May 14, 1979 was 223; and (3) payment of penalties would not impair respondent's ability to continue in business.

DOCKET NO. WEST 80-83

Citation No. 789581

On May 14, 1979, MSHA inspector Donald B. Hanna conducted an inspection of respondent's Price River Coal Co. No. 5 Mine (formerly Braztah No. 5 Mine). During the inspection, Hanna issued citation

No. 789581, pursuant to section 104(d)(1) of the Act. 1/ Respondent was charged with an unwarrantable failure to comply with safety standard 30 C.F.R. § 75.400, which provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

The citation also alleges that the violation was "significant and substantial."

Hanna stated in the citation that combustible materials had been allowed to accumulate in the mine's 6th West working section along the No. 1 belt. Float coal dust was deposited on rock-dusted surfaces along the operating belt conveyor which was transporting coal. The float coal dust ranged in color from gray to black, affected an area 20 feet wide in the entry and up to 40 feet wide at the crosscut intersections, and extended a distance of approximately 400 feet from the belt tail-piece outby five crosscuts. In addition, combustible materials, loose wood, pieces of brattice, fine dry coal dust and loose coal cuttings had been allowed to accumulate along both sides of the belt conveyor. The coal dust and loose coal was approximately one inch deep in the entry, and at a depth ranging from approximately two to twelve inches in the area of one side of the five crosscuts. The No. 1 belt entry had been reported dark and in need of rock dusting prior to the day shift in the mine's pre-shift examination book. The report had been signed by the mine foreman.

1/ Section 104(d)(1) of the Act provides in pertinent part as follows:

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

No action to abate the condition was detected by the inspector at the time he issued the citation (Exhibit P-1).

Hanna repeated such observations during the hearing (Tr. 188, 190-196). In addition, he testified that at the time of his inspection he noted that loose coal had accumulated between the belt's tail-piece roller and a safety guard. He observed that the coal was being ground by the operating belt into coal dust and float coal dust, was then carried by air currents and deposited at an "overcast" at the 5th crosscut (Tr. 188, 194).

The time for abatement of the conditions was set for 4:00 p.m. on May 14, 1979. The abatement period was subsequently extended until 11:00 p.m. due to the extent of accumulations and abatement work required. When Hanna returned to the area at 9:05 a.m. on May 15, 1979, the abatement work was approved; the combustible materials had been removed, and the area had been dusted with 200 pounds of rock dust (Tr. 184, 199-200, 207, 208. Exhibit P-1). Hanna estimated that it took crews of at least six men working during the day and night shift between ten and fifteen hours to abate the condition.

On December 10, 1979, the Secretary filed a petition for the assessment of a civil penalty against respondent predicated on the issuance of the citation charging violation of safety standard 75.200. The Secretary proposed a penalty of $1,000.00. Respondent duly contested the proposed assessment of penalty.

Respondent failed to rebut Hanna's findings. In fact, John Tatton, respondent's safety inspector who accompanied Hanna on his underground inspection of the coal mine, admitted during the hearing that fine dry coal dust (varying in color from gray to black), loose coal cuttings, wood, and pieces of brattice had accumulated at spot locations in the cited area (Tr. 167-169).

Since Hanna's findings were not rebutted by respondent but instead were actually corroborated in part by respondent's own witness, I accept as fact the evidence and testimony presented by the petitioner. I therefore find that respondent allowed combustible materials to accumulate in the mine's 6th West working section along the No. 1 belt and that such accumulations constituted a violation of safety standard 75.400.

I shall next address issues raised by the parties involving the special findings that such a violation was "significant and substantial," and represented respondent's "unwarrantable failure" to comply with a mandatory safety standard. Such findings are necessary in order to support Hanna's issuance of a citation pursuant to section 104(d)(1) of the Act. Petitioner contends that the accumulation of combustible materials constituted a "significant and substantial" violation. Hanna testified that an explosion of float coal dust in the area of the 6th West working section along the No. 1

belt was possible if sufficient ignition charge existed. Hanna further stated that potential ignition sources included electrical components and cables, and frictional heat being generated by coal being ground at the tail-piece of the No. 1 belt (Tr. 189, 211, 217). He believed that the possibility of fire and explosion posed a threat of serious and fatal injury to miners (Tr. 180).

Respondent denies that the accumulations of combustible materials represented a "significant and substantial" violation. Respondent in its post-hearing brief suggests that the condition was not significant because the "inspector admitted that the condition did not require shutting the production down and that it 'wasn't that bad' ... p. 241." Upon reviewing the transcript, I find that Hanna did not make such a statement. Instead, Hanna testified that although the condition was not an imminent danger, the float coal dust represented a serious violation having significant and substantial possibility of ignition (Tr. 109, 110).

The finding of whether a violation is "significant and substantial" depends on whether there existed a reasonable likelihood that the hazard contributed to or would have resulted in an injury of a reasonably serious nature. Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981)(ALJ). The test involves two considerations: the probability of resulting injury and the seriousness of the resulting injury. Upon analysis of the testimony at the hearing and the facts surrounding the violation, I am convinced that at the time the citation involved here was issued there was a reasonable likelihood that the hazard of float coal dust ignition would have resulted in serious or fatal injury to miners in the area of the 6th West working section. Respondent's seeming confusion between a finding of "significant and substantial" violation and "imminent danger" does not disturb such a finding. 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," 30 U.S.C. § 802(j), emphasis added. For a hazard to be termed significant and substantial, no determination need be made that an accident may reasonably be expected to occur before the condition can be abated.

Accordingly, I conclude that the violation of standard 75.400 was "significant and substantial." A determination must next be made of the issues related to Hanna's finding that the violation was the result of respondent's "unwarrantable failure" to comply with the mandatory safety regulation.

The standard by which an "unwarrantable failure" is determined was established in Zeigler Coal Company, 7 IBMA 280 (1977). That

se stated that a violation is the result of an unwarranted failure if the violative condition is one which the operator knew or should have known existed, or which the operator failed to correct through indifference or lack of reasonable care. In support of the issuance of a 104(d)(1) citation charging "unwarrantable failure," Hanna testified to his belief that the combustible materials had accumulated over more than one shift (Tr. 209), and that an agent of the respondent (the mine foreman, Marinos) knew of the violative condition due to reports made in the mine's pre-shift book by the fire boss. Hanna testified that the violative condition along the No. 1 belt had been reported in the pre-shift book by the fire boss on the day of the inspection, and on numerous times over the period of a month (Tr. 186), 206-207, 212).

Despite Hanna's testimony citing "unwarrantable failure," the Secretary takes the position that under Windsor Power House Coal Company, 2 FMSHRC 1739 (July 1980)(ALJ) the special finding of "Unwarrantable failure" is not at issue and need not be proved in a penalty proceeding on a 104(d)(1) citation (petitioner's brief at 4).

In arguing against the finding of "unwarrantable failure," the respondent charges that the inspector based the finding only on the fact that the condition had been reported in the pre-shift book. Respondent further states that:

> Under the facts of the case there was no evidence that the operator intentionally, knowingly, or recklessly permitted accumulations of combustible materials. The mere fact that the operator was aware of the condition (emphasis added) is not sufficient to constitute an unwarrantable citation. See Freeman Coal Mining case ... (respondent's brief at 2).

In addressing the arguments of the parties, I first reject petitioner's claim that a finding of "unwarrantable failure" need not be proved in a penalty proceeding involving a citation issued pursuant to section 104(d)(1) of the Act. In Windsor Power, supra, Judge Melick found that the Act's provisions allow an operator to challenge the existence of a violation charged in a citation in a civil penalty proceedings. However, he found no authority under the Act to consider the special findings of "significant and substantial" and "unwarrantable failure" in civil penalty proceedings; failure to timely file a notice of contest to the citation within 30 days after its receipt foreclosed the operator from challenging such special findings. 2 FMSHRC at 1741.

Upon reviewing a more recent Commission decision, I find that both the existence of a violation and the special findings charged in a citation may properly be reviewed in a civil penalty proceeding. In National Gypsum, supra, the Commission found that the validity of special findings is in issue in a penalty proceeding. Review of special findings charging an operator with "significant and substantial" violation and "unwarrantable failure" to comply with federal regulation was found by the Commission to be important due to the effect of such findings in triggering the possible issuance of subsequent withdrawal orders under appropriate provisions of the Act.

In accord with the Commission decision, I therefore reject petitioner's contention that the special finding of "unwarrantable failure" is not at issue in the present civil penalty proceeding. Instead, I find that the charge of respondent's "unwarrantable failure" to comply with safety standard 75.400 must be reviewed.

A finding of unwarrantable failure on respondent's part is supported by Hanna's undisputed testimony that combustible material had accumulated during more than one shift. Furthermore, the evidence shows that the violative condition had been reported at least once in the pre-shift book prior to Hanna's inspection (Exhibit R-1). Respondent did attempt to rebut Hanna's testimony that he observed that the cited condition had been reported in the pre-shift book numerous times in the month preceding his inspection. However, I find such an attempt to be unsuccessful. Respondent produced three non-consecutive pages and reports from the pre-shift book, showing two pre-shift reports with no mention of the violative condition (Exhibit R-1). However, respondent had not preserved the actual pre-shift book. Such selective production of evidence is ineffective in rebutting Hanna's charge that respondent had notice of the violative condition.

I therefore conclude that respondent knew or should have known of the violative condition, and that it failed to correct such a condition. Its violation of safety standard 75.400 therefore constituted unwarrantable failure to comply with the law. In making such a finding, I reject respondent's claim that under Freeman Coal Mining Company, 1 MSHC 1209 (December 1974), mere awareness of a hazardous condition is not enough to constitute an "unwarrantable failure." Respondent misreads the cited case, which provided in pertinent part that under the Federal Coal Mine Health and Safety Act of 1969:

> The issue of "unwarrantable failure" in an "accumulation" case presents the question of whether the operator intentionally or knowingly or recklessly permitted the accumulation of or failed to clean up the particular masses of combustible materials ... It does not concern the question of whether the operator was at fault for not being

aware generally that the Act proscribes and requires clean-up of "accumulations." 1 MSHC at 1211.

In summary, both special findings of "significant and substantial" and "unwarrantable failure" are affirmed, as is citation No. 789581.

PENALTY

As previously noted at the outset of this decision, the parties stipulated to the mine's size, history of violations and financial status. Further criteria that need to be discussed in determining the appropriate civil penalty to be assessed are the respondent's negligence, the gravity of the violation, and good faith abatement efforts.

In addressing the issue of negligence, I accept inspector Hanna's testimony that the combustible materials had accumulated over a period longer than one work shift, and that in fact Hanna observed that the violative conditions had been reported numerous times over the period of a month in the mines pre-shift book. In view of such testimony, I conclude that respondent had adequate notice of a hazardous condition and yet failed to correct it. I therefore find that respondent's failure to remove combustible materials and adequately rock dust in the area of the No. 1 belt amounts to gross negligence.

The evidence in this case shows that the gravity of the violation was serious. The accumulations of combustible materials, in combination with significant accumulations of float coal dust, created a serious hazard of explosion and consequently the threat of serious or fatal injury to miners. Safety inspector for the mine, John Tatton, testified that in the event of an explosion, the 6th West and 4th West crews (each consisting of approximately seven people) would be involved, as well as several other mine employees having duties in the area (Tr. 178, 179).

Finally, respondent demonstrated good faith in the abatement of the violative conditions. Two crews were assigned to perform abatement duties and after continuous work, abatement was completed within ten to fifteen hours.

On balance, I find that the penalty of $1,000.00 as proposed by the Secretary to be appropriate.

Withdrawal Order No. 789596

Inspector Hanna returned to the Price River Coal Co. No. 5 Mine on June 14, 1979 (within 90 days of the issuance of citation No. 789581) to conduct an inspection. At 12:38 a.m., Hanna issued withdrawal order No. 789596 pursuant to section 104(d)(1) of the Act, alleging that respondent had failed unwarrantably to support the roof in the areas of the No. 4 entry and the No. 3 crosscut. Section

104(d)(1) provides that if during any mine inspection, an MSHA inspector finds a violation of any mandatory health or safety standard, and further finds that such violation could significantly and substantially contribute to a mine hazard and is due to an operator's unwarrantable failure to comply with the standard, such findings shall be included in a citation issued to the operator. Furthermore: 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. Specifically, Hanna cited respondent with violation of 30 C.F.R. § 75.200 which provides in pertinent part as follows:

> 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.

The order also alleges that the violation was "significant and substantial." Following abatement of the cited condition, the order was terminated on June 14, 1979.

On December 10, 1979 the Secretary filed a petition for the assessment of a civil penalty on the issuance of withdrawal order 789596 for a violation of 75.200. The Secretary proposed a penalty of $1,500.00. Respondent duly contested the proposed assessment of penalty. However, respondent did not file a "notice of contest" to withdrawal order No. 789596, pursuant to section 105(d) of the Act. 2/

2/ Section 105(d) of the Act provides in pertinent part as follows:

> 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

footnote continued

The undisputed evidence establishes that the mine's roof control plan required that any roof having a width greater than 20 feet be supported by timbers (Tr. 271). However, in the mine's No. 4 entry, main North working section, no mine posts had been installed for a distance of 39 feet although the entry had been driven from a width of 20 feet, six inches up to 25 feet wide. In addition, the No. 3 crosscut between the No. 3 and No. 4 entries had been driven to a width of 21 feet, eight inches; and again no mine posts had been installed (Exhibit P-4). Hanna made all measurements with a standard measuring tape (Tr. 279). The condition had been reported by the night shift foreman on June 13, 1979 in the mine's on-shift book (Exhibit R-3, Tr. 283). The mine foreman's report noted that the "top was working" in the area so that hydraulic jacks could not be set (Tr. 283).

While the area had been adequately roof bolted within four hours after the mine foreman's report, no timbering had been performed in the twelve hour interim between the time the report was made and that of the inspection (Tr. 293, 295, 302, 304). Timbers were available for installation, and installed within twenty minutes after issuance of the withdrawal order.

Further unrebutted evidence presented by petitioner at the hearing established that respondent's failure to adequately support the roof exposed miners to the potential hazard of a roof fall (Tr. 288). At the time of the inspection, Hanna observed signs that the pressure in the area was building up. The signs included excessive sloughage, roof fracturing, and flooring being pushed up (Tr. 287). In addition, Hanna experienced a "bounce" (quick jarring of the ribs and roof) while writing the citation (Tr. 286). In the event of an accidental roof fall, two miners and an on-shift inspector might have been exposed to serious or fatal injury (Tr. 290).

While respondent failed to rebut the Secretary's charge of hazardous roof conditions, it nevertheless urges that the withdrawal order be dismissed and that the proposed penalty be disallowed. In support thereof, respondent claims that citation No. 789581 was invalid. As a consequence, withdrawal order No. 789596 is claimed to be invalid also, since the order was triggered by the citation's previous issuance pursuant to section 104(d)(1) of the Act.

Footnote 2 con't

> the reasonableness of the length of abatement time fixed in 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.

Lengthy discussion of respondent's contention is unnecessary. I have affirmed citation No. 789581 (issued May 14, 1979) and the associated violation and "unwarrantable failure" to comply with a mandatory standard. I therefore find that the citation created a proper predicate under the Act for issuance of a 104(d)(1) withdrawal order.

I therefore turn next to the legal arguments presented by the Secretary.

Petitioner contends that since this is a penalty proceeding, the validity of the withdrawal order is not at issue. The Secretary argues that as a consequence, the Administrative Law Judge is limited to a determination of (1) the existence of a violation; (2) whether the violation of standard 75.200 was "significant and substantial;" and (3) an appropriate penalty. The Secretary contends that under such case law as Windsor Power House Coal Company, 2 FMSHRC 1739 (July 1980)(ALJ), respondent is estopped from contesting the special finding of "unwarrantable failure" due to its failure to timely contest the withdrawal order (petitioner's brief at 7, 8).

Commission decisions arising under the old 1969 Act have established the precedent that the validity of a withdrawal order is not an issue in a penalty proceeding. Pontiki Coal Corporation, 1 FMSHRC 1476 (October 1979); Wolf Creek Collieries Company, 1 FMSHRC ____ (March 1979). However, the existence of a violation itself and penalty assessment are still at issue in such a case. Whether the validity of special findings that accompany a cited violation may also be challenged in a penalty proceeding is not so easily settled. To my knowledge, the Commission has not dealt squarely with the right of an operator to question special findings in a penalty case. Decisions of administrative law judges dealing with the issue are in conflict. Both Windsor Power, supra, involving a 104(d)(1) citation, and Black Diamond Coal Mining Co., 5 FMSHRC 764 (April 1983)(ALJ), involving 104(d)(1) withdrawal orders, have suggested that the failure to contest a 104(d)(1) citation or withdrawal order accompanied by special findings within 30 days of issuance estops an operator from challenging such findings during a civil penalty proceeding. However, Administrative Law Judge Carlson held in CF&I Steel Corporation, 4 FMSHRC 1777 (September 1982)(ALJ), that an operator who fails to contest a withdrawal order issued pursuant to section 104(d) of the Act may nevertheless challenge the validity of accompanying special findings in a subsequent penalty proceeding arising from the same violation. The judge in that case stated that "special findings are merely incidents of the violation, not the withdrawal order." 4 FMSHRC at 1786.

I accept such reasoning as a rational extension of the Commission decision in National Gypsum, supra, which allowed for the review of special findings charged in a citation during a civil penalty proceeding. I therefore find CF&I Steel Corporation to be

determinative in dealting with the issues at hand. Accordingly, I conclude that the present discussion of withdrawal order No. 789596 must include a ruling on the special findings accompanying the 104(d)(1) order, as well as a determination of a violation and assessment of a civil penalty.

Turning to the unrebutted evidence and testimony of this case, I find that the evidence establishes that substantial portions of the roof in the mine's No. 4 entry and associated No. 3 crosscut were inadequately supported in violation of safety standard 75.200. I further conclude that the violation was "significant and substantial" under the definition of National Gypsum, supra. The unstable and inadequately supported roof made a roof fall reasonably likely. In the event of such a collapse, serious or fatal injury to miners under the fall was almost inevitable.

I turn finally to the issue of respondent's "unwarrantable failure" to comply with standard 75.200. "Unwarranted failure" occurs where the violative condition is one of which the operator had knowledge or should have had knowledge, or which the operator failed to correct through indifference or lack of reasonable care: Zeigler Coal, supra.

Respondent argues that under the rule of Eastern Associated Coal Corporation, 3 IBMA 331 (1974), the violation charged in the withdrawal order was not caused by the operator's unwarrantable failure, since the evidence does not show that the operator intentionally, knowingly, or recklessly allowed the hazardous roof condition to exist (respondent's brief at 4). The Interior Board of Mine Operations Appeals, in reviewing a violation under the 1969 Federal Coal Mine Health and Safety Act, did use such criteria in discussing the requisite degree of fault necessary to support a finding of unwarrantable failure. However, the Board also cited the Act's legislative history as defining unwarrantable failure as:

> ... the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of lack of due diligence, or because of indifference or lack of reasonable care, on the operator's part. 2 IBMA at 356.

Such a definition is not significantly different from the definition expressed in Ziegler Coal and now commonly cited in Commission decisions. Using the Ziegler Coal definition, I therefore find that the evidence in the case before me shows that violation was the product of respondent's "unwarranted failure" to comply with standard 75.200. It is apparent that respondent had notice of the hazardous roof condition due to an on-shift report made by the night shift foreman approximately twelve hours before Hanna's inspection. Although the area had stabilized sufficiently within four hours to allow roof-bolting, no timbers were installed as required by the mine's approved roof plan.

In summary, I find that violation of standard 75.200 did occur as charged in withdrawal order No. 789596, and that special findings of "significant and substantial" violation and "unwarrantable failure" are supported by the evidence in the case.

PENALTY

The mine's size, history of violations, and financial status were stipulated by the parties.

From the evidence, I must conclude that the operator was negligent in failing to install timbers in the cited areas of the mine. Since the condition had been reported in the mine's on-shift book, respondent had notice of the hazard and violation, and yet failed to abate it in the twelve hours preceding the inspection. I therefore find that respondent's failure to correct the hazardous condition amounts to gross negligence.

The evidence in the case shows that the gravity of the violation was severe. In failing to properly support the roof in the area of the No. 4 entry and associated No. 3 crosscut, respondent exposed at least three miners to the hazard of a roof fall. In the event of such a roof fall, serious or fatal injury to the miners was highly probable.

Respondent demonstrated good faith in abating the violative condition. Timbers were installed in accord with the mine roof plan within twenty minutes of the issuance of the withdrawal order.

On balance, I find that the penalty of $1,500.00 as proposed by the Secretary is appropriate.

DOCKET NO. WEST 80-135

This case involves the issuance of a section 104(a) citation No. 789961 [3]/ for a violation of 30 C.F.R. § 75.1403 which provides

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3/ Section 104(a) of the Act provides in pertinent part as follows:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

in part as follows:

> 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.

That general statement is followed by 11 subsections. Subsection 75.1403-1 provides in pertinent part as follows:

> § 75.1403-1 General criteria.
>
> (a) Section 75.1403-1 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required. (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

The undisputed evidence establishes that Hanna inspected respondent's Price River Coal Co. No. 5 Mine on July 18, 1979 and at that time observed the operation of a scoop-tram without its batteries being protected by cover plates secured to the battery tray. At that time, Hanna issued citation No. 789577 pursuant to standard 75.1403 as notice to respondent that Hanna was "requiring that all cover-plates be secured to mobile equipment when such equipment is being operated." The condition was abated within 40 minutes after issuance of the citation when the cover plates were secured to the battery trays (Exhibit P-6).

However, upon returning to the mine on July 19, 1979, Hanna observed that the scoop-tram was once again being operated without the cover plates being secured to the battery trays. As a consequence, Hanna issued citation No. 789961. The condition was abated within six minutes (Exhibit P-16). On February 4, 1980, the Secretary filed a petition for the assessment of a civil penalty predicated on the issuance of citation No. 789961 for a violation of Hanna's safety requirement issued pursuant to 30 C.F.R. § 75.1403. The Secretary proposed a penalty of $305.00. Respondent duly contested the proposed assessment of penalty.

Respondent does not deny continued operation of its scoop-tram without having secured the battery cover plates, despite having been provided with notice in citation No. 789577 that such condition was considered by Hanna to be a safety violation. Respondent does how-

ever contend that citation No. 789961 is invalid due to lack of long-term notice regarding the requirement that the battery covers be secured when operating the machine in the mine from the area of the portal to the first open crosscut. Respondent claims that neither Hanna nor any other inspectors had required such a practice before the issuance of the citation presently contested. In contrast, Hanna testified that during previous inspections of the mine, he must not have observed the condition or he would have issued the same safety requirement (Tr. 334).

Upon reviewing such arguments, I find respondent's claim to be unsupported by case law. Generally, an operator's reliance on prior inspections does not estop the Secretary from bringing an action on newly discovered safety violations. Midwest Minerals, Inc., 3 FMSHRC 251 (January 1981)(ALJ); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981)(ALJ); Servtex Materiala Company, 5 FMSHRC 1359 (July 1983) (ALJ). I therefore conclude that the failure of previous inspections to result in the issuance of a citation for the safety violation charged in this case does not indicate that citation No. 789961 is automatically invalid.

Respondent further contends that the citation is invalid because operating the scoop-tram in the area between the mine portal and the first open crosscut without having the battery cover plates secured did not constitute a safety hazard. Such an area of the mine is claimed by respondent to be a "significant safety area" (respondent's brief at 2). In contrast, Hanna testified that the unprotected battery could be damaged by a roof fall or collision while operating in the area. Should the battery be damaged, battery acid might burn the unshielded machine operator. In addition, the batteries might burn, releasing toxic fumes and seriously or fatally injuring miners (Tr. 326, 327).

Hanna also noted that in the event that the scoop-tram should have a wreck while going down the steep incline from the portal into the mine, the unsecured covers could become flying objects causing broken bones or fatal injury (Tr. 325, 327).

I find Hanna's testimony of the hazard involved in operating the scoop-tram without secured battery covers to be convincing. I therefore reject respondent's contention that citation No. 789961 is invalid due to lack of a safety hazard.

Respondent also argued that the citation was invalid because an MSHA inspector cannot write specific mandatory requirements under standard 75.1403 and issue a citation for violation of such a requirement, but can write citations only for violations of standards specifically stated in subsections 75.1403-2 through 75.1403-11. In contrast, the Secretary asserts that both statutory construction and case law support the position that an MSHA inspector can write a

valid, mandatory requirement, and issue a citation for violation of such a requirement, pursuant to standard 75.1403 (petitioner's brief at 1).

I accept the Secretary's arguments. Section 75.1403 requires that an operator provide other safeguards which are adequate to minimize hazards relating to the transportation of men and materials. The standard explicitly defers to the judgment of an inspector, as an authorized representative of the Secretary, as to what other safeguards may be necessary. Section 75.1403-1(a) explains the regulatory scheme for the provision of safeguards. It states that 75.1403-2 through 75.1403-11 are the criteria which will guide an inspector on other statutory requirements, but also states that other safeguards may be required. I interpret such a statment as giving an operator notice that safeguards in addition to those specifically named in 75.1403-2 through 75.1403-11.

Section 75.1403-1(b) states that the inspector must advise an operator in writing "of a specific safeguard which is required pursuant to § 75.1403." Such a requirement serves to give an operator notice that a specific safeguard will be required. Only after written notice to provide a safeguard has been given may an inspector issue a citation (or "notice") pursuant to section 104(a) of the Act.

The MSHA inspector complied with the requirements of standard 75.1403 when he issued citation No. 789577 on July 18, 1979. When he returned the next day and found that respondent continued to allow the violative condition, he issued citation No. 789961 pursuant to section 104(a) of the Act.

Prior decisions of the Commission have upheld such actions taken pursuant to standard 75.1403. In Consolidated Coal Company, 2 FMSHRC 2021 (July 1980)(ALJ), Judge Cook stated as follows:

> 30 C.F.R. § 75.1403 accords substantial power to a Federal mine inspector in that it authorized him to write what are, in effect, mandatory safety standards on a mine-by-mine basis to minimize hazards with respect to transportation of men and materials in that mine. Failure to provide the safeguard within the time specified and the failure to maintain the safeguard thereafter renders the mine operator susceptible to the issuance of a withdrawal order and to the assessment of civil penalties. 30 C.F.R. § 75.1403-1(b). In short, the operator must comply with the requirements of a de facto mandatory safety standard promulgated without the protections or the opportunity to submit comments afforded in the rule making process applicable to the promulgation of industry wide mandatory safety standards. 2 FMSHRC at 2035.

Furthermore, the Commission has upheld application of a safeguard notice issued under standard 75.1403-1 to an operator's mine by affirming an administrative law judge's determination that the safeguard notice had been violated and that a civil penalty might appropriately be assessed. Penn Allegh Coal Company, Inc., 4 FMSHRC 1218 (July 1982).

I therefore conclude, upon consideration of the undisputed evidence in this case, that respondent violated the safety requirement or notice issued by inspector Hanna pursuant to standard 75.1403. Accordingly, I affirm citation No. 789961.

PENALTY

Respondent stipulated that the Price River Coal Co. No. 5 Mine is a large operation and had 223 assessed violations in the 24 months preceding May 14, 1979. Payment of a penalty was also stipulated as not impairing respondent's ability to continue in business.

From the evidence I conclude that respondent was negligent in allowing the scoop-tram to be operated without having cover plates secured over the battery. Since respondent was provided with notice one day before the citation's issuance that battery cover plates were required to be secured, it should have known of the hazard and violation. On balance, I find the degree of negligence to be moderate.

Petitioner stipulated to respondent's good faith abatement of the violative condition. Respondent's good faith is further indicated by the fact that abatement was completed within twenty minutes of the citation's issuance.

Finally, I find the gravity of the violation to be moderate. Although the violation may have resulted in serious or fatal injury, the number of miners exposed to the hazard appears to be limited to the machine operator and any other miners in the immediate vicinity of the operation of scoop-tram.

After applying the criteria of section 110(i) of the Act to the facts of the case, I find the penalty proposed to be appropriate. I therefore assess a penalty of $305.00 for respondent's violation of a safety requirement issed pursuant to 30 C.F.R. 75.1403.

CONCLUSIONS OF LAW

Based upon the entire record of these consolidated cases, and consistent with the narrative portions in this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Respondent violated 30 C.F.R. § 75.400 as charged in citation No. 789581. The violation was "significant and substantial" and was the result of an "unwarrantable failure" to comply with the cited standard. The appropriate civil penalty for the violation is $1,000.00.

(3) Respondent violated 30 C.F.R. § 75.200 as charged in withdrawal order No. 789596. The violation was "significant and substantial" and was the result of an "unwarrantable failure" to comply with the cited standard. The appropriate civil penalty for the violation is $1,500.00

(4) Respondent violated a safety notice or requirement issued pursuant to 30 C.F.R. § 75.1403 as charged in citation No. 789961. The appropriate civil penalty for the violation is $305.00.

ORDER

1. In Docket No. WEST 80-83, Citation No. 789581 and order/citation No. 789596 are affirmed and civil penalties of $1,000 and $1,500 respectively are assessed against the respondent.

2. In Docket No. WEST 80-135, Citation No. 789961 is affirmed and a civil penalty of $305 is assessed against the respondent.

Respondent is therefore ORDERED to pay civil penalties in the total sum of $2,805.00 within forty (40) days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

Distribution:

Phyllis K. Caldwell, Esq., (Certified Mail), Office of the Solicitor U. S. Department of Labor, 1585 Federal Building, 1961 Stout Street Denver, Colorado 80294

Stanley V. Litizzette, Esq., (Certified Mail), Price River Coal Co. Helper, Utah

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 11, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-57-M
	:	A.C. No. 20-00801-05501
v.	:	
	:	Nugent Sand Mine
NUGENT SAND COMPANY, INC., Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

On August 8, 1983, I approved settlements for three of the six violations involved in this matter and I ordered the Solicitor to submit additional evidence with respect to the remaining three. On August 31, 1983, I issued a further order to the Solicitor to submit information. Such information now has been submitted.

After a review of the Solicitor's latest motion, I am unable to approve the proposed settlements of $20 each. According to the Solicitor Citation 2088974, which was issued for failure to have a fire extinguisher on a front-end loader, involved a moderate degree of negligence because the employer was aware that a fire extinguisher was required. This factor alone would militate against a $20 penalty. With respect to gravity the Solicitor states as follows: "An injury would have been unlikely because if a fire were to occur, the employee could jump out of the front-end loader." The Solicitor further states in this respect "The type of an injury, if one were to occur, would not have resulted in any lost workdays. The type of injury contemplated would be sprains or cuts from jumping off the front-end loader."

I must reject the Solicitor's representations. The fact that the violation might force an individual to jump out of the front-end loader is to me on its face a very serious matter. There is no support for the Solicitor's assertion that the type of injury contemplated would be only a sprain or cuts.

I have no alternative, therefore, but to take appropriate action to have this item set for hearing.

With respect to Citations 2088975 and 2088976 which involve failure to guard a take-up pulley and a head pulley, the Solicitor again states that the operator was guilty of a moderate degree of negligence because it was aware that pinch points must be guarded. Such a degree of negligence militates against a $20 penalty. Moreover, I am unable to accept the Solicitor's assertion there was no likelihood of injury because employees seldom travel in the area. Nor am I able to accept his representation that the type of injury would not be in the form of a hand amputation but rather only in the form of a cut or a bruise when performing only maintenance duties. It may be that although the conveyor is supposed to be idle when maintenance is performed, it might be started up accidentally and the resultant injury could be very serious indeed. These matters should be resolved at a hearing.

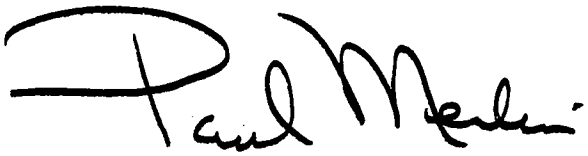
Accordingly, I have no alternative, therefore, but to take appropriate action to have these items set for hearing.

This case is hereby assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215



Paul Merlin
Chief Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Robert Chandonnet, Vice President, The Nugent Sand Company, Inc., P. O. Box 1209, Muskegon, MI 49443 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 11, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-80-M A.C. No. 20-00038-05504
v.	:	
MEDUSA CEMENT COMPANY, Respondent	:	Medusa Cement Company Plant

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

On August 31, 1983, I disapproved the Solicitor's motion to approve a settlement for the one violation in this case for the original assessment of $56. I described the circumstances as follows:

> Citation No. 2089073 was issued for a violation of 30 C.F.R. § 56.16-6 because the covers on oxygen and acetylene cylinders being transported were not in place to protect the stems of the cylinders. The Solicitor states that the operator demonstrated no negligence but he gives no basis for this assertion. The Solicitor further states that the violation was significant and substantial but again he gives no reasons. I note that the inspector stated on the citation that falling materials from the conveyors could easily strike one of the stems and create a serious hazard. The inspector checked boxes indicating occurrence was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty.

The Solicitor now has filed an amended motion in which he advises that the operator demonstrated no negligence because it was not aware of the violation. I cannot accept this representation. Even if the operator was not actually aware of the violation the possibility that it should have been aware, must be explored.

With respect to gravity the Solicitor now states as follows:

> (b) If an event occurred to which the cited standard is directed then it was reasonably likely that one employee would be injured. The reason is that a cylinder without proper protection could become a "torpedo", thereby injuring an employee.
>
> (c) The type of injury that would result is that an employee could lose a day or more of work or be restricted in his job duties. The reason is that a cylinder acting with the force of a "torpedo" is a serious hazard which would cause serious injury to an employee.

When the Solicitor paints a picture of potential grievous bodily harm, as he has done here, I do not believe a penalty of $56 is appropriate unless some other compelling circumstances are present.

Moreover, the Solicitor has advised that Crane Company which owns Medusa Cement Company had 1,768,760 hours worked in all of its mines prior to the issuance of this citation and the Medusa Cement Company had 239,900 hours worked in the same period. The proposed penalty therefore, is inconsistent with the operator's size in light of the other circumstances already set forth.

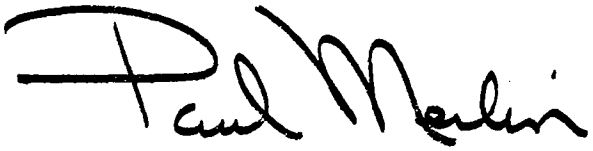
Accordingly, I have no alternative but to take appropriate action to have this matter set for hearing.

This case is hereby assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215



Paul Merlin
Chief Administrative Law Judge

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 11 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 82-300
	:	A.C. No. 36-03425-03501
v.	:	
	:	Docket No. PENN 83-44
U.S. STEEL MINING COMPANY, INC., Respondent	:	A.C. No. 36-03425-03506
	:	
	:	Docket No. PENN 82-322
	:	A.C. No. 36-03425-03504
	:	
	:	Maple Creek No. 2 Mine

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above dockets were heard separately but are hereby consolidated for the purpose of this decision. They all involve the Maple Creek No. 2 Mine. Two citations are involved in Docket No. PENN 82-300, two in PENN 83-44, and four in PENN 82-322. Pursuant to notice, the cases were heard in Uniontown, Pennsylvania, on June 22 and June 23, 1983. Alvin L. Shade and Francis E. Wehr, Sr. testified on behalf of Petitioner; David Coffman, Ronald Hartzell and Paul H. Shipley testified on behalf of Respondent. Both parties filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS AND CONCLUSIONS COMMON TO ALL DOCKETS

1. At all times pertinent to these proceedings, Respondent was the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 2 Mine.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the Maple Creek No. 2 Mine, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

3. The subject mine has an annual production of 872,848 tons of coal. Respondent has an annual production of 15,046,082 tons. Respondent is a large operator.

4. The assessment of civil penalties in these proceedings will not affect Respondent's ability to continue in business.

5. The subject mine had a total of 530 assessed violations for the 24 months prior to the issuance of the citations involved herein. Ninety one were violations of 30 C.F.R. § 75.503, 20 of 75.516, 72 of 75.200, 11 of 75.515 and 47 of 75.1403. An unknown number of the violations of 75.516 had the significant and substantial designation removed after their issuance, and Respondent objects to their being included in the history of prior violations.

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

DOCKET NO. PENN 82-300

The two citations involved in this docket both charge permissibility violations (30 C.F.R. § 75.503). In one case, the conduit was pulled away from the packing gland on the headlight to the continuous mining machine and the junction box was loose. In the other, the conduit was pulled away from the packing gland on the switch for the deenergizing bar. Both citations were issued charging significant and substantial violations, but at the hearing, counsel for the Secretary moved to delete the significant and substantial designation from both citations. No bare wires were seen, but if the wire is pulled from the conduit, it could be struck or cut to create a spark. However, the headlight is guarded and such an occurrence is unlikely. The same is true of the conduit on the deenergizing bar. The violations were not serious. Respondent has been cited for this violation on a number of occasions. Therefore, I conclude that the violations resulted from its negligence. I conclude that an appropriate penalty for each of these violations is $50.

DOCKET NO. PENN 83-44

1. Citation No. 2011263, issued August 20, 1982, charges a violation of 30 C.F.R. § 75.516 because the energized wire to a signal light was not supported on insulators, but in one instance was hung on a wire nail and was in contact with wooden cribs. It appears that the nail had been part of an insulated hook from which the insulation had been broken off or had worn off. The wire was not bare or damaged. The mine was idle and had been idle for about 2 months when the citation was issued. The system is protected by a 10 ampere fuse. I conclude that the violation was unlikely to cause an injury. Therefore, it was not significant and substantial. Respondent had been cited for this same condition previously, and should have been aware of it. I conclude that an appropriate penalty for this violation is $50.

2. Citation No. 2011267, issued September 9, 1982, charges a violation of 30 C.F.R. § 75.504 because the conduit was pulled out of the packing gland on the continuous miner headlight. The citation originally charged a significant and substantial violation, but at the hearing, Petitioner moved to delete the significant and substantial designation. The inspector testified that a hazard was unlikely. I conclude that the violation was not serious. Respondent has been cited for this violation on many occasions and therefore, I conclude that the violation resulted from its negligence. I conclude that an appropriate penalty for this violation is $50.

DOCKET NO. PENN 82-322

1. Citation No. 829652, issued June 18, 1982, charges a violation of 30 C.F.R. § 75.200, in that two roof bolts were missing in an area along the track haulage. The bolts had been installed but apparently had fallen out of the roof. There was a slip in the roof and the roof was loose and drummy. The roof bolts were not on the floor when the citation was issued, leading to the conclusion that they might have been out for a period of time. The inspector testified that one missing bolt was on the "tight" side over the trolley wire and the other over the center of the track. The section foreman testified that both had been located on the tight side. In any event, there was an area of unsupported roof, making a roof fall reasonably likely. Such an occurrence would likely result in serious injuries to miners. I conclude that the violation was significant and substantial. The condition should have been known to Respondent despite the fact that it is permitted to do the preshift examination by jeep which makes it difficult to spot all the roof areas. Therefore, the violation was caused by Respondent's negligence. I conclude that an appropriate penalty for this violation is $200.

2. Citation No. 829653, issued June 18, 1982, charges a violation of 30 C.F.R. § 75.515, in that an insulated bushing was not provided where the insulated wires entered the control box for a water pump. The insulation on the wires was not broken or damaged. The water pump's electrical system was protected by two fuses - one a 30 amp fuse on the cable, and one a 10-30 amp control fuse inside the box. When it is operating, the pump vibrates, and the vibration could cause a cut in the insulation of the wire in the absence of bushing. This could result in the pump to become the ground and, if the circuit protection failed, anyone touching the pump could be shocked or electrocuted. I conclude that the violation made such an occurrence reasonably likely. Therefore, it was significant and substantial. Respondent had been cited several times for similar violations. I conclude that this violation was the result of its negligence. I conclude that an appropriate penalty for this violation is $125.

3. Citation Nos. 829654 and 829656 were issued on June 18 and June 21, 1982. Each charges a violation of 30 C.F.R. § 75.1403 (notice to provide safeguards) because track haulage switches were not provided with reflectors to show the alignment of the switch.

The hazard caused by the absence of a reflector on a switch is that the operator of a haulage vehicle might mistake the position of the switch, and by going in the "wrong" direction, jostle the occupants in the vehicle or derail the vehicle. Because low-speed haulage equipment was in use in the subject mine, the injuries would not be nearly as serious as would be the case where high speed haulage equipment was involved. This limits the weight to be accorded Government's Exhibit No. 6, the Report of a Fatal Coal Mine (Haulage) Accident, which involved high speed haulage. Nevertheless, a derailment could result in injuries of a reasonably serious nature. I conclude that the violations were significant and substantial. They were moderately serious, and the condition was known or should have been known to Respondent. I conclude that appropriate penalties for each of these violations is $100.

ORDER

1. Citation Nos. 1249544, 1249549, 2011263, and 2011267 charge violations not properly designated as significant and substantial.

2. Citation Nos. 829652, 829653, 829654, and 829656 are AFFIRMED as properly charging significant and substantial violations.

3. Respondent shall, within 30 days of the date of this decision, pay the following penalties for the violations found herein to have occurred:

CITATION		PENALTY
1249544		$ 50
1249548		50
2011263		50
2011267		50
829652		200
829653		125
829654		100
829656		100
	Total	$725

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 12 1983

LITTLE SANDY COAL SALES, INC. Contestant	:	NOTICE OF CONTEST
	:	Docket No: KENT 83-178-R
v.	:	Order No: 2053590; 3/18/83
	:	
	:	No. 1 Tipple
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Va, for Respondent;

Before: Judge Moore

This case was set for hearing in Pikeville, Kentucky, on September 8, 1983, at 10:00 A.M. After arriving in the Pikeville area on September 7, I received a call from my secretary stating that Mr. Everman, owner of Little Sandy Coal Sales, Inc. the contestant, was ill and could not attend the hearing on the following day. Mr. Everman left two numbers at which he could be reached. One was his office number and the other was his home number, and he announced to my secretary that he would be at the home number after 4:00 P.M.

On the following day, after several inspectors, the Solicitor's attorney, and I had arrived at the hearing site and waited until twenty minutes after 10:00 A.M. for Mr. Everman to appear, I called my secretary and asked her to get in touch with Mr. Everman. My secretary called Mr. Everman's office and was informed that he was not there at the time but was expected. She then called Mr. Everman's home and let the phone ring 9 times; there was no answer.

Mr. Everman had requested an expedited hearing in this case and it appeared that Mr. Fitch and the inspectors had tried to accommodate Mr.Everman in reaching a speedy determination as to whether his operation was a mine, subject to the Federal Mine Safety and Health Act. In fact, the inspectors have extended the abatement time of other citations so that Mr. Everman will not have to litigate those citations until a determination has been made as to the legal status of his operation. I think Mr. Everman owed the government a little more than a last-minute call to my office saying that he was too sick to attend the hearing.

At the hearing I did not hold Mr. Everman in total default but did rule that by his failure to appear he had waived his right to cross-examine the government witnesses. I announced that I would communicate with Mr. Everman after the trial to determine whether or not he had good reason to be absent.

The government was then allowed to elicit testimony and exhibits from a supervisory inspector. The inspector identified the exhibits and described the Little Sandy Coal Sales operation. In short, the company buys raw coal, puts it through a crusher, refines it by screen into 3 sizes and then sells the coal. I asked the inspector how this operation differed from that of a normal tipple. His answer was that in the typical tipple which is not located at a mine itself, the tipple operator does not own the coal. He crushes and sizes somebody else's coal, whereas Mr. Everman buys the coal, processes it and then sells it.

Mr. Everman telephoned me as soon as I got back to our Virginia office and apologized for not attending the hearing. He said he would get a doctor's certificate showing that he was too ill to participate in the hearing. I told him that if he would send me that doctor's certificate I would allow him to submit further evidence but that I would not reconvene the hearing to allow him to cross-examine the MSHA inspector. He said that he would like to submit some material but that he would like to look at the transcript first. I then transferred the call to my secretary, who gave him the necessary information concerning the court reporter.

Whether Mr. Everman changed his mind about the copy of the transcript or managed to get one before one was delivered to this office, I don't know. But he did submit a substantial amount of information (similar to a brief) on September 26, 1983. Attached was a note from Dr. Shufflebarger which said "Mr. Everman was unable to attend due to illness." In the circumstances, I hold the excuse insufficient to justify Mr. Everman's failure to appear at the hearing. The note does not say what was wrong with Mr. Everman, or how ill he was. And he was well enough to be in his office. I will nevertheless, consider the material he submitted.

In the handwritten portion of his submission, Mr. Everman makes a number of important points. He compares his operation to that of the Allied Chemical plant in Ashland, Kentucky, which is considered by MSHA as a coke manufacturing plant and not a mine. The plant receives coal by rail, grinds it to the proper size to make coke to be shipped to various customers. At his plant, Mr. Everman says, he takes coal "and manufactures stoker".

He also points out that his operation is considered manufacturing by the State of Kentucky in regard to sales tax and workmen's compensation insurance and that he is not considered a mine by the federal Office of Surface Mining or the Kentucky Department of Surface Mining. His most telling argument however, involves the case of Secretary of Labor vs. Oliver M. Elam, Jr. Company, 4 FMSHRC 5, (January 7, 1982). Elam's operation is quite similar to that of Little Sandy. Elam got paid for loading coal that it did not own on to barges that it did not own. Some coal was loaded directly on to the barges by conveyor belts, but other pieces of coal were too big and had to be run through a crusher in order to fit on the covered conveyor belts. Little Sandy, on the other hand, owns the coal it processes, and the crushing, sizing and loading is to make the coal marketable and not just so that it will fit his conveyors. It is a small difference but it is enough. Secretary of Labor v. Alexander Brothers, Inc. 4 FMSHRC 541 (April 5, 1982).

I sympathize with Mr. Everman. I hope this decision does not put him out of business as he claims it will, and I hope he takes an appeal to the Commission for a final determination.

I reject all of Mr. Everman's arguments to the effect that the facts, as related by him, as well as by the inspector, indicate that he is not a mine operator. I find that the violation occurred, that the operation is covered by the Federal Mine Safety and Health Act, and I accordingly AFFIRM the citation for failure to have sanitary toilet facilities.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mr. Edgar Everman, Little Sandy Coal Sales, Inc., P.O.Box 335, Grayson, KY 41143 (Certified Mail)

/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 12 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
Petitioner	:	Docket No. WEST 82-1-M
v.	:	MSHA Case No. 42-01689-05003 X02
AMERICAN MINE SERVICES, INC.,	:	LaSal No. 2 Mine
Respondent	:	

AMENDMENT OF DECISION

The decision issued in the above captioned matter on September 30, 1983, is hereby AMENDED to reflect that the civil penalty assessed for citation 583964 is "$78.00" rather than "$87.00." Likewise, on page six of the decision, all references to a penalty sum of "$87.00" are AMENDED to reflect "$78.00."

In all other respects, the decision remains the same.

John A. Carlson
Administrative Law Judge

Distribution:

James H. Barkley, Esq., (Certified Mail),
Office of the Solicitor,
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294

Mr. Morris E. Friberg, (Certified Mail),
American Mine Services, Inc.
4705 Paris Street, Denver, Colorado 80239

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 13 1983

EDWIN WEBBER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 82-195-DM
v.	:	
HARRISON WESTERN CORP., Respondent	:	

DECISION

Appearances: Terris & Sunderland, Washington, D.C., Attorneys for Complainant; Dennis J. Conroy, Esq., Watkiss & Campbell, Salt Lake City, Utah, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Salt Lake City, Utah in May 1983. After trial and entry of a tentative bench decision in favor of complainant, the parties moved for approval of a stipulation for settlement. 1/ Based on a consideration of the circumstances set forth in the trial record, the tentative decision and the parties stipulation, I find the settlement proposed is in the best interest of complainant and in accord with the remedial purposes 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 forthwith pay the sum of $22,000 to complainant, Edwin K. Webber, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

1/ Because the complainant appeared at the trial pro se, the presiding judge assumed responsibility for fully developing the record. See Heckler v. Campbell, ___ U.S. ___, 51 L.W. 4561, 4564, n. 1, 76 L. Ed. 2d 66, 77, n. 1; Lashley v. Secretary of Health and Human Services, 708 F.2d 1048, 1051-1052 (6th Cir. 1983). Subsequent to trial, the complainant obtained the pro bono services of counsel who filed a brief in support of the tentative decision and negotiated the settlement.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 14 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 83-137
	:	A.C. No. 15-11408-03510
v.	:	
	:	Pride Mine
PYRO MINING COMPANY, Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; William M. Craft, Assistant Director of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary charges the Pyro Mining Company (Pyro) with three violations of mandatory regulations. The general issues before me are whether Pyro has violated the regulatory standards as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violations.

CITATION NO. 2074459 At hearing, the Secretary moved to amend its petition by seeking to withdraw this citation for lack of evidence. The Secretary now concedes that the cited explosives in fact had not been stored in the working place as alleged. Under the circumstances there appears to have been no violation of the cited standard and the motion for amendment and withdrawal is granted. Commission Rule 11, 29 C.F.R. § 2700.11.

CITATION NO. 2074458 This citation, issued by MSHA Inspector Ronald Oglesby pursuant to section 104(a) of the Act, initially alleged a violation of the standard at 30 C.F.R. § 75.523. The standard which tracks the enabling language at 30 U.S.C. § 865(r), provides that "[a]n authorized

representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency." The citation alleges as follows: "A violation was observed on No. 1 unit, section ID003 in that the FMC roof bolter (left side of section) would not deenergize when actuating lever was pushed. The lever was damaged to the extent, part of lever bar was broken off."

The citation clearly does not charge a violation of the cited regulation and, indeed, it is difficult to conceive of any factual circumstance that would constitute a violation of the regulation. As explained by Inspector Oglesby at hearing, the reference in the citation to the standard at 30 C.F.R § 523 was erroneous and he meant to charge a violation under the standard at 30 C.F.R. § 75.523-2(b). The Secretary declined, however, to amend the citation to comport with this intent. The undersigned therefore issued on July 29, 1983, a notice of intent to modify the citation pursuant to section 105(d) of the Act to charge that the standard violated was 30 C.F.R § 75.523-2(b) and not 30 C.F.R. § 75.523. See also Rule 15(b) Federal Rules of Civil Procedure and United States v. Stephen Brothers Line, 384 F.2d 118, 124 (5th cir. 1967). In accordance with the notification to the parties of this intended action, the parties were given additional opportunity for hearing and/or to present additional evidence. International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977).

The operator did in fact submit additional evidence and argument by letter dated August 1, 1983. The Secretary declined to submit any additional evidence and indicated that he had no objection to either the proffered evidence or to the action contemplated by the undersigned judge. Accordingly, at this time Citation No. 2074458 is modified to reflect that it charges a violation of the standard at 30 C.F.R. § 75.523-2(b). Secretary v. Consolidation Coal Company, 4 FMSHRC 1791 (1982).

The standard at 30 C.F.R. § 75.523-2(b) provides that "[t]he existing emergency stop switch or additional switch assembly shall be actuated by a bar or lever which shall extend a sufficient distance in each direction to permit quick deenerization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated."

The facts relating to this citation are not in dispute. It is only the interpretation to be placed upon those facts that is at issue. During the course of an inspection of the Pride Mine on October 27, 1982, MSHA Inspector Ronald Oglesby observed the "FMC" roof bolter operating in the No. 1 unit, section ID003 with a broken panic bar. Although the roof bolter was not then operating inby the last open crosscut, it is not disputed that it could have been so operated.

Pyro does not disagree that the panic bar on the roof bolter was broken as alleged but argues that the cited roof bolter was not "electric face equipment" within the meaning of the MSHA Electrical Manual. The manual defines "electric face equipment" as electrical equipment that is "installed, taken into, or used in or inby the last open crosscut." The definitions found in the MSHA manuals are not officially promulgated, however, and are not binding upon the Commission or its judges, Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), Old Ben Coal Company, 2 FMSHRC 2806 (1980). In any event even under the definition of "electric face equipment" found in the cited MSHA Manual there would nevertheless have been a violation of the cited standard in this case. The uncontradicted testimony of Inspector Oglesby was that, when cited, the roof bolter was located in the last open crosscut.

I also note that in the case of Secretary v. Solar Fuel Company, 3 FMSHRC 1384 (1981), the Commission held that "equipment which is taken or used inby the last open crosscut" means equipment habitually used or intended for use inby regardless of whether it is located inby or outby when inspected. The Commission emphasized in Solar Fuel that it is not where the equipment is located at the time of inspection that is important, but whether it is equipment which can be taken or used "inby." Accordingly, since the roof bolter here cited is without question equipment that can be taken or used inby the last open crosscut it is clear that the violation is proven as charged in the amended citation.[1] Whether that violation was "significant and substantial," however, depends on whether, based on the

[1] The operator also contends in a letter dated August 1, 1983, that the Secretary failed to prove the degree of pressure applied to the cited panic bar and the distance the bar was moved in accordance with 30 C.F.R. § 75.523-2(c). The alleged deficiency is irrelevant, however, inasmuch as no violation of 30 C.F.R. § 75.523-2(c) has been alleged.

particulars surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. I accept the undisputed testimony of Inspector Oglesby concerning this issue. In particular, he testified that in the absence of a functioning "panic bar" a machine operator or other person could be pushed and pinned against the coal ribs and, if unable to actuate the panic bar, could easily be crushed. Oglesby testified about past incidents of crushed legs and fatalities resulting from such a defect. Indeed there had been four accidents since 1978 at the Pyro Mines alone involving equipment pushing miners into the ribs, resulting in crushed lower extremeties, broken bones and, in one case, permanent disability. The violation was accordingly "significant and substantial." For the same reasons the violation was one of high gravity.

Donald Lamb, an official of Pyro admittedly knew that operative panic bars were required on his roof bolters and acknowledged that the operator had been cited previously for similar problems with the panic bars. The operator accordingly should have been on particular notice of this recurring problem and may be charged under the circumstances with negligence in failing to discover the broken panic bar.

CITATION NO. 2075863 This citation alleges a violation of the operator's roof control plan under the standard at 30 C.F.R. § 75.200 and reads as follows:

> The roof control plan dated 8/10/82 was not being followed on No. 3 unit (ID004) in that a three way place was observed. The first cut had been taken out of right and left crosscuts and face also had been cut and loaded. Cuts 1 and 2 were extracted and roof had not been supported before the face was extracted. Plan states (page 16) that 1 and 2 are to be bolted before the face areas cut and loaded. Roof bolter was in area at time of inspection pinning No. 2 crosscut.

The cited portion of the roof control plan consists of a diagram (attached hereto as Appendix A) with an explanation reading as follows: "Cuts No. 1 and No. 2 will be extracted and the roof supported, then on the next

mining cycle, cuts No. 3, 4 and 5 will be taken in a normal manner, etc. The face will be driven no more than 30 feet from the inby rib of crosscut until crosscut is holed through and ventilation is established."

The citation was issued on December 14, 1982, by MSHA Inspector Jerrold Pyles. During the course of his inspection on that date, Pyles observed that three cuts had been taken on the No. 3 unit. The right and left crosscuts and the face had all been cut to a depth of 9 feet and loaded out. The cuts had not yet been bolted although a roof bolter was beginning to bolt the No. 2 crosscut. Since this evidence is not disputed it is apparent that the roof control plan has been violated as alleged. The operator nevertheless argues that a violation of the roof control plan would exist only if miners are actually working inby unsupported roof. I find nothing in the plan to support the defense and accordingly reject it.

I further find that the violation was "significant and substantial". National Gypsum, supra. According to the uncontradicted testimony of Inspector Pyles, there had been a history of roof falls at the Pride No. 6 Mine and that the stability of the cited unsupported roof was "unpredictable." Moreover, there had previously been six roof falls in the same general area of the mine. Two miners were working on the roof bolter in the vicinity of the unsupported roof at the time the condition was discovered and would have been the most likely victims of any roof fall. Serious and fatal injuries would be likely if the roof did in fact fall. The violation was accordingly "significant and substantial" and of a high level of gravity.

According to the undisputed testimony of Inspector Pyles, it is the industry practice for the section foreman to run the sites for center lines and to mark the width of places to be cut before the cut is actually made. The cutting machine operator indeed would not have the authority to proceed with his work until such directions were given by the section foreman. It may therefore reasonably be inferred that an agent of the operator, the section foreman, knowingly directed the commission of the violation.

In determining the appropriate civil penalty for the violations within the framework of section 110(i) of the Act, I am also considering that the operator is medium to small in size and that it has a fairly substantial history of violations including previous violations of the standards cited herein.

ORDER

Citation No. 2074459 is vacated. Citation No. 2074458 is affirmed and a penalty of $300 is assessed. Citation No. 2075863 is affirmed and a penalty of $500 is assessed. The penalties herein shall be paid within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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

William M. Craft, Assistant Director of Safety, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

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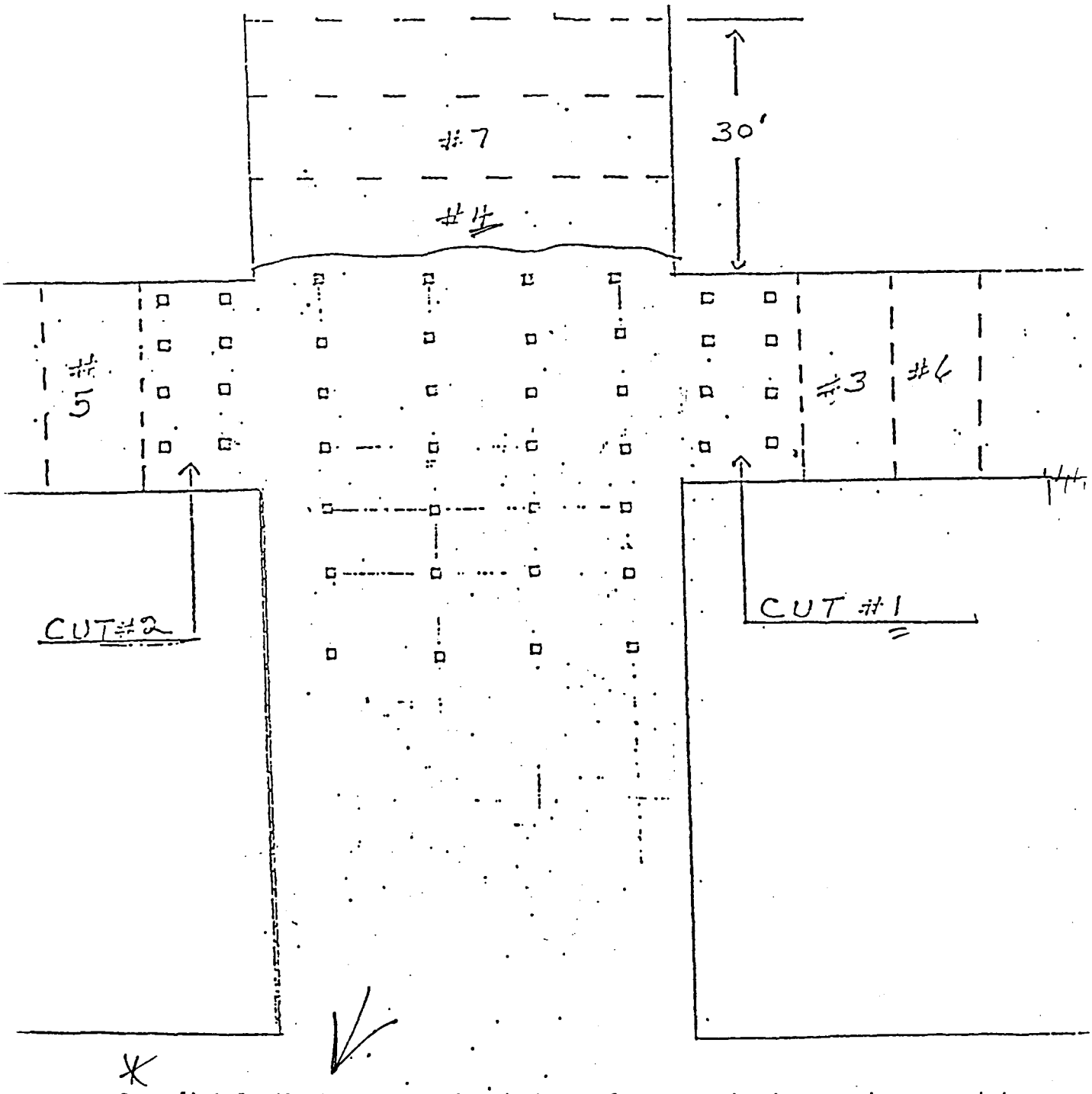
APPENDIX A

Cut Pattern For
Conventional Sections



Cuts #1 & 2 will be extracted and the roof supported, then on the next mining cycle, cuts #3, 4 & 5 will be taken in a normal manner, etc. The face will be driven no more than 30' from the inby rib of crosscut until crosscut is holed through and ventilation established.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-74-M A.C. No. 20-02514-05501
v.	:	
MEDUSA CEMENT COMPANY, Respondent	:	Medusa Cement Company (Plant)

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the eleven violations in this case for the original assessments total of $326.

Six of the violations were originally assessed for $20 apiece. The Solicitor advises that one of these violations involved no negligence, three involved a low degree of negligence and one involved a moderate degree. The Solicitor also represents that in two of these violations there was no likelihood of an injury and in three the occurrence of an injury was unlikely. He notes that abatement was accomplished in each instance. However, the Solicitor gives no basis for any of his assertions regarding negligence and gravity. In one instance, Citation No. 2088996, he makes no representations at all regarding negligence and gravity.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the

Commission would be nothing but a rubber stamp for the Secretary. The mere recitation by the Solicitor of bare conclusions is not a sufficient basis upon which I can predicate settlement approvals of $20 apiece. Of course, as I previously have held the Commission is not bound by 30 C.F.R. § 100.4 which is the basis of the six $20 "single penalty assessments."

The five remaining violations were assessed for amounts ranging from $30 to $68. The Solicitor advises that two of these violations involved no negligence and three involved a low degree of negligence. The Solicitor also states that each of these violations was significant and substantial. He notes that abatement was accomplished in each instance. The Solicitor gives no basis for his assertions regarding negligence or the significant and substantial nature of these violations. The inspector has checked boxes concerning negligence and gravity for all five violations.

I have recently held in many other cases that the term "significant and substantial" is irrelevant in a penalty proceeding before the Commission. Under section 110(i) the relevant criterion is gravity. But as I also have previously stated, I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. In absence of other evidence penalty amounts of $30 or $39 as recommended in some of these cases would appear low. The Solicitor has told me nothing about size, prior history, or ability to continue in business.

In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-75-M, LAKE 83-77-M and LAKE 83-81-M.

Accordingly, the settlement motion is Denied and this case is assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, Eighth Floor, Chicago, IL 60604 (Certified Mail)

Mr. Thomas Thimm, Plant Manager, Medusa Cement Company, Bells Bay Road, P. O. Box 367, Charlevoix, MI 49720 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-75-M
	:	A.C. No. 20-00038-05501
v.	:	
	:	Medusa Cement Company
MEDUSA CEMENT COMPANY, Respondent	:	(Plant)

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the twenty violations in this case for the original assessments total of $1,341.

Six of the violations were originally assessed for $20 apiece. The Solicitor advises that one of these violations involved a moderate degree of negligence and five involved a low degree. The Solicitor also states that in each violation the occurrence of an injury would have been unlikely. He notes that abatement was accomplished in each instance. However, the Solicitor gives no information to support his representations regarding negligence and gravity.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. Of course, the Commission is not bound by 30 C.F.R. § 100.4 which was the basis of six $20 "single penalty assessments."

The fourteen remaining violations were assessed for amounts ranging from $39 to $136. The Solicitor advises that four of these violations involved no negligence and ten involved a low degree of negligence. The Solicitor also states that each of these violations was significant and substantial. He notes that abatement was accomplished in each instance. Here again, the Solicitor gives no information to support his conclusions regarding negligence or gravity. The inspector checked boxes concerning negligence and gravity for all fourteen of these violations. Most of the checked boxes coincide with the Solicitor's conclusions. In one instance, Citation No. 2089069, however, the inspector indicates no negligence while the Solicitor indicates a low level of negligence.

In many other cases I have previously stated that I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. As already pointed out, under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria. The Solicitor has told me nothing about size, prior history, or ability to continue in business.

Accordingly, the proposed settlements must be Denied.

In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-74-M, LAKE 83-77-M and LAKE 83-81-M.

In light of the foregoing, this case is assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-76-M A.C. No. 20-00038-05502
v.	:	
MEDUSA CEMENT COMPANY, Respondent	:	Medusa Cement Company (Plant)

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the two violations in this case for the original assessments total of $105.

Citation No. 2089083 was issued for a violation of 30 C.F.R. § 56.11-1 because a build-up of cement was noted on the stairway and walkway at the bottom of the transfer elevator. The violation was assessed at $85. The Solicitor states that the operator demonstrated a low degree of negligence but he gives no basis for this assertion. The Solicitor further states that the violation was significant and substantial but again he gives no reasons. The inspector checked boxes indicating that negligence was low and that occurrence was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty.

Citation No. 2089085 was issued for a violation of 30 C.F.R. § 56.11-12 because the cover plate for the No. 2 fuel oil pump pit was not in place. The violation was assessed at $20. The Solicitor states that the operator demonstrated a low degree of negligence and that there was no likelihood of an injury. However, the Solicitor provides no information to support these representations.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to

be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. Of course, the Commission is not bound by 30 C.F.R. § 100.4 which was the basis of the one $20 "single penalty assessment" in this penalty proceeding.

The Solicitor has told me nothing about size, prior history, or ability to continue in business. Under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria.

In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding.

Accordingly, the settlement motion is Denied and this case is assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-77-M A.C. No. 20-00038-05503
v.	:	
MEDUSA CEMENT COMPANY, Respondent	:	Medusa Cement Company (Plant)

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the eleven violations in this case for the original assessments total of $691.

Six of the violations were originally assessed for $20 apiece. The Solicitor advises that two of these violations involved a moderate degree of negligence and four involved a low degree. The Solicitor also states that in each violation the occurrence of an injury would have been unlikely. He notes that abatement was accomplished in each instance.

Three of these $20 violations, which involved the failure to properly locate emergency stop devices at unguarded pinch points, were originally determined to be significant and substantial violations. Each citation was modified because, the inspector found, "the endangered party would probably be able to activate the emergency stop cord or would be drawn into it which would activate the emergency stop and accomplish its purpose of minimizing injury. Therefore [the citation] is modified to indicate the occurrence is unlikely." The inspector's statement that an endangered party "probably" could activate the emergency cord or otherwise "be drawn into it" does not by itself constitute a sufficient basis to conclude whether or not the violation was significant and substantial. On the contrary, the statement is particularly vague and uninformative. Most importantly, for present purposes I do not have any basis upon which to determine gravity.

Another of the $20 violations, which involved the failure to guard a drive chain, also was determined originally to be a significant and substantial violation. The citation was modified because, according to the inspector, roping off an area in front of and to the side of the chain drive and attaching a sign to the rope "would alert anyone coming on to the scene to the unusual condition and would make it unlikely that anyone would be injured as a result of the missing guard." The inspector's statement, alone, does not justify a $20 penalty, which in my opinion, most often denotes an absence of gravity.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. The recitation by the Solicitor of bare conclusions is not a sufficient basis upon which I can predicate settlement approvals of $20 apiece. Of course, as I previously have held the Commission is not bound by 30 C.F.R. § 100.4 which is the basis of the six $20 "single penalty assessments."

The five remaining violations were assessed for amounts ranging from $85 to $136. The Solicitor advises that one of these violations involved a moderate degree of negligence and four involved a low degree. The Solicitor also states that each of these violations was significant and substantial. He notes that abatement was accomplished in each instance. Here again, the Solicitor gives no information for his conclusions regarding negligence and gravity. "Significant and substantial" is not the same as gravity. The inspector did check boxes concerning negligence and gravity for all five of these violations. Most of the checked boxes coincide with the Solicitor's conclusions. In one instance, Citation No. 2089050, however, the inspector indicates a moderate degree of negligence while the Solicitor indicates a low degree.

In many other cases I have previously stated that I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. As already pointed out, under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria. In addition to inadequate data on gravity and negligence, the Solicitor has told me nothing about size, prior history, or ability to continue in business.

Accordingly, the proposed settlements must be Denied.

In another case involving this operator (LAKE 83-80-M) I disapproved a settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-74-M, LAKE 83-75-M and LAKE 83-81-M.

In light of the foregoing, this case is assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

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Mr. Thomas Thimm, Plant Manager, Medusa Cement Company, Bells Bay Road, P. O. Box 367, Charlevoix, MI 49720 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-81-M
	:	A.C. No. 20-02514-05502
v.	:	
	:	Medusa Cement Company (Plant)
MEDUSA CEMENT COMPANY, Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the three violations in this case for the original assessments total of $98.

Citation No. 2088997 was issued for a violation of 30 C.F.R. § 56.14-1 because guarding was not provided for the counterweight wheel for a shaker screen. The violation was assessed at $20. The Solicitor states that the operator demonstrated a moderate degree of negligence and that an injury was unlikely to occur. The Solicitor, however, provides no information to support these assertions.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. The mere recitation by the Solicitor of bare conclusions is not a sufficient basis upon which I can approve $20 penalty assessments.

Citation Nos. 2089063 and 2089064 were issued for failure to properly maintain a fire extinguisher and failure to clear a walkway of material causing a slip and fall

hazard, respectively. The violations were assessed at $39 apiece. The Solicitor states that the operator demonstrated a low degree of negligence in both instances but he provides no information to support this assertion. The Solicitor further states that the violations were significant and substantial but again he gives no reasons. In both citations, the inspector checked boxes indicating that negligence was low and that occurrence was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty. I have previously stated that I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. As already noted, under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria, including gravity. In absence of other evidence, $39 would appear a low penalty amount. The Solicitor has told me nothing about size, prior history, or ability to continue in business.

In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-74-M, LAKE 83-75-M and LAKE 83-77-M.

Accordingly, the settlement motion is Denied and this case is hereby assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 14 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-52
	:	A.C. No. 36-05018-03507
v.	:	
	:	Cumberland Mine
U.S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Thomas A. Brown, Jr., Esq., and Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves a single citation issued September 9, 1982, alleging a violation of 30 C.F.R. § 75.200 because Respondent failed to comply with its approved roof control plan. Respondent does not deny that the violation occurred, but denies that it was significant and substantial, and contests the amount of the penalty. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on June 22, 1983. Steve Yurkovich testified on behalf of Petitioner; Don Laurie and Rudy Juracko testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision:

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Cumberland Mine.

2. The subject mine produces in excess of 1 million tons of coal annually. Respondent produces in excess of 15 million tons of coal annually. Respondent is a large operator.

3. In the 24 months prior to the violation alleged herein, the subject mine had 32 assessed violations of 30 C.F.R. § 75.200. This history of prior violations is not such that a penalty otherwise appropriate should be increased because of it.

4. The imposition of a penalty in this case will not affect Respondent's ability to continue in business.

5. The approved roof control plan in effect at the subject mine at all times pertinent to this proceeding required that in all track haulage intersection spans a minimum of one crib or two posts be installed as supplementary roof supports in one or more of the inactive approaches (Government Exh. 2).

6. On September 9, 1982, supplementary roof supports were not present in either of the approaches to the track haulage road at the intersection of the No. 3 entry and the 21st crosscut in the 63 Face South section of the subject mine. Citation No. 2011731 was issued charging a violation of 30 C.F.R. § 75.200.

7. The roof in the cross cut was "potted out" in an area of about 80 or 90 square feet. The roof was split inby the intersection and starting to break.

8. Ten roof bolts had been installed in the potted out area, which apparently occurred during the mining cycle when the miner operator cut higher than normal. The ten bolts were three or four more than called for in the roof control plan. The mining of this area took place about 14 weeks prior to the issuance of the citation.

9. Header blocks were added to the bolts in the potted out area to catch loose material around the bolt.

10. The violation was abated September 9, 1982, by the installation of two posts in the right side of the intersection. They were later replaced by cribs in October or November of 1982.

ISSUES

1. Was the violation of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The condition described in Finding of Fact No. 6 was a violation of the approved roof control plan and therefore of 30 C.F.R. § 75.200.

3. The violation referred to above was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

DISCUSSION

The roof control plan requires additional supports at track haulage intersections to help prevent roof falls along the haulage roads. Not all roof control plans have such a requirement, and the MSHA Inspector admitted that such a requirement is not necessary for haulage intersections unless the roof conditions are bad. However, the intersection in question had a large potted out area and was beginning to break. The inspector described the roof in the intersection as "bad." In such a place, he believed that additional supports were necessary to prevent a roof fall. I conclude that a roof fall was reasonably likely to occur as a result of the violation and, if it occurred, it would likely cause serious injuries to miners. This judgment must be made considering the conditions present at the time the citation was issued. The fact that the roof has not fallen and the cribs are apparently not bearing weight as of the hearing date is not determinative of the question.

4. The violation was serious. Roof falls are the most common cause of fatalities in the nation's mines.

5. The violation was obvious. Respondent should have been aware of it. It resulted from negligence.

6. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $250.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED

1. Citation No. 2011731, including its designation as significant and substantial, is AFFIRMED.

2. Respondent shall, within 30 days of the date of this order, pay the sum of $250 for the violation found herein to have occurred.

James A Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 83-111-M
	:	A.C. No. 35-00540-05501
v.	:	
	:	Ross Island Plant
ROSS ISLAND SAND & GRAVEL COMPANY, Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

On September 28, 1983, I ordered the Solicitor to submit additional information to support the proposed settlements of $20 apiece for the two violations involved in this matter. The Solicitor has now responded.

With respect to Citation No. 2225917 the Solicitor advises as follows:

> In regard to this citation, detailing the fact that a work deck area behind a screen where the scalper machine was located, was being littered with wood and other debris, a violation of 30 CFR 56.11.1, if the inspector were to testify he would state in regard to negligence: that the negligence involved was ordinary negligence. The wood scattered around the workplace was obvious and was the result of the company's failure to correct said condition.
>
> In regard to the gravity of the situation, the inspector would testify that there were approximately two or three persons working in the area and it was probable that they would trip or fall. The type of injury that might occur is unpredictable as it would depend entirely on the nature of the fall, but was unlikely to cause lost work days or restricted duty.

With respect to Citation No. 2225918 the Solicitor advises as follows:

> In regard to Citation 2225918 detailing the fact that an acetylene bottle, located in the welding bay, was not secured, a violation of 30 CFR 56.16-5, if the inspector were to testify, he would state in regard to negligence: that the negligence involved was ordinary negligence, in that the operator failed to exercise reasonable care to prevent and correct the condition. The bottle was in plain view and obviously unsecured.
>
> In regard to the gravity of the situation, the inspector would testify that there were two to three men working in the area all the time doing welding or working at the front end of a loader. The probability of an accident occurring was 'probable' because although there was no flammable material around, there remains the possibility of pressure accumulating and the bottle acting like a trajectory. The gravity of an injury if it were to occur would be unpredictable depending upon the length of time the bottle was unsecured and the direction it took. It would be expected that a minimal number of days would be lost or work restricted.

In light of the foregoing, I am unable to approve $20 settlements for either of these violations. Although the operator is small and without a prior history, gravity and negligence in both instances appear at first blush to be much greater than would be consistent with $20 penalties. At the very least, the inspector's statements raise questions which should be resolved at hearing.

Accordingly, the motion for settlement is Denied. This case is hereby assigned to Administrative Law Judge Virgil E. Vail.

All future communications regarding this case should be addressed to Judge Vail at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
333 W. Colfax Avenue, Suite 400
Denver, CO 80204

Telephone No. 303-837-3577

Paul Merlin
Chief Administrative Law Judge

Distribution:

Rochelle Kleinberg, Esq., Office of the Solicitor, U. S. Department of Labor, 8003 Federal Office Building, Seattle, WA 98174 (Certified Mail)

Mr. R. G. Tuttle, Corporate Director, Ross Island Sand & Gravel Company, 4315 South East McLoughlin Blvd., P. O. Box 02219, Portland, OR 97202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 17 1983

CLINCHFIELD COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. VA 82-51-R Order and Citation No. 2038802; 6/18/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Hurricane Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 83-24 A. C. No. 44-01773-03509
v.	:	Hurricane Creek Mine
CLINCHFIELD COAL COMPANY, Respondent	:	

DECISION

Appearances: Fletcher A. Cooke, Esq., Clinchfield Coal Company, Lebanon, Virginia, for Contestant/Respondent; Paul Thompson, General Counsel, Pittston Coal Group, Lebanon, Virginia, for Contestant/Respondent; David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Steffey

A hearing was held on April 27 and 28, 1983, in Abingdon, Virginia, in the above-entitled proceeding pursuant to sections 105(d) and 107(e), 30 U.S.C. §§ 815(d) and 817(e), of the Federal Mine Safety and Health Act of 1977. The parties indicated at the conclusion of the hearing that they wished to file post-hearing briefs. Counsel for both parties filed simultaneous initial posthearing briefs on August 17, 1983, and counsel for Clinchfield Coal Company filed a reply brief on September 9, 1983.

Issues

The subject of the hearing was the issuance by MSHA on June 18, 1982, of Order and Citation No. 2038802, pursuant to sections 107(a) and 104(a) of the Act, requiring all persons to be withdrawn from a roof-fall area in the 2 Left Section of Clinchfield's Hurricane Creek Mine and alleging that a violation

of 30 C.F.R. § 75.200 had occurred. Clinchfield claims in its application for review filed on July 19, 1982, in Docket No. VA 82-51-R, that no imminent danger existed and that no violation of section 75.200 occurred. The Secretary of Labor filed on April 6, 1983, in Docket No. VA 83-24, a petition for assessment of civil penalty seeking to have a civil penalty assessed for the alleged violation of section 75.200 alleged in Order and Citation No. 2038802.

The three basic issues raised by the parties are: (1) whether a violation of section 75.200 occurred; (2) whether an imminent danger existed on June 18, 1982, when Order No. 2038802 was issued, and (3) what civil penalty should be assessed under section 110(i) of the Act if a violation of section 75.200 is found to have occurred.

Summary of the Evidence

Counsel for the Secretary of Labor and counsel for Clinchfield Coal Company entered into the following stipulations (Tr. 7-8): (1) Clinchfield is the owner and operator of the Hurricane Creek Mine involved in this proceeding. (2) Clinchfield and the Hurricane Creek Mine are subject to the Act. (3) The administrative law judge has jurisdiction to hear and decide the case. (4) The inspector who issued Order No. 2038802 on June 18, 1982, under sections 107(a) and 104(a) of the Act is a duly authorized representative of the Secretary of Labor. (5) A true and correct copy of Order No. 2038802 was properly served upon Clinchfield. (6) All witnesses are accepted generally as experts in coal mine health and safety. (7) Imposition of civil penalties will not affect the operator's ability to continue in business. (8) Clinchfield is a medium-sized coal company which produces about 3,000,000 tons of coal annually. (9) The Hurricane Creek Mine is a medium-sized mine. (10) The Mine Safety and Health Administration and the Virginia Division of Mines conducted a joint investigation on June 4, 1982, of an accident which occurred at the Hurricane Creek Mine on June 2, 1982, and also conducted on June 18, 1982, a reinvestigation of the accident, but the MSHA and Virginia personnel who participated in the reinvestigation on June 18, 1982, were not involved in the issuance of Order No. 2038802 (Tr. 328).

The issues in this proceeding must be resolved in light of the witnesses' testimony which is summarized in the following paragraphs:

1. Nickie Brewer, a coal-mine inspector from MSHA's Norton, Virginia, Office conducted a spot inspection at Clinchfield's Hurricane Creek Mine on June 18, 1982. He was accompanied into the mine by Supervisory Inspector E. C. Rines, and by Denver Meade, a member of the United Mine Workers of America and chairman of the safety committee at the Hurricane Creek Mine (Tr. 10-12; 78; 130).

2. The three men started their inspection in the No. 1 entry of the 2 Left Section and when they reached the last open crosscut between the Nos. 5 and 6 entries, they encountered some extensive overhanging brows which Brewer found to be an imminent danger. Therefore, at 12:00 noon he issued Order No. 2038802 dated June 18, 1982, under section 107(a) of the Act. Order No. 2038802 also cited a violation of 30 C.F.R. § 75.200 under section 104(a) of the Act (Tr. 12; 20; 73). The condition or practice given in the order reads as follows (Exh. 1, p. 1):

> An unsupported, overhanging, arching rock brow that showed separation (cracked and broken) was present along the left rib of the No. 5 entry, right crosscut of the 2 Left (005) Working Section where a roof fall had occurred and a continuous-mining machine had been recovered from under fallen roof material. This brow began approximately 57 feet inby the centerline off the No. 5 entry and extended inby approximately 20 feet. The brow arched toward the center of the entry approximately 9 feet and was 2 feet thick.
>
> Another unsupported rock brow was present along the right rib of the same entry crosscut, beginning approximately 54 feet inby the same centerline and extending inby approximately 18 feet. The brow overhung from 22 inches to approximately 9 feet out over the entry. Unsupported, fractured roof was also present immediately inby the fall area in the No. 6 entry measuring 9 feet by 9 feet extending inby to the face and right rib of the No. 6 entry.
>
> At the time of this inspection there was no activity in this vicinity and the area was dangered off. However, a continuous-mining machine had been recovered in this area prior to this inspection.

3. Order No. 2038802 was terminated on December 6, 1982, and the reason given for terminating the order was that (Exh. 1, p. 2):

> The safe procedure for recovering mine machinery from area where roof falls have occurred has been discussed with the workmen on all shifts. Also the area where the roof fall had occurred had been dangered and barricaded off. The company also has no intention of mining in the area of the roof fall.

4. Brewer testified that on June 18 he found no danger sign of any kind to warn persons of the hazards of going into the crosscut in which the unsupported brows existed (Tr. 46; 318-319). In his order, however, Brewer had stated that "* * * there was no activity in this vicinity and the area was dangered

off." Brewer said that the area was not dangered off until after he had hung red tags in the fall area to warn persons of the existence of the imminent danger (Tr. 46). Brewer's supervisor suggested that since Brewer, rather than Clinchfield, had posted danger signs, Brewer should modify his order to remove the ambiguous reference to the area's having been dangered off (Tr. 56). Therefore, on January 18, 1983, Brewer issued a modification of the order reading as follows:

> Order No. 2038802 issued June 18, 1982, is hereby modified to include the following statement:
>
> The approaches to this area of violation prior to the issuance of the order of withdrawal were not dangered off.

5. In support of his finding of the existence of an imminent danger, Brewer introduced as Exhibit 2 a diagram of the way the overhanging brows appeared to him when he examined them by going into the crosscut from the No. 5 entry. Brewer wrote the letter "A" on Exhibit 2 to show the location of the right rib of No. 6 entry inby the brows (Tr. 22). The letter "B" on Exhibit 2 shows the location of the left brow which was 20 feet long, was arched out over the center of the crosscut for a distance of 9 feet, and was about 2 feet thick. Brewer was especially concerned about a crack at the place where the left brow began (Tr. 13). He interpreted the existence of the crack as an indication that the brow was just hanging there "waiting to fall" (Tr. 22; 32). Brewer wrote the letter "C" on Exhibit 2 to show the location of the right brow which was 18 feet long, arched out over the crosscut a distance of from 22 inches to 9 feet, and was 1-1/2 to 2 feet thick. Brewer placed the letter "D" on Exhibit 2 to mark the 9-foot square area in the roof of the No. 6 entry where the roof was unsupported, cracked, and broken (Tr. 24).

6. Brewer stated that the brows described in summary paragraph No. 5 were the remaining edges of a roof fall which had occurred in the crosscut on June 2, killing two miners and covering up Clinchfield's continuous-mining machine (Tr. 33). Brewer said that a motor and a control bank had to be replaced on the continuous-mining machine before it could be extricated from the roof fall and it was his belief that the miners were exposed to unsupported roof while they were in the process of replacing the parts. Brewer introduced as Exhibit 4 a diagram showing that the overhanging brows would have been over the head of anyone replacing parts on the continuous-mining machine or working the controls to extricate the continuous-mining machine from the crosscut (Tr. 34-39).

7. Although no coal was being produced in 2 Left Section at the time Brewer wrote the order citing an imminent danger, he said that the continuous-mining machine recovered from the roof-fall area was about 120 feet away from the fall area and that if

Clinchfield had succeeded in getting the miner repaired by that evening, active production of coal would have been resumed (Tr. 48-50; 64). Brewer also claimed that the crosscut had to be considered a place where miners were regularly required to work because preshift examinations of the area would have had to have been made in order for repairmen to work on the disabled continuous-mining machine (Tr. 18-19). Since he had found no danger sign or breaker posts when approaching the crosscut from the No. 5 entry, he said that it was quite likely to assume that the preshift examiner would go into the crosscut to the No. 6 entry to take an air reading and be killed by one of the unsupported brows (Tr. 19-20). Brewer also believed that Clinchfield's failure to support the brows was associated with a high degree of negligence because supervisory personnel were in the crosscut at the time the continuous-mining machine was recovered and yet they had taken no action to correct the hazardous conditions which existed when he inspected the crosscut on June 18 (Tr. 41).

8. Brewer's supervisor, E. C. Rines, supported Brewer's exhibits and his belief that an imminent danger existed. Rines emphasized the height of the brows where they terminated against the roof cavity, their 9-foot extension from the ribs toward the center of the crosscut (Tr. 91), and the fact that there were no bolts in the brows and that the only bolts they saw were in the center of the crosscut (Tr. 93), except for a single bolt near the rib in the right brow close to the point where the crosscut intersected with the No. 6 entry (Tr. 92; Exh. 3, p. 1). Rines believed that single bolt had failed to pull out when the roof fall occurred. Rines said that even if Clinchfield had erected a danger sign at the intersection of the No. 5 entry and the crosscut cited in the order, the existence of a danger sign would not be a reason to prevent an inspector from issuing an imminent-danger order (Tr. 310-311).

9. Larry Coeburn was the MSHA inspector normally assigned to perform inspections at the Hurricane Creek Mine (Tr. 126). He was not with Brewer and Rines when the imminent-danger order was issued, but he accompanied Clinchfield's personnel when they went to examine the crosscut on June 22 and he concurred with Brewer's and Rines' belief that the unsupported brows in the crosscut constituted a very hazardous condition. He believed that if the brows had fallen, they would necessarily have fallen across the middle of the crosscut. He said that when he went to the roof-fall area on June 22, there was still no physical obstruction to prevent a miner from entering the hazardous crosscut from the No. 5 entry. Therefore, he participated in cutting timbers and boards so that they could erect actual barricades at each end of the roof-fall area to preclude persons from entering the area unless they removed the barriers (Tr. 125). At the time they erected the barricades, actual production of coal was being conducted in the 2 Left Section just two crosscuts inby

the crosscut in which the imminent danger had been cited and still existed (Tr. 128).

10. Denver Meade, the safety committeeman who accompanied Brewer on his inspection of the 2 Left Section, stated that the likelihood of the brows' falling was "[j]ust about as great a chance as it could get. I made the statement up there it was like working close to a cocked gun, working up there" (Tr. 130-131). Meade participated in installing roof bolts and in erecting crossbars outby the area of the roof fall. He said that he saw no supports whatsoever under the brows cited in the imminent-danger order and that he was just about as confident as one can get in stating that there were no roof bolts in the brows (Tr. 131). Meade also testified that a company official, Gail Kizer, went out from under both permanent and temporary supports to attach ropes to rocks so that the rocks could be pulled off of the continuous-mining machine which had been covered up in the roof fall (Tr. 132). Meade placed an "X" on page 1 of Exhibit 3 to show the location of one of the rocks which were pulled out before the continuous-mining machine could be removed (Tr. 137).

11. A preshift examiner, Robert Vickers, testified that he preshifted the 2 Left Section between 9 p.m. and midnight on June 17, 1982, and he introduced as Exhibit A a preshift examiner's report showing that he wrote the words "Danger off at fall" on the line for noting hazards in the No. 6 entry. Vickers said that the notation was made because he saw a Pepsi or Coke can with illuminated tape on it hanging from a roof bolt about eye level in the No. 5 entry near the crosscut leading to the roof-fall area. Vickers claimed that a reflectorized can was used in the Hurricane Creek Mine as a danger sign and that miners know to examine the area inby such cans for hazardous conditions before entering such areas. Vickers said his notation was intended to mean that the entire fall area and both the approaches from entries Nos. 5 and 6 had been "dangered off" (Tr. 149-150). Vickers stated that he did not go inby the reflectorized can and that he inspected the No. 6 entry by going through the crosscut outby the roof-fall area to examine the No. 6 entry. Vickers could not recall when the can first appeared in the No. 5 entry, but he made another preshift examination between 9 and midnight on June 18 and the can was still hanging in the No. 5 entry where he had observed it on June 17 (Tr. 155). Vickers also believed that there was a reflectorized can in the No. 6 entry (Tr. 156). Vickers went so far as to assure the Secretary's counsel that he was as certain that there was a can in both the No. 5 and No. 6 entries as he was that he was sitting in the courtroom (Tr. 157).

12. Logan Busch, a Clinchfield miner with 13 years of experience, including 8 years of operating a continuous-mining machine, participated in the removal of the continuous miner which had been covered up by the roof fall in the crosscut between Nos. 5 and 6 entries (Tr. 179-180). He and another miner

worked for an entire shift bolting the cavity left in the roof which fell on the continuous miner (Tr. 191). They stood on top of the continuous miner and worked their way around cribs built on top of the miner (Tr. 184). The stoper, or pneumatic drill, they were using weighs about 200 pounds and is very difficult to use in the cramped conditions they encountered on top of the miner and on the side of the miner (Tr. 191-195; 201-203). Busch said that they installed roof bolts every place they could reach with the stoper. Some of the area on the right side of the miner was too high to reach with the steel they were using (Tr. 185) and they could not bolt the roof over and immediately outby the ripper head because the ripper was cutting coal at the time the roof fell and the rock at the top of the head and immediately behind the head was still lying on top of the miner and there was no room at all to use the stoper in that area (Tr. 183).

13. Busch, who has assisted in recovering about seven or eight continuous miners from roof falls (Tr. 181), and some other Clinchfield employees went to the 2 Left Section on Sunday, June 13, 1982, to remove the continuous-mining machine after the roof had been bolted and most of the rocks had been removed from the sides of the continuous miner. Busch and his supervisor, Don Cross, removed some remaining rock from behind the boom of the miner while a repairman, Roy Sauls, installed a pump and a valve block on the right side of the miner (Tr. 180). Busch then positioned himself at the continuous miner's controls, but the miner was not yet free enough to be trammed from the area until a rope was attached to the miner and hooked to a scoop (Tr. 185). By using the ripper head to dislodge rocks near the front of the miner and by relying upon the scoop's assistance, Busch was able to back the miner out of the crosscut (Tr. 186). Busch stated that there were bolts over the deck of the miner which made him believe it was safe for him to operate the controls (Tr. 182). He was, nevertheless, aware of the crack in the left brow, but he concluded that the left brow was caught against firm rock in the center of the bolted roof-fall cavity. He further believed that if the left brow had fallen, it would have fallen on the continuous miner at a point inby the operator's controls where he was situated (Tr. 203-204).

14. After Busch and the other members of the recovery team had added oil to the miner's hydraulic system, they succeeded in tramming it outby the crosscut for about a break and a half and they left it there for evaluation as to the need for further repairs (Tr. 190). Busch says that the reflectorized can, described in summary paragraph No. 11 above, was "still" in the No. 5 entry on June 13, but he thinks or is "pretty sure" that they also erected a single timber in the intersection of the No. 5 entry with the crosscut and that they wrote the word "Danger" on that single timber (Tr. 190). After Busch had trammed the miner out of the crosscut, no supports at all were left in the roof-fall

area other than those which had been installed with the stoper prior to removal of the miner. Since Busch had been unable to install any bolts near the front of the continuous miner, there was naturally no support of any kind at the far end of the roof fall where the crosscut intersected the No. 6 entry (Tr. 189).

15. Roy Sauls, a repairman with 13 years of experience, including 12-1/2 years of experience in the Hurricane Creek Mine, has assisted in recovery of continuous-mining machines from seven or eight roof falls (Tr. 205; 212). He replaced the "C" pump and valve block on the right side of the miner on Sunday, June 13, just before the miner was trammed from the crosscut. He worked at the edge of the right brow in doing so and the brow had neither roof bolts nor temporary supports under it at the time he did the work (Tr. 207-208). He examined the brow and felt that the fall area had been made as safe as a fall area can be made. While he considered it safe for him to do the repair work, he also expressed the opinion that "[t]here's a possibility there could have been another fall in there anywhere" (Tr. 209). Sauls stayed around on June 13 until his supervisors and he had examined the continuous-mining machine and it was the consensus that the miner would have to be disassembled and taken to the central shop to be rebuilt because the damage done to it by the roof fall was too extensive to be repaired underground (Tr. 211).

16. Don Cross has worked for Clinchfield for 18 years and he was the supervisor in charge of recovery of the continuous-mining machine on June 13, 1982 (Tr. 213). His account of the recovery of the continuous miner does not differ from Busch's explanation which has been summarized in paragraph Nos. 12, 13, and 14 above. There was likewise little difference in the testimony of Busch and Cross as to the setting of a timber outby the crosscut with the word "Danger" written on it after removal of the continuous miner from the crosscut. Just as Busch had stated that he "was not for sure" and "believed" that they had erected such a timber (Tr. 190), so did Cross qualify the setting of the timber "to the best of [his] knowledge" (Tr. 215). Cross, like Busch, also stated that the reflectorized warning can was "still" hanging in the No. 5 entry at the approach into the crosscut (Tr. 215). Cross' credibility also suffers somewhat from his inconsistent statement on cross-examination that he had only worked 1 day in the fall area (Tr. 216) as compared with his statement during direct examination that "* * * we had worked on the area the shift previous" (Tr. 214).

17. Monroe West has been Clinchfield's safety director since September 1, 1977. Prior to that, he served for 18 years in various positions with the Bureau of Mines and MSHA, including several years as subdistrict manager of MSHA's Norton, Virginia, Office (Tr. 217). He was in the No. 5 entry and crosscut on June 18 when the imminent-danger order was issued, but he

did not see the reflectorized can allegedly observed by other Clinchfield witnesses (Tr. 223; 227). West introduced as Exhibit C a copy of the Hurricane Creek Mine's roof-control plan which was in effect on June 18. West stated that paragraph 3(a) of the roof-control plan provides as follows (Tr. 223):

> (a) Upon completion of the loading cycle, a reflectorized warning device, such as a "stop" sign, shall be conspicuously placed to warn persons approaching any area that is not permanently supported. It is to be emphasized that the warning device has been placed to cause the person to stop, examine, and evaluate the roof and rib conditions prior to entering the area--even after temporary supports have been installed.

West said that a reflectorized can was used at the Hurricane Creek and other mines to warn miners of hazardous conditions and that miners will not enter the area beyond such a warning device even if no physical barrier is erected to prevent them from going into the area beyond such a can (Tr. 223-225).

18. West was asked to examine the preshift report made by an examiner for the oncoming 8-a.m.-to-4-p.m. shift on June 18 and that report has no notation at all to show that the reflectorized can did or did not exist in the No. 5 entry of the 2 Left Section (Tr. 230). West stated that it is not necessary to preshift a section which is idle if there is no activity in the section (Tr. 228), but he said that preshifts were required when miners were working in the 2 Left Section to determine the exact locations of roof bolts or to perform repairs on the continuous-mining machine (Tr. 228).

19. Ronald Hamrick, an employee of the Virginia Division of Mines with 30 years of coal-mining experience, testified that he was in the 2 Left Section on June 2, 4, and 18, 1982, as a participant in the original investigation and reinvestigation of the roof fall which occurred on June 2 (Tr. 249-250). On June 18, he was in the No. 6 and No. 5 entries and he recalls seeing a reflectorized can hanging in the No. 5 entry. He looked beyond the can into the crosscut and saw roof bolts and believed that they had forgotten to remove the can because it appeared that the crosscut had already been permanently supported. He did not go more than 10 or 15 feet into the crosscut because his supervisor called him about the time he saw the can and they went inby the crosscut and examined the face areas and torqued roof bolts (Tr. 251-252). Hamrick did not see the reflectorized can on June 4 and does not think one existed at that time (Tr. 258). Hamrick said that he probably made some notes about the investigation but that he did not have the notes with him and that he doubts if he would have made a notation about observing the reflectorized can because that is a common occurrence (Tr. 258).

Hamrick also stated that Clinchfield's attorney had referred to the can in a telephone conversation prior to the time he appeared as a witness in this proceeding (Tr. 259). Hamrick did not see a reflectorized can in the No. 6 entry (Tr. 261).

20. Earl Hess has worked for Clinchfield for 25 years and is superintendent of the Hurricane Creek Mine (Tr. 262). He testified that the roof fall occurred on Wednesday, June 2, 1982, that the first investigation occurred on Friday, June 4. The mine was idle for the miners' vacation from June 2 to June 10, 1982 (Tr. 227; 238). They began the work preparatory to recovering the continuous-mining machine on Monday, June 7, by having miners bolt the roof outby the fall area. That work continued, including the installation of crossbars from the No. 5 entry on into the crosscut up to the boom of the continuous miner, and the stopering or bolting of the roof-fall cavity above the continuous miner. The miner was recovered on Sunday, June 13, and was taken to the end of the track "about" Wednesday, June 16, so that it could be disassembled and transported to the central shop for rebuilding. Normal or routine production in the 2 Left Section did not resume until July 12, 1982, according to Hess (Tr. 262-267).

21. Hess testified that they mined the crosscut inby the one in which the roof fall occurred and that they went inby the roof fall by proceeding inby in the No. 6 entry. They never did connect up the No. 6 entry with the area where the roof fall occurred and where Inspector Brewer had found the 9-foot square area of unsupported and cracked roof (Tr. 265; 268). The decision not to proceed with normal mining from the face side of the No. 6 entry was made, however, after Brewer issued the imminent-danger order on June 18, 1982 (Tr. 266). Hess stated that the Hurricane Creek Mine had only three continuous-mining machines at the time the roof fall occurred. After the continuous miner damaged in the roof fall had been removed for repair to the central shop, another one had to be brought into the mine in order for them to continue mining activities in the 2 Left Section. On June 18, 1982, when the imminent-danger order was issued, the closest active mining then in progress was about 2,000 feet away in the 2 Right Section (Tr. 264-265).

22. Paul Guill is Clinchfield's chief engineer (Tr. 158). He presented as Exhibit B a diagram of the roof-fall area showing the continuous-mining machine's location in the crosscut and the number of roof bolts he and his surveyors found in the crosscut (Tr. 160). Guill testified that he and his assistants set up transits at points marked with the numbers "1691" and "1692" on Exhibit B. From those points they "shot" the roof bolts and plotted each of the roof-bolt locations on Exhibit B (Tr. 161-162). Guill shows dotted lines and solid lines to mark the beginning and ending edges of the brows cited in Inspector Brewer's imminent-danger order. Guill explained that his Exhibit B

depicts the brows in more than one plane with the dotted lines showing where the brows begin at the normal roof line, or 6-1/2 feet above the mine floor. The solid lines on Exhibit B show the places where the roof fall ended (Tr. 166). Although an examination of Inspector Brewer's Exhibit 3, page 1, appears to show more roof bolts in the center of the crosscut than Guill depicts in his Exhibit B, that is not really the case because Guill's "modes of representation are different" from Brewer's as a result of the three-dimensional aspects of Guill's roof-bolt exhibit (Tr. 169). On Exhibit 3, page 1, Inspector Brewer shows 13 roof bolts in the immediate roof-fall area if one counts the single roof bolt near the rib where the word "roof bolt" appears. Examination of Guill's Exhibit B shows 20 roof bolts in the roof-fall area, but page 2 of Exhibit 3 shows roof bolts only inby the point where the brows begin and that commencement point is at the junction of the boom with the frame of the continuous-mining machine (Tr. 283; 295; Exh. 3, p. 2). Since Guill's Exhibit B shows at least 7 bolts outby the place where Brewer's Exhibit 3 begins to show the locations of roof bolts in the fall area, Guill's and Brewer's exhibits both reflect the existence of 13 roof bolts in the fall area. The letter "D" was placed on Guill's Exhibit B to denote the fact that Guill agreed with MSHA that no roof bolts had been installed in the mine roof above the ripper head and for several feet outby the ripper head (Tr. 176).

23. In rebuttal of Clinchfield's case, the Secretary's counsel recalled all of his witnesses. Rines, Brewer, and Meade each testified unequivocally that they were in both the No. 5 and No. 6 entries on June 18 from five to seven different times at the place where Clinchfield's witnesses claimed they saw the reflectorized can. They stated that the centerline from which they made their measurements as to the extent of the brows and the location of roof bolts was established very close to the place where the reflectorized can had allegedly been hung and that they did not see such a can on any of their numerous trips in and out of the entries (Tr. 280; 318; 322). They all stated that they are familiar with the use of reflectorized cans as danger signs and that they would have seen it if it had existed in either the No. 5 or No. 6 entry (Tr. 280; 318; 322). Coeburn was not in the crosscut on June 18, but was there on June 22 when Guill and the surveyors took sightings to spot the roof bolts in the crosscut and he stated that no reflectorized can was hanging in the No. 5 entry on that day (Tr. 325).

24. Rines also testified on rebuttal that the timber with the word "Danger" written on it, described by Clinchfield's witnesses Busch and Cross did not exist on June 18 (Tr. 281). Moreover, Rines stated that he was in the crosscut before the miners' bodies were recovered from the roof fall and that he knows that he could have taken a stoper and could have bolted the left and right brows either by resting the stoper on the

continuous-miner or by standing on the mine floor and using an extended piece of steel for drilling into the roof cavity at its highest point of about 14 feet. He said that the installation of roof bolts in the scattered bolting pattern used by Clinchfield's witness Busch was unacceptable (Tr. 304). Rines stated that he could have bolted the roof-fall area with a proper number of bolts and would still have been protected by the temporary supports which he himself had helped to install (Tr. 287-288). Rines admitted during cross-examination, however, that the roof under the roof fall just immediately outby the head of the ripper did not have sufficient clearance on top of the continuous-mining machine for Busch or anyone else to install roof bolts (Tr. 305).

25. Rines also insisted during his rebuttal testimony that the miners exposed themselves to the unsupported left and right brows during the time they were recovering the continuous miner from the roof-fall area (Tr. 306), although he had stated previously during direct examination that he could not say that anyone was exposed to the unsupported brows during removal of rock because he did not see Clinchfield's employees remove the rocks (Tr. 90). Rines admitted that he was not a geologist (Tr. 296), but he stated that the Jawbone coal seam being mined in the Hurricane Creek Mine contains "slips" which result in roof falls like the one which happened on June 2 and that it is easy to "misjudge the way the planes lie in a slippery roof" (Tr. 286).

Consideration of Parties' Arguments

Docket No. VA 82-51-R

The Issue of Whether a Violation of Section 75.200 Occurred

The Portion of Section 75.200 Violated

Pages 4 through 14 of Clinchfield's initial brief are devoted to arguing that no violation of section 75.200 was proven by MSHA. Clinchfield's brief (p. 5) begins its argument by claiming that the inspector failed to specify what portion of section 75.200 had been violated. At transcript page 20 his counsel asked him "[w]hy do you say that there was a violation of 75.200". His reply was that section 75.200 "requires that the roof and that the ribs be adequately supported. And the ribs were not adequately supported, or brows."

At transcript page 73, Clinchfield's counsel asked the inspector:

> Q Mr. Brewer, in the order you cited, 30 CFR Section 75.200, which refers to the roof-control plan, just for purposes of clarity, what was the specific violation of roof-control plan?

A I didn't write the roof-control plan. I wrote 200, but everything that's under 200 is not the roof-control plan. I wrote failure to adequately support the roof and ribs. 75.202, it could have been written there, too.

The second sentence of section 75.200 reads as follows:

> * * * 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. * * *

Based on the testimony quoted above, I find that the inspector clearly explained the portion of section 75.200 which he believed had been violated.

Exposure of Miners to Hazardous Brows on June 13, 1982

Clinchfield's brief (p. 6) alleges that Brewer thought that the miners who recovered the continuous-mining machine from the roof-fall area were exposed to unsupported roof, but Clinchfield claims that none of the inspectors were present when the continuous miner was recovered and do not know whether any miners were exposed to unsupported roof or brows. Clinchfield also cites the testimony of Busch and Sauls, who assisted in recovery of the continuous miner, in support of its claim that no one was exposed to unsupported roof or ribs when the miner was recovered.

As summary paragraph No. 6, supra, shows, Brewer introduced Exhibit 4 for the sole purpose of showing that Sauls would have been exposed to the unsupported right brow when he replaced a pump and a valve block on the continuous miner before it was recovered from the fall area. Sauls' own testimony supports Brewer's belief. During his direct testimony, Sauls first said he wasn't exposed to the unsupported brows and then reversed himself and stated that "I won't say I wasn't, but the mine top was bolted over top of where we was working" (Tr. 207). Sauls also agreed that there were no bolts in the brows and that they did not have any temporary supports under them (Tr. 208). Also as I have noted in summary paragraph No. 15, supra, Sauls stated that there was a possibility that a fall could have occurred at any time. Additionally, as indicated in summary paragraph No. 13, supra, Busch was concerned sufficiently about the crack in the left brow, that he gave consideration to the question of whether it would fall while he was tramming the continuous miner from the fall area.

If one examines the fall area as depicted in Exhibits B and C, page 2, showing the location of the continuous miner in the crosscut, and if one takes into consideration that the continuous

miner is from 10 to 11 feet wide (Exh. C, p. 12) and was situated in a crosscut 20 feet wide with 9-foot brows overhanging the crosscut, it would not have been possible for the miners to have worked on the continuous miner without having been exposed to injury or death by the falling of the unsupported brows. As explained in summary paragraph No. 22, supra, Clinchfield's Exhibit B, when properly evaluated, fails to controvert the fact that the brows were unsupported by roof bolts. Moreover, as noted in summary paragraph No. 10, supra, Meade was present when rocks were being removed from the top of the continuous miner and Meade stated unequivocally that he had seen one of Clinchfield's company officials go completely out from under supported roof in order to attach ropes to rocks being pulled from the fall area.

It should be noted that Brewer alleged a violation of section 75.200 under section 104(a) of the Act which provides that an inspector may issue a citation for a violation of the Act or a mandatory safety standard if he is engaged in an inspection or an investigation and that he may issue the citation if he "believes" that a violation occurred. I find that the preponderance of the evidence in this proceeding shows that the inspector had ample grounds for believing that the miners were exposed to the hazards of the unsupported brows when they were engaged in removing the continuous miner from the roof-fall area.

Hazards Existing on June 13 versus Hazards Existing on June 18

Clinchfield's brief (pp. 6-7) argues that the crosscut was much more safely supported on June 13 when the continuous miner was recovered than it was on June 18 when the inspector wrote his order. The testimony of Clinchfield's witnesses does not support those claims. Busch stated that he had installed roof bolts where possible and the exhibits show that he had installed 13 roof bolts along the middle of the crosscut's roof (Exh. 3, p. 1; Summary paragraph No. 22). Sauls testified that there were no bolts in the brows or temporary supports under the brows before the continuous miner was removed (Tr. 208). Busch stated that he could not get any bolts in the roof on the right side of the crosscut because the roof was too high to reach with the stoper and that he had not placed any bolts near the ripper head or for several feet outby the ripper head because there was not enough clearance between the roof and the top of the continuous miner (Tr. 192-194). Busch does not even claim to have put more than one bolt in either brow (Tr. 193). Finally, Busch said that he kicked the last rocks off the continuous miner by starting the ripper head (Tr. 186). Therefore, Busch was just as vulnerable to a probable fall of the brows at the time the continuous miner was being removed as the other operator was when he was killed by the previous roof fall which occurred in that identical place on June 2. The preponderance of the evidence shows that there were two unsupported brows at the time the

continuous miner was removed on June 13 and there were still two unsupported brows when the inspectors examined the fall area on June 18 and issued the imminent-danger order. No significance at all can be placed on Clinchfield's emphasis on the collars or crossbars which had been set in the No. 5 entry outby the roof-fall area because those collars were set before the miner was removed and they continued to exist after the miner was removed (Tr. 186; 195).

The Alleged Timber Inscribed With Word "Danger"

Clinchfield's brief (p. 7) concedes that the roof-fall area was hazardous after the continuous miner was removed, but claims that the area was "dangered off" by a timber set in the middle of the entry by Busch and Cross who allegedly wrote the word "Danger" on that timber. Clinchfield's brief quotes the testimony of both Busch and Cross in support of its claim that a timber was set in the entry after the continuous miner was removed, but the setting of the timber is not corroborated by any other witness. The preshift examiner, who claims to have seen a reflectorized can hanging in the No. 5 entry, did not mention seeing the timber. The Virginia mine inspector, who allegedly saw the can, did not mention the timber. None of the three inspectors who were in the fall area saw the timber. Clinchfield's safety director, who was in the fall area, did not mention the timber.

Clinchfield's brief (pp. 7-8) quotes from the testimony of both Busch and Cross in supporting its claim that a breaker bearing the word "Danger" had been set outby the fall area, but Clinchfield's brief (p. 7) drops a very significant sentence from the beginning of Busch's statement and indents the quotation to make it appear that the quotation is the complete answer given by Busch. That omitted sentence reads "I'm not for sure." In the remaining part of Busch's statement about the setting of the timber he uses the word "believe" and the phrase "pretty sure".

Cross is not very positive in asserting that he set a timber with the word "Danger" written on it. Clinchfield's brief (p. 7) also quotes from Cross' testimony with an indentation which makes it appear that the entire statement is given. Significantly, however, before Cross made the portion of his statement quoted on page 7 of Clinchfield's brief, he testified as follows (Tr. 215):

> A Charlie and his men wanted to check how much damage was done [to] it. So Logan [Busch] and I went back to -- of course, we helped them move it down some first -- we went back up to the crosscut. And, to the best of my knowledge, we set one timber in front of the place. We were going to breaker it off. But we was running close on time, and we were

> getting paid double-time. [Clinchfield's quotation begins at this point.] So we set one timber. And I had a piece of chalk, railroad chalk, in my pocket that we use and I wrote "Danger" on it from top to bottom.

Over the years, I have found that when witnesses are making statements of doubtful certainty, they qualify the statements with the phrase "to the best of my knowledge". Busch was more forthright than Cross about the setting of the timber in that he just made a flat announcement at the beginning of his statement that he was "not for sure". The purpose of a timber with the word "Danger" written on it is to warn persons of a hazard. That timber would accomplish no purpose if no one is able to find it. Yet, as indicated above, at least three of Clinchfield's witnesses and all four of the Secretary's witnesses were in the crosscut where the alleged timber was supposed to have been set and not one of them ever saw the timber. Therefore, i find that the preponderance of the evidence fails to support a conclusion that a timber with the word "Danger" on it was ever set in the crosscut.

One further point needs to be made with respect to the alleged timber with the word "Danger" on it. Paragraph 19(b) of Clinchfield's roof-control plan provides as follows (Exh. C, p. 9):

> (b) All roof falls and other areas in the active workings where the mine roof material has been removed from its natural location by any means and is not being cleaned up shall be posted off at each entrance to the area by at least <u>two rows of posts</u> (or the equivalent) installed on not more than 5-foot centers across the opening. [Emphasis supplied.]

In the quotation of Cross' testimony above, he stated that "* * * [w]e were going to breaker it off" but that since they were running close on time, he thought they might have set one timber with the word "Danger" written on it. Cross was a supervisor with 18 years of experience and his testimony shows that he knew he should have set at least two rows of posts in conformance with the roof-control plan to "breaker off" the crosscut, but he let the fact that he was running close on time cause him to omit taking the safety precaution required by the roof-control plan. One of the reasons that the inspectors issued the imminent-danger order was the fact that they could find no indication that Clinchfield had erected any danger signs to warn miners either to stay out of the hazardous crosscut or to approach it only with great caution.

The Alleged Reflectorized Can

Clinchfield's brief (pp. 8-9) makes the argument that it had properly hung a "warning device", or reflectorized can, in the No. 5 entry as required by paragraph 3(a) of its roof-control plan (Summary paragraph No. 17, supra). Clinchfield argues that since it is only required to hang such a warning device outby each place after a cut of coal is removed by the continuous miner before permanent supports are installed, that it was in compliance with its roof-control plan with respect to the unsupported brows observed by the inspectors on June 18. Although I shall hereinafter find that the reflectorized can had not been hung in this instance, Clinchfield would not have been in compliance with its roof-control plan even if the alleged reflectorized can had been hung. That argument must be rejected for at least two reasons. First, Clinchfield's roof-control plan does not envision that Clinchfield will simply hang a reflectorized can outby each working place when the continuous miner is withdrawn and leave the place unsupported for weeks at a time. On the contrary, the roof-control plan provides that temporary supports will be erected within 5 minutes after the miner has finished cutting a place, unless Clinchfield is using a roof-bolting machine equipped with an automated temporary roof-support system (ATRS). If the roof-bolting machine is so equipped, it is still expected that permanent roof bolts will be installed within a short period of time after a place has been cut. Moreover, if the ATRS bar cannot be positioned firmly against the roof, Clinchfield is then required to install temporary supports within 5 minutes after the continuous miner has completed the taking of a cut of coal (Exh. 3, pp. 5; 13-15). Since the roof in the crosscut where the roof fall had occurred formed a slant from 6-1/2 feet at the rib to 13 or 14 feet in the center of the entry, Clinchfield's ATRS bar could not have been positioned flat against the roof and Clinchfield's roof-control plan required it to install temporary supports under the brows in the crosscut, but none had been set.

The second reason for rejecting Clinchfield's claim that it had done all it was required to do under its roof-control plan to warn persons about the hazard of the unsupported brows is that paragraph 19 of its roof-control plan specifies the procedures which will be followed where a roof fall has occurred and, as indicated on page 16, supra, paragraph 19(b) required Clinchfield to install "at least two rows of posts" across both approaches to the crosscut, that is, across both the Nos. 5 and 6 entries. Clinchfield had installed such breakers across the No. 6 entry, but had done nothing to warn persons approaching the crosscut from the No. 5 entry other than to hang an alleged reflectorized can in the No. 5 entry.

Clinchfield's brief (p. 9) attempts to justify its failure to set breakers in the No. 5 entry before June 18, or to take

any more safety precautions than it did before June 18, by arguing that it had decided not to continue mining in the roof-fall area and that nothing more than the hanging of a reflectorized can needed to be done because no miners would ever have had to work in the immediate vicinity of the hazardous brows. Inspector Brewer thought on June 18, at the time he wrote his order, that Clinchfield was planning to continue developing the No. 6 entry from the face side of the roof fall (Tr. 63). Supervisory Inspector Rines said that Clinchfield had not abandoned its intention of continued development from the face side of the roof-fall area until after the imminent-danger order was written on June 18 (Tr. 83; 85-86). Clinchfield does not deny that it abandoned its intention of development from the face side of the roof-fall area after the order was issued on June 18, but claims that, until its decision to bypass the fall area was made, "* * * it was safe and reasonable to danger the area off with the reflectorized sign in the same manner miners are warned against going inby the face area where there is unsupported roof" (Br., p. 9).

In addition to the reasons I have already given for rejecting Clinchfield's claim that it was reasonable, or even in compliance with its roof-control plan, to leave the No. 5 entry outby the crosscut marked only with an alleged reflectorized can, I find, as the following discussion shows, that Clinchfield failed even to hang the alleged reflectorized can.

There are a number of doubtful aspects to Vickers' testimony concerning the reflectorized can which he claims to have seen in the No. 5 entry. First, his notation, "Danger off at fall" (Exh. A), was made in the preshift book with respect to the No. 6 entry, not the No. 5 entry, where he and three other witnesses claim to have seen the can (Vickers, Tr. 151; Busch, Tr. 190; Cross, Tr. 213; Hamrick, Tr. 251). Since Vickers first approached the fall area from the No. 5 entry and claims to have seen the can in the No. 5 entry, there is no obvious reason for him to have failed to make the notation about dangering off the area on the line for noting hazardous conditions in the No. 5 entry, especially since he stated on direct examination that hanging the can was a sufficient warning to danger off the entire fall area regardless of whether one approached it from the No. 5 or the No. 6 entry (Tr. 150). Vickers did not even mention that he had also seen a reflectorized can in the No. 6 entry until I asked that question after he had failed to state that fact during both direct and cross examination (Tr. 156).

Second, Vickers took an air reading in the No. 6 entry for determining air velocity for the return entry (Tr. 151). There is no reason for him to have failed to see about eight breaker posts which were erected across the No. 6 entry because those breaker posts were observed by three of MSHA's witnesses and one Clinchfield witness and were considered to be an indication that

hazardous conditions existed beyond the breakers (Coeburn, Tr. 125; Hamrick, Tr. 251; Rines, Tr. 281; Brewer, Tr. 319). Therefore, it is more likely than not that Vickers made the notation of "Danger off at fall" because he had seen the breakers in the No. 6 entry and later decided that a can he had seen at some other place in the mine was actually observed in the No. 5 entry.

Third, Vickers is the only witness who claims to have seen a reflectorized can in the No. 6 entry (Tr. 151; 156-157). No other witness corroborated his claim that a can had been placed in both the No. 5 and No. 6 entries (Tr. 251; 280; 318-319). Another reason to doubt Vickers' claim that he saw a can suspended from a roof bolt in the No. 6 entry is that bottom materials had been removed from the floor in the No. 6 entry which made the height from the floor to the mine roof 8 feet in the No. 6 entry, as opposed to the roof's normal height of 6-1/2 feet (Tr. 280). Vickers stated that the cans are suspended by a wire from a roof bolt and that they hang down about a foot from the roof so as to be about eye level. In describing the cans, he made no distinction about the height of the roof in the No. 6 entry as compared with the No. 5 entry (Tr. 156).

Fourth, Vickers allegedly saw the reflectorized can during his 9 p.m.-to-midnight preshift examination on June 17, but the preshift examiner who checked the 2 Left Section at 6 a.m. on June 18, or less than 8 hours later, did not indicate that he had or had not seen a danger sign in either the No. 5 or No. 6 entry. Although three MSHA witnesses testified with great certainty that the can did not exist in the No. 5 or the No. 6 entry during the day shift on June 18 when the imminent-danger order was issued, and although Clinchfield's safety director did not see the can during the day shift on June 18 (Tr. 224; 227), Vickers testified that the can was still hanging in the No. 5 entry when he made another preshift examination about 9 p.m. on June 18 (Tr. 155).

Fifth, Clinchfield's other witnesses, who heard Vickers testify that the can was hanging in the No. 5 entry on June 17 and 18, testified that the can was "still" hanging there on June 13 when they recovered the continuous-mining machine (Tr. 190; 215). Since Vickers had testified that he did not know when the can first appeared in the No. 5 entry (Tr. 155), a witness with an independent recollection of having seen the can would not be likely to refer to the can as "still" hanging there on June 13 when no one had claimed to have seen it before June 17.

The only witness called by Clinchfield's attorney who appeared to have an independent recollection of having seen the reflectorized can in the No. 5 entry was the Virginia mine inspector, Hamrick, who said that he saw the can about 10 a.m. on June 18, but Hamrick also inspected the area of the 2 Left Section inby the crosscut where the roof fall occurred and since Clinch-

field's roof-control plan requires that such a "reflectorized warning device" be hung outby any place from which coal has been removed by the continuous-mining machine prior to installation of permanent roof bolts (Exh. C, par. 3(a)), Hamrick could just as easily have seen a reflectorized can outby one of the other face areas, rather than in the No. 5 entry outby the roof-fall area. That is especially probable in view of Hamrick's testimony that he had been asked by Clinchfield's counsel about the can a considerable period of time after he had been in the mine on June 18. Moreover, Hamrick said that it would not have occurred to him to make a notation of having seen the can in his notes which he probably took because seeing the cans is such a common occurrence (Summary paragraph No. 19, supra). If they are such a common occurrence and make such a slight impression on Hamrick's mind as not to be noteworthy, it is just as likely that he saw the can some other place in the mine during the day shift on June 18 as it is that he saw it in the No. 5 entry where three other witnesses failed to see the can during the day shift on June 18 even though they entered the No. 5 entry just as Hamrick was leaving it (Tr. 293).

On the basis of the above discussion, I find that the preponderance of the evidence fails to support Clinchfield's claim that a "reflectorized warning device" had been hung in the No. 5 entry prior to the time that the inspector issued imminent-danger Order No. 2038802 on June 18, 1982.

Clinchfield's brief (pp. 9-11) argues at some length that Supervisory Inspector Rines cannot support the Secretary's claim that miners were exposed to the hazards of the unsupported brows when the continuous-mining machine was being removed from the roof-fall area. My discussion above has already shown that Sauls was unwilling to state for certain that he was not exposed to a possible fall of the unsupported brows when he replaced the pump and valve on the continuous miner on June 13 (Summary paragraph No. 15, supra). The union committeeman, Meade, stated unequivocally that a company official went out from under supported roof when he was tying ropes to rocks to pull them out of the fall area (Summary paragraph No. 10, supra).

Clinchfield is correct in saying that no MSHA personnel were present when the continuous miner was removed from the roof-fall area on June 13 and it is true that the inspectors can only speculate about their belief that miners were exposed to the hazards of the unsupported brows when they were recovering the continuous miner, but the testimony of witnesses Sauls and Meade support a finding that the brows were unsupported at the time the miner was recovered and that Clinchfield employees were exposed to those hazards at the time the miner was recovered.

Judge Koutras' decision, Mathies Coal Co., 4 FMSHRC 1121 (1982), relied upon by Clinchfield on pages 11 and 12 of its brief is not applicable to the facts in this case because Judge Koutras did not have witnesses in that case who supported the inspector's belief that a violation of section 75.200 had occurred, whereas in this proceeding, there is testimony by at least two eyewitnesses who support the inspectors' belief that miners were exposed to the hazards of the unsupported brows when the continuous miner was being recovered from the crosscut.

Interpretation of Portion of Section 75.200

The final argument made in Clinchfield's brief (pp. 12-14) is that the violation of section 75.200 alleged by MSHA cannot be proven because the unsupported brows described in the inspector's order and citation were not in an active working place and therefore their existence in the mine cannot be considered a violation of the portion of section 75.200 relied on by the inspector. As previously indicated, the portion of section 75.200 relied upon by the inspector reads as follows:

> * * * 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. * * *

Clinchfield states that the definition of "active workings" is "* * * any place in a coal mine where miners are normally required to work or travel." Clinchfield argues that no miners were "required to work or travel" anywhere in the vicinity of the roof-fall area after June 13, 1982, when the continuous miner was removed from the crosscut. Clinchfield contends that after the miner was removed on June 13, 1982, the only work done in 2 Left Section where the roof fall occurred was the moving of the continuous miner to the end of the track where it was disassembled and taken out of the mine. Clinchfield argues that the nearest active working section on June 18 when the order was issued consisted of the 1 and 2 Right Sections which were 2,000 feet away from the 2 Left Section. Clinchfield also argues that the mere fact that a preshift examiner came to the No. 5 entry outby the crosscut on June 17 and 18, 1982, cannot be considered sufficient activity to make the roof-fall area an active working place because the preshift examiner observed the reflectorized can in the No. 5 entry and the breaker posts in the No. 6 entry and did not enter the crosscut, so that it cannot be said that a miner was required to travel in the crosscut on June 18 when the order was issued.

There is conflicting testimony as to how much activity was in progress on June 18, 1982, when the order was issued. Clinchfield's Superintendent Hess stated that the continuous miner was

moved to the end of the track on June 16, 1982, and was disassembled and removed from the mine for rebuilding at some point after June 16 and that active mining did not occur again in that 1 Left Section until July 17, 1982 (Tr. 263; 267). The inspector and the union safety committeeman, on the other hand, stated that the continuous miner removed from the fall area was only one or two breaks, or 120 feet, away from the fall area on June 18 (Summary paragraph No. 7; Tr. 136). Moreover, Inspector Coeburn was in the fall area on June 22 and he testified that active mining was in progress only two crosscuts inby the roof-fall area on June 22 (Tr. 128).

Even if one disregards all the conflicting evidence as to the extent of the activity in 1 Left Section on June 18, 1982, there is no dispute by anyone as to Vickers' contention that he performed a preshift examination in the crosscut on both June 17 and 18 and there is no dispute that another person made a preshift examination on June 18 (Summary paragraph Nos. 11 and 18, supra). Both preshift examiners took an air reading in the No. 6 entry for the purpose of determining the velocity of the air in the return entry (Tr. 151; 232). The Commission found in Old Ben Coal Co., 3 FMSHRC 608, 609 (1981), that an accumulation of loose coal existed in "active workings" in circumstances where the cited area was required to be inspected at least once a week, was traveled as an escape route, and was rock-dusted periodically. In its Old Ben decision, the Commission cited two cases in which the former Board of Mine Operations Appeals had made rulings about the circumstances which constitute active workings. In one of those cases (Mid-Continent Coal and Coke Co., 1 IBMA 250 (1972)), the former Board stated that if only one miner passes through an area to make an inspection, an accumulation of float coal dust would be a hazard to him.

Clinchfield argues that the preshift examiners saw the reflectorized can and did not enter the crosscut and that they were, therefore, not required to travel in the roof-fall area within the meaning of the definition of "active workings".

Clinchfield's safety director stated that a possible travelway for the taking of an air reading would have been through the crosscut in which the roof fall had occurred although he believed that was not the "easiest legitimate route" (Tr. 232). Inspector Brewer thought that the preshift examiner would just about have to have traveled through the crosscut to examine the return entry (Tr. 19). The preshift examiner who checked the 1 Left Section on the morning of June 18, 1982, did not make an entry about any danger he may have seen in the roof-fall area and, in the absence of his testimony, no one knows whether he traveled through the crosscut or not (Tr. 232). In any event, the continuous miner was actively engaged in cutting coal on June 2 when the roof fall occurred and no decision to bypass the roof fall was made until

after the order was issued on June 18 (Tr. 84-86). Therefore, at the time the preshift examinations were made, the area where the roof fall occurred was within the definition of "active workings" because, as I have shown above, no reflectorized can existed to warn the preshift examiners that the roof-fall area was to be avoided and, even if the reflectorized can did exist, the roof-fall area had not been cleaned up or bolted, and Clinchfield was obligated under paragraph 19(b) of its roof-control plan to install two rows of posts across the crosscut at the No. 5 entry. As the Commission stated in El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981):

> * * * The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard. * * *

The Commission also held in Penn Allegh Coal Company, Inc., 4 FMSHRC 1224, 1227 (1982) that a judge is not bound by the opinions of any single witness, but should base his legal conclusions "* * * upon the evidence of record considered as a whole." I have hereinbefore thoroughly reviewed all of the evidence presented by both Clinchfield and the Secretary and conclude that Clinchfield did violate section 75.200 because it had left hazardous unsupported brows in the crosscut between the Nos. 5 and 6 entries on the 2 Left Section without supporting them or otherwise controlling them adequately to protect persons from falls of the roof or ribs as required by section 75.200 of the Act. The area was within an active working place and miners were traveling in the area to make preshift examinations.

The Issue of Whether an Imminent Danger Existed

Alleged Dangering Off

Clinchfield's brief (pp. 15-20) argues that the unsupported brows observed by Inspector Brewer did not constitute an imminent danger because the crosscut where the brows existed had been dangered off and no mining activity was in progress on the 2 Left Section. As to Clinchfield's claim that the area had been dangered off, I incorporate in this portion of my decision the discussions on pages 15-16 and 18-20, supra, in which I found that neither the reflectorized can nor the timber with the word "Danger" written on it ever existed at the intersection of the No. 5 entry and the crosscut in which the unsupported brows were observed by the inspector.

Assuming, arguendo, that the reflectorized can and timber had been erected by someone at sometime, the fact remains that

they could not be found by MSHA's three witnesses or Clinchfield's own safety director on June 18, 1982, when the imminent-danger order was issued. A warning device which cannot be found by four people serves no purpose and cannot be used in support of a claim that the unsupported brows had been dangered off to prevent persons from going into the crosscut where the brows could fall upon them. Also, as I have previously explained on pages 16-17, supra, Clinchfield was required by paragraph 19(b) of its roof-control plan to install two rows of posts across the entrance to the roof-fall area at the No. 5 entry approach and it had failed to do so. Moreover, even if a reflectorized can and a "Danger" timber had been placed at the intersection of the No. 5 entry and the hazardous crosscut, it was Clinchfield's responsibility to assure that those warning devices continued to remain in a conspicuous place where they could be seen by persons who might have gone into the crosscut.

The excerpt on page 18 of Clinchfield's brief to the testimony of its witness Vickers who testified that a reflectorized can is "* * * just like a stop sign is to a driver out on the highway" has no force and effect because a stop sign on the highway, which a motorist cannot find, does not warn a motorist of a dangerous intersection any more than a can, which a miner cannot find, warns a miner of a hazard in a coal mine. For the reasons given above, I must reject Clinchfield's defense to the issuance of the imminent-danger order to the extent that its defense is based on the claim that it had properly dangered off the roof-fall area where the imminent danger existed.

Removal or Nonexistence of Persons Did Not Eliminate Imminent Danger

The remaining arguments raised in Clinchfield's brief (pp. 19-20) in support of its claim that no imminent danger existed in the roof-fall area reveal a basic misunderstanding on Clinchfield's part as to what constitutes an imminent danger under the Act. That misunderstanding is most clearly expressed on page 20 of Clinchfield's brief where it is contended that there was "* * * no activity present in the area which could constitute an imminent danger at the time the 107(a) order was issued". It is clear from the foregoing quotation that Clinchfield believes that no imminent danger can be found to exist unless at least one person is actually engaged in some type of work so close to the imminent danger that he will probably be killed before the imminent danger can be abated. Clinchfield is confusing the nonexistence of persons in the vicinity of the imminent danger with the nonexistence of the hazard which produces the imminent danger.

Clinchfield's confusion is obvious from the facts in the cases which it cites in support of its argument that the removal of persons from the imminent danger abates the imminent danger. On page 19 of its brief, e.g., Clinchfield cites Old Ben Coal Co.,

6 IBMA 256 (1976), in which the former Board of Mine Operations Appeals upheld a judge's decision finding that no imminent danger existed in a situation in which an inspector had issued an imminent-danger order because he had seen a miner, before the order was issued, riding on top of a locomotive with his legs hanging over the side of the locomotive. The Board agreed with the judge that the imminent danger no longer existed at the time the order was written because the miner had jumped off the locomotive.

Clinchfield claims that the Board's rationale in the Old Ben case applies to the facts in this case because no actual coal production was in progress and no one had any reason to be in the crosscut where the unsupported brows existed. The fallacy in Clinchfield's argument is that when the miner jumped off the locomotive in the Old Ben case, he eliminated the existence of the imminent danger at the time he jumped off the locomotive because the imminent danger was coexistensive with the miner's presence on the locomotive, whereas in this proceeding, the imminent danger continued to exist after the inspector wrote his order, regardless of the fact that no person was observed by the inspectors to be standing under the unsupported brows. Thus, nonexistence of persons in the roof-fall area did not automatically abate or terminate the existence of the imminent danger.

Another case which Clinchfield mistakenly cites in support of its claim that no imminent danger existed is Judge Boltz's decision in C F & I Steel Corp., 3 FMSHRC 99 (1981), in which Clinchfield states that the judge vacated an imminent-danger order "* * * because prior to its issuance the operator had removed miners from the area, ceased production work in the affected section and no power was energized in that section" (Brief, p. 20). Judge Boltz himself explained the difference between abating an imminent danger and removal of persons from the proximity of the imminent danger in his decision in another C F & I case, 3 FMSHRC 2819 (1981) as follows (at p. 2823):

> I would characterize the holding of the first cited case somewhat differently. Pittsburgh Coal Company, supra, [2 IBMA 277 (1973)] stands for the proposition that the presence of 1.5 volume per centum or more of methane will support the issuance of an imminent danger withdrawal order. Id. at 277, 279. The Valley Camp Coal Company, supra, [1 IBMA 243 (1972)] stands for the proposition that an order of withdrawal can properly be issued if no miners are in the mine 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. Id. at 248. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. C F & I Steel Corporation, supra, [3 FMSHRC 99 (1981)] I concluded that

> the danger presented by the accumulation of methane had been eliminated. That is not the case with the matter at hand. The accumulation of methane existed on May 8, 1980, having been only recently discovered, could reasonably be expected to cause death or serious physical harm before the danger posed had been eliminated. No abatement was in progress. Therefore, I find that the order of withdrawal is valid and should be affirmed.

Clinchfield also mistakenly cites Judge Koutras' decision in Climax Molybdenum Co., 2 FMSHRC 2976 (1980), in support of its claim that removal of miners from a hazardous area eliminates or abates an imminent danger. It is true that Judge Koutras vacated an imminent-danger order in the Climax case but he vacated the order primarily because the inspector was not sure that the exposed electrical connections cited in the order would have shocked or killed any person who might have touched them--not because the miners closest to the wires were 500 to 600 feet from the alleged imminent danger (2 FMSHRC at 2980).

In its reply brief (pp. 2-11), Clinchfield cites additional cases in support of the same arguments which I have rejected above. For example, on page 7 of its reply brief, Clinchfield quotes from the former Board's decision in Eastern Associated Coal Corp., 2 IBMA 128 (1973), in which the Board stated at page 137, "* * * a condition or practice cannot be imminently dangerous if the specific and usual mining activity can safely continue in the area during (or prior to) the abatement process". Clinchfield then argues as follows (Brief, p. 7):

> * * * In the present case, the condition was abated through the dangering off of the area in question, but it could also have been abated through the resumption of the normal mining operations. Either way, miners were protected against any reasonable expectation that the condition could cause death or physical harm to a miner."

Neither of the conclusions made by Clinchfield in the above quotation is correct. The hazardous condition created by the existence of the unsupported brows was not eliminated by Clinchfield's alleged dangering off of the roof-fall area. Again, assuming arguendo, that the roof-fall area had been dangered off by the erection of a warning device, that action had no salutary effect whatsoever on the hazardous nature of the unsupported brows. They would have remained just as likely to fall on any person entering the area after the alleged warning device was erected as they would before the warning device was erected.

In fact, Clinchfield never did take any action whatsoever to abate the imminent danger by installing supports in or under the brows. Supervisory Inspector Rines testified that MSHA normally follows the provisions of section 107(a) which states that an imminent-danger order is to remain in effect "* * * until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist." Rines said that Clinchfield never did abate the imminent danger cited in the order, but they terminated it at Clinchfield's request after the inspectors had personally participated in erecting posts and nailing boards on the posts to make certain that no miners could enter the roof-fall area.

As for Clinchfield's claim that the roof-fall area would have been supported if a decision had been made to continue mining in that area, it is obvious that no one could have started cutting coal under the brow in the No. 6 entry without first installing permanent roof supports to assure that the brows would not fall. Since the roof and brows were too hazardous for normal mining operations to begin before the brows and roof had been supported, the former Board's statement in the Eastern Associated case, supra, does not apply to the facts in this case because the "usual mining activity" could not have been carried on while the mine roof and brows were being restored to an acceptable condition of safety.

Another case which Clinchfield cites in its reply brief (P. 9) is Judge Carlson's decision in Western Slope Carbon, Inc., 5 FMSHRC 795 (1983), in which Clinchfield claims that Judge Carlson held that before an accumulation of float coal dust can be considered to be an imminent danger, the coal dust must be in suspension. Judge Carlson merely noted that both suspension of the dust and a spark would all have to be present before an explosion could occur. The primary reason that the judge failed to find occurrence of an imminent danger was MSHA's lack of proof as to the existence of an ignition source (5 FMSHRC at 799). Additionally, it should be noted that the court in Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974), specifically rejected the operator's argument in that case that a finding of imminent danger could not properly be made in the absence of a suspension of float coal dust in the air, an ignition source, and a concentration of methane.

Section 3(j) Definition and "Probable As Not" Gloss

Clinchfield's initial brief (p. 15) does correctly quote the definition of an imminent danger given in section 3(j) of the Act, i.e., "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before

such condition or practice can be abated." The facts given in summary paragraph Nos. 2, 4-8, and 10, supra, support my conclusion that an imminent danger existed in the roof-fall area between Nos. 5 and 6 entries on June 18, 1982, when imminent-danger Order No. 2038802 was issued. The unsupported brows could reasonably have been expected to cause death or serious physical harm before such brows could be adequately supported.

The former Board augmented the definition of section 3(j) in its decision in Freeman Coal Mining Co., 2 IBMA 197 (1973), as follows (at p. 212):

> [w]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. * * *

The Seventh Circuit affirmed the Board's definition and finding of an imminent danger in the Freeman case previously discussed above. Therefore, the Board's expanded definition of imminent danger is a part of the present law pertaining to imminent danger. In Pittsburg & Midway Coal Mining Co., 2 FMSHRC 787 (1980), the Commission affirmed a judge's decision finding existence of an imminent danger. In doing so, however, the Commission made the following observation (at p. 788):

> * * * In this regard, we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., we will examine anew the question of what conditions or practices constitute an imminent danger. * * *

I am not aware of any case in which the Commission has expressed a further opinion as to the definition of imminent danger, but I believe that my findings of an imminent danger in this proceeding would be supported by the preponderance of the evidence regardless of whether the original language of section 3(j) is used or the "as probable as not" standard is applied. Inspector

Brewer specifically applied his education and experience as a coal miner and as an inspector in making his determination that an imminent danger existed. He began his discussion by noting that the area had not been dangered off, that he had to consider the area as an active working place because the miners were still working on the continuous miner which had been removed from the roof-fall area in order for the miners to work on the section for any purpose, that he felt the brows posed an imminent hazard to anyone who might go into the roof-fall area (Tr. 17), that he knew there had been three unintentional roof falls in the Hurricane Creek Mine in the last year which had covered up continuous miners, and that with that background of knowledge, the existence of unsupported, overhanging, arching brows triggers the feeling, "if you're a coal miner", that an imminent danger exists (Tr. 18). The inspector further testified that he issued the imminent-danger order to assure that the only miners who would be sent into the roof-fall area would be going there solely to correct the hazards associated with the existence of the unsupported brows (Tr. 20).

On cross-examination the inspector stated that if normal mining operations had resumed, a section foreman, a continuous-miner operator, a helper, and a shuttle-car operator, would be exposed to the hazards caused by the unsupported brows (Tr. 49). Although the inspector agreed that no actual mining operations were in progress in the 2 Left Section on the day the order was issued, he said that there was no mining activity at that time because the continuous miner was torn up and the miners were waiting to get an operative machine on the section. He further stated that his concern was that the continuous miner might be repaired and that active mining would occur by that evening (Tr. 50).

As a matter of fact, when Inspector Coeburn was in the roof-fall area on June 22, he stated that active mining was in progress only two crosscuts inby the roof-fall area and Mine Superintendent Hess agreed that the 2 Left Section had been developed inby the roof-fall area and that the decision to bypass the roof-fall area had been made only after the imminent-danger order was issued (Tr. 128; 266; 268).

The preponderance of the evidence, therefore, shows that it was just as probable as not that the unsupported brows would have fallen on one or more miners and would have injured or killed them if normal mining activities had been resumed before the brows were properly supported. Although Clinchfield argues in its reply brief (p. 10) that the first action that would have been taken if normal mining activities had been resumed in the roof-fall area would have been to support the roof properly, that is not an eventuality which the inspectors could leave to doubt. It is a fact that the two rows of posts required by

paragraph 19(b) had not been installed and the inspectors could find no warning device required by paragraph 3(a) of the plan. As the court stated in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25 (7th Cir. 1975), the inspector cannot wait until the danger is immediate because then no one could stay in the mine to correct the hazardous conditions which he has found (523 F.2d at 34).

For the reasons hereinbefore given, I find that imminent-danger Order No. 2038802 was properly issued on June 18, 1982, under section 107(a) of the Act and it will hereinafter be affirmed.

Docket No. VA 83-24

The Issue of What Civil Penalty Should Be Assessed

Penalty Proceedings Before Commission and Judges Are De Novo

Since I have already found in the preceding portion of this decision that a violation of section 75.200 occurred because Clinchfield had failed to support the brows in the crosscut between the Nos. 5 and 6 entries in the 2 Left Section after the continuous-mining machine was recovered from the roof-fall area on June 13, 1982, it is necessary that I assess a civil penalty pursuant to the six criteria which are listed in section 110(i) of the Act (Tazco, Inc., 3 FMSHRC 1895 (1981)). The parties entered into stipulations which govern two of the criteria. First, it was stipulated that imposition of a civil penalty would not affect Clinchfield's ability to continue in business. Second, it was stipulated that Clinchfield is a medium-sized company and that the Hurricane Creek Mine here involved is a medium-sized mine.

Respondent's initial brief (pp. 21-23) requests that the Secretary's special assessment proposed under 30 C.F.R. § 100.5 be vacated if I should find that there is any merit to the Secretary's allegation that a violation of section 75.200 occurred. When an operator requests a hearing before one of the Commission's administrative law judges in a civil penalty proceeding, the proceeding is de novo and the judge is required to assess a penalty under the six criteria listed in section 110(i) of the Act without giving any consideration to the Secretary's proposed penalty or the procedures utilized by the Secretary to arrive at his proposed penalty (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U. S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); Co-Op Mining Co., 2 FMSHRC 784 (1980); and Sellersburg Stone Co., 5 FMSHRC 287 (1983)).

Inasmuch as it is necessary for me to make findings concerning the four criteria as to which the parties entered into no stipulations, I shall consider the merits of Clinchfield's arguments pertaining to those four criteria without expressing any opinion as to the merits of the findings made by the Secretary in reaching his proposed penalty.

The Secretary's brief requests that I assess the civil penalty of $3,000 proposed by the Secretary in Docket No. VA 83-24, but the Secretary supports the proposed penalty by relying upon the evidence introduced in this proceeding. Therefore, it is appropriate to consider the Secretary's arguments also, but those arguments will likewise be evaluated without giving any opinion as to whether I agree or disagree with the findings made by the Secretary in arriving at his special assessment of $3,000.

History of Previous Violations

Neither Clinchfield's initial brief (pp. 21-23) nor its reply brief (p. 12) specifically discusses the criterion of Clinchfield's history of previous violations. The Secretary's brief (p. 16) asserts that the criterion of history of previous violations was a matter of stipulation, but the only transcript reference the Secretary makes in support of that assertion is to page 140 of the transcript where Clinchfield's counsel did not object to the introduction of Exhibit 5 which is a computer printout listing prior violations at the Hurricane Creek Mine. Exhibit 5 shows that Clinchfield has previously violated section 75.200 on five occasions prior to June 18, 1982, when the violation here involved was cited. One of those prior violations was assessed under MSHA's single penalty assessment procedure and the penalty paid was, therefore, only $20. Section 100.3(c) states that previous violations assessed under the single penalty provisions of the regulations will not be used in evaluating the criterion of history of previous violations, but as I indicated above, penalty assessments in cases before the judges are de novo and I am not bound by the Secretary's penalty procedures described in section 100.3 of the regulations. Moreover, it should be noted that section 110(i) of the Act appears to give the Secretary a considerable amount of flexibility in proposing penalties, whereas section 110(i) specifically provides that the Commission "shall" consider all six criteria in determining civil penalties.

I consider violations of section 75.200 to be among the most serious violations which can occur in coal mines because roof falls still account for a large number of deaths in coal mines every year. An operator should conscientiously follow its roof-control plan and all other provisions of section 75.200 at all times. Clinchfield's history of five violations of section 75.200 may not be passed over lightly. Therefore, I find

that any penalty assessed under the other five criteria should be increased by $400 under Clinchfield's history of previous violations.

Negligence

As to the criterion of negligence, the Secretary's brief (p. 16) claims that Clinchfield showed a high degree of negligence in failing to support the brows. The Secretary argues that Clinchfield could have bolted the unsupported brows prior to removal of the continuous miner and notes that 5 days after the removal of the miner, the brows were still unsupported when the roof-fall area was examined by MSHA's inspectors and no danger signs could be found. Clinchfield's reply brief (p. 12) argues that the miners were not exposed to the unsupported brows when they recovered the continuous miner.

In its initial brief (pp. 21-22), Clinchfield argues that it was not negligent because it had posted a warning device (reflectorized can) in accordance with its roof-control plan. Clinchfield cites the testimony of Busch, Cross, Vickers, and Hamrick in support of its contention that the reflectorized can had been hung at the intersection of the No. 5 entry and the crosscut in which the unsupported brows existed, but I have heretofore given on pages 15-16 and 18-20, supra, my reasons for finding that the reflectorized can and timber with the word "Danger" written on it did not exist. Clinchfield additionally argues that if I should find that the designated area was not properly dangered off, I should take into consideration that such failure to danger properly was the result of a misinterpretation of the regulations, rather than an indication of negligence for which Clinchfield should be severely penalized.

It is difficult to understand why Clinchfield was as little concerned about supporting the brows as the evidence in this case indicates. I have already alluded to the fact that even if a reflectorized can had been hung at the intersection of the No. 5 entry and the crosscut containing the unsupported brows, it was incumbent upon Clinchfield's management to assure itself that the "warning device" continued to remain situated where it could be seen by anyone coming into the roof-fall area to make a preshift examination. The evidence clearly shows that only one preshift examiner made any notation about the dangering off of the roof-fall area and he did not make that notation until June 17, 1982, or 4 days after the continuous miner was removed from the crosscut. The next morning, June 18, three MSHA witnesses and Clinchfield's safety director could not find that "warning device" even though MSHA's witnesses specifically looked for some sort of warning to advise miners as to the hazardous nature of the unsupported brows.

The record does not contain any explanation to show why Clinchfield's mine foreman or mine superintendent would have

been unaware of the hazardous nature of the roof-fall area in view of the fact that two employees had been killed there by the roof fall on June 2. Brows which were still unsupported on June 18, or 16 days after the roof fall, cannot be considered to be of no consequence, particularly since Clinchfield did not decide to bypass the hazardous roof-fall area until June 18 after the imminent-danger order had been issued (Tr. 266). Also, as I have previously noted on pages 16-18, supra, Clinchfield's roof-control plan required it to install two rows of posts outby the roof-fall area since it had not gone in and cleaned up the crosscut. Even if one accepts Clinchfield's argument that management had not decided whether to bypass the roof-fall area entirely or to go in and support the area and continue mining there, that is still no reason for Clinchfield to leave the area without at least installing the two rows of posts which are required to be installed outby a roof-fall area if the area has not been cleaned up (Exh. C, par. 19(b)).

In light of the above discussion, I can find no mitigating circumstances to soften a conclusion as to Clinchfield's negligence in failing to support the hazardous brows or, in the alternative, at least making certain that the area was continually marked by a highly visible warning device or two rows of posts. The preponderance of the evidence supports a finding that Clinchfield was grossly negligent in allowing the violation of section 75.200 to occur. Therefore, I find that $2,000 of the penalty should be assessed under the criterion of negligence.

Gravity

The Secretary's brief (pp. 15-16) argues, as to the criterion of gravity, that the violation was very serious. The Secretary states that the miners doing recovery work on the continuous miner were exposed to the unsupported brows, that one of Clinchfield's division superintendents went out from under supported roof when he was wrapping a rope around rocks to drag them from the roof-fall area, and that the brows were left unsupported on June 13 after the continuous miner was recovered, thereby exposing any miner who might pass through the crosscut to the immediate hazard of the unsupported brows.

Clinchfield's reply brief (p. 12) claims that the miners were not exposed to the unsupported brows when they were recovering the continuous miner on June 13 and that the Secretary has improperly alleged that the violation existed on June 13 because the inspectors were not present when the continuous miner was being recovered and therefore can only speculate as to what occurred on June 13. It must be borne in mind that the violation of section 75.200 is for not supporting the brows or otherwise controlling them adequately to protect persons from falls of the roof or ribs. The violation began to exist on

June 13 when the continuous miner was recovered and continued to exist until June 22 when the roof-fall area was physically barricaded to prevent anyone from entering the area. I am, of course, interpreting section 75.200 to mean that the physical barricades were sufficient to control the area so as to protect persons from a fall of the unsupported ribs.

The evidence conclusively shows beyond any doubt that the brows began to be unsupported on June 13 because Clinchfield's witnesses stated that no bolting was done in the roof-fall area except with the stoper, that all bolting was done before the continuous miner was recovered, and that no bolting was done after the miner was removed from the crosscut (Tr. 189; 191; 209). Since no witness has been able to refute the inspector's finding that the brows were unsupported, the violation of section 75.200 existed on June 13 and continued to exist up to June 22 when the inspectors and Clinchfield's employees barricaded the area to prevent persons from entering the area.

I have already discussed the fact that the crosscut was 20 feet wide and that the overhanging brows extended out from the ribs toward the center of the crosscut for a distance of up to 9 feet from both the right and left sides of the crosscut. In such circumstances, anyone installing parts on the side of the continuous miner, which was from 10 to 11 feet wide, was necessarily exposed to the hazard of having the unsupported brows fall on him (Tr. 208). Sauls' testimony shows that he was not positive but that he was exposed to the hazards of the unsupported brows (Tr. 207). Busch stated that he considered the fact that the left brow might fall at the very moment he was tramming the continuous miner from the roof-fall area (Tr. 203-204). Finally, Meade testified that he saw one of Clinchfield's officials go inby all supports to attach ropes to rocks so that they could be pulled from the roof-fall area (Tr. 132).

The hazards associated with the unsupported brows cannot be divorced from a realization that they were the remaining portion of roof surrounding an area of roof which had fallen so suddenly on June 2 that two miners were killed before they could escape the falling rock. There was still a crack on the left rib which was sufficiently obvious to be of concern to the miner who was tramming the machine out of the fall area on June 13. The evidence, therefore, supports a finding that the unsupported brows continued to pose a threat to anyone who might pass through the crosscut.

Clinchfield argues in its initial brief (p. 22) that even if I find that the brows constituted a hazard, that it would be improper to accept Inspector Brewer's evaluation to the effect that four miners (operator and helper on continuous miner, shuttle car operator, and section foreman) would have been exposed to injury or death if the brows had fallen. Clinchfield

claims that no miners would have gone into the roof-fall area for any purpose other than to support the brows properly if Clinchfield had decided to continue mining from the face side of the roof-fall area and that if normal mining activities had been resumed, the number of people exposed would have been only the number of miners required to support the roof in accordance with Clinchfield's roof-control plan.

It is possible, of course, that the number of miners who would have been required to support the roof properly would involve more than the operator and helper on the roof-bolting machine, but that is a matter which was not discussed during the hearing. Consequently, there is no evidence to show that the inspector properly concluded that if Clinchfield had succeeded in repairing the continuous miner by the evening shift on June 18, its employees would have trammed the continuous miner back into the crosscut and resumed cutting coal without giving any consideration at all to the fact that the area of the crosscut nearest to the No. 6 entry was completely unsupported and the fact that a 9-foot square area of roof immediately outby the face of the No. 6 entry was not bolted or otherwise supported.

It is a fact that the continuous miner was so badly damaged by the roof fall that it had to be entirely removed from the mine for rebuilding in Clinchfield's central shop. Therefore, the most likely injury or death which would have occurred on June 18, if the brows had fallen, would have been to cause injury to a preshift examiner who might have passed through the crosscut for the purpose of taking an air reading to compute air velocity in the No. 6 return entry. When the continuous miner was recovered on June 13, only Sauls was exposed while the pump and valve were replaced, and when the actual tramming of the miner began, only Busch was operating the controls. When the rope was being tied to rocks inby any roof supports, only Clinchfield's mine official was exposed. The preponderance of the evidence, therefore, supports a finding that any fall of the brows on June 13, or thereafter, up to and including the time the violation was cited on June 18 would have been one person. Nevertheless, if the brows had fallen, they would have been likely to kill anyone on whom they might have fallen. In such circumstances, the violation must necessarily be considered to be very serious and I find that $1,000 of the penalty should be assessed under the criterion of gravity.

Good-Faith Abatement

The sixth and final criterion remaining to be considered is whether Clinchfield made a good-faith effort to achieve rapid compliance after the citation was written. The Secretary's brief (p. 16) alleges that "[n]o good faith was shown concerning

abatement of the violation." Clinchfield's reply brief does not discuss good-faith abatement, but in its initial brief (p. 23), Clinchfield argues that it did demonstrate good faith in abating the violation because it actively participated in physically constructing a barricade on each side of the roof-fall area consisting of both timbers and boards, together with erecting "Danger" signs, to make certain that no person would go into the roof-fall area. Clinchfield also states that it made the decision on June 18, after the order was written to abandon the affected portion of the No. 6 entry. Clinchfield contends that the aforesaid actions should be given consideration because, although the order was not terminated until December 6, 1982, Supervisory Inspector Rines agreed that all the actions summarized in the order of termination as reasons for terminating it had been taken by June 22, 1982 (Tr. 104-105).

When inspectors issue orders, they normally withdraw personnel from the area of danger and the orders do not specify a time within which the hazards have to be corrected because it is assumed that the operator's having to withdraw personnel from the area of danger will be a sufficient incentive to cause the operator to take immediate corrective action. Since the violation here involved was written as part of an imminent-danger order, the inspector did not insert any time in his order to show when the violation of section 75.200 was required to be abated (Exh. 1, p. 1). Consequently, even though Clinchfield did nothing to barricade the roof-fall area between June 18 and June 22 when the barricades were constructed, it must be borne in mind that the order was written on a Friday and the barricades were constructed on a Tuesday. In the interim between Friday and Tuesday, the area was dangered off by the tags hung outby the fall area by Inspector Brewer. In such circumstances, it can hardly be found that Clinchfield showed a lack of good faith in abating the violation because there may have been some understandable confusion in the minds of Clinchfield's management as to what action it needed to take after the area had been dangered off by the inspector's imminent-danger order.

For the foregoing reasons, I find that Clinchfield showed good faith in abating the violation by agreeing with MSHA's personnel that physical barricades should be constructed despite the fact that Clinchfield's roof-control plan required the construction of only two rows of timbers outby the roof-fall area. The fact that Clinchfield's management had decided to bypass the No. 6 entry, rather than continue mining from the face side where the roof-fall had occurred, is another reason to accept Clinchfield's argument that it was not required to take any action toward abating the violation other than agreeing to construct the physical barricades on each side of the roof-fall area on June 22.

It has always been my practice neither to increase nor decrease a penalty otherwise assessable under the other criteria when I find that an operator has demonstrated a good-faith effort to achieve rapid compliance. A penalty is increased if the operator fails to show good-faith abatement and is decreased if the operator is able to demonstrate that he took some extraordinary action in achieving rapid compliance. Since I have found that Clinchfield made a good-faith effort to achieve rapid compliance, the penalty otherwise assessable in this proceeding will not be increased or decreased under the criterion of good-faith abatement.

Total Assessment

By way of summary, a medium-sized operator is involved, payment of penalties will not cause it to discontinue in business, there was a somewhat adverse history of previous violations of section 75.200, the violation was associated with gross negligence, the violation was very serious, and there was a good-faith effort to achieve rapid compliance. The operator's size was taken into consideration in indicating that a penalty of $400 would be assessed under the criterion of history of previous violations, that $2,000 would be assessed under the criterion of negligence, and that $1,000 would be assessed under the criterion of gravity. Therefore, a total penalty of $3,400 will hereinafter be assessed for the violation of section 75.200 alleged in Order and Citation No. 2038802 dated June 18, 1982.

WHEREFORE, it is ordered:

(A) Clinchfield Coal Company's application for review of Order No. 2038802 filed on July 19, 1982, in Docket No. VA 82-51-R is dismissed and Order No. 2038802 dated June 18, 1982, is affirmed.

(B) Clinchfield Coal Company shall, within 30 days from the date of this decision, pay a civil penalty of $3,400 for the violation of section 75.200 alleged in Order and Citation No. 2038802 dated June 18, 1982.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Fletcher A. Cooke, Esq., Clinchfield Coal Company, P. O. Box 4000, Lebanon, VA 24266 (Certified Mail)

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

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 17 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-393-M A/C No. 42-00149-05017 F
v.	:	Utah Copper Division
KENNECOTT MINERALS COMPANY, UTAH COPPER DIVISION, Respondent	:	

DECISION

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent Kennecott Minerals Company with violating Title 30, Code of Federal Regulations, Section 55.9-20, a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the "Act").

A hearing on this case and related cases involving the parties commenced in Salt Lake City, Utah on September 20, 1983.

At the hearing the petitioner moved to amend his proposed civil penalty by reducing it to $700 from $1,000.

As grounds therefor the petitioner states the negligence of the operator was less than originally assessed. (Tr. 8).

In view of the amendment respondent moved to withdraw its notice of contest. (Tr. 9-10).

For good cause shown and pursuant to Commission Rule 29 C.F.R. 2700.11 the motions are granted and I enter the following:

ORDER

1. Citation 576293 and the proposed penalty, as amended, in the amount of $700, are affirmed.

2. Respondent is ordered to pay said sum within 30 days of the date of this decision.

John J. Morris
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 19 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of EARNEST GADDY, Complainant	:	DISCRIMINATION PROCEEDING Docket No: CENT 81-258-DM (MD 81-83)
v.	:	
ANCHOR STONE COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Moore

The parties have reached a settlement in the above that is satisfactory to each. I approve the settlement.

Respondent is accordingly ORDERED to pay forthwith the sum of $7,436.86 to Mr. Gaddy. The case is DISMISSED.

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

Distribution:

Mr. Earnest R. Gaddy, 136 No. 108th East Avenue, Collinswood, OK 74021 (Certified Mail)

Charles S. Plumb, Esq., Doerner, Stuart, Saunders, Daniel & Anderson, 1200 Atlas Life Building, Tulsa, OK 74103 (Certified Mail)

Ronnie A. Howell, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square, Dallas, TX 75202 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

OCT 19 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 83-246
	:	A. C. No. 15-12624-03503
v.	:	
	:	
R.F.H. COAL COMPANY, Respondent	:	No. 1 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on October 13, 1983, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement, respondent would pay civil penalties totaling $10,000 instead of the penalties totaling $47,580 proposed by the Mine Safety and Health Administration.

There are unique circumstances which warrant the approval of greatly reduced penalties in this proceeding. The No. 1 Mine was operated by five members of a single family. On January 20, 1982, four of the family members and three employees were underground and the remaining member of the family was on the surface of the mine when an enormous explosion occurred at the working faces. The explosion was propagated to the surface of the mine and the force of the explosion was so great that it killed all seven persons working underground and completely destroyed or considerably damaged all mining equipment in its path, including equipment on the surface of the mine. Respondent's owners are the widows of the four family members who were killed in the explosion with the exception of one owner who lost her brother and three uncles in the tragedy.

Financial data submitted by respondent's counsel indicate that the mine had no taxable income in the last year of its operation. The mine in which the explosion occurred has been permanently abandoned and sealed and the corporation has no intention of reentering the coal business at any time in the future. In such circumstances, the payment of civil penalties amounting to $10,000 will undoubtedly be adequate to serve as a deterrent against future violations of the mandatory health and safety standards as intended by the Federal Mine Safety and Health Act of 1977. The untimely death of four members of the same family, the oldest of whom was only 39 years of age, will likewise remain as a permanent and painful memory for all persons involved.

Section 110(i) of the Act requires that six criteria be used in determining civil penalties. One of the six criteria is whether the payment of penalties will cause the operator to discontinue in business. Although respondent has already ceased to operate a coal business, I believe that the criterion of whether payment of penalties would cause an operator to discontinue in business is intended for application to factual conditions such as have been shown to exist in this proceeding.

The motion for approval of settlement has proposed an allocation of the $10,000 in settlement penalties among the eight violations alleged in the pertinent orders and citations in a manner which is appropriate if one takes into consideration the other five criteria listed in section 110(i) of the Act.

According to MSHA's report of the underground explosion which occurred on January 20, 1982, the cause of the explosion was the firing of an explosive charge in the No. 6 entry which blew flames into the No. 5 entry in which coal dust was still in suspension from a prior explosives shot. MSHA's investigators found reason to believe that an inadequate amount of rock dust had been applied outby the entry in which the dust explosion occurred because the explosion was propagated from the face area of the mine clear to the surface of the mine. MSHA also found that a contributing factor to the explosion was respondent's failure to erect brattice curtains to within 10 feet of the working faces. Additional contributing factors were omission of stemming materials in the boreholes and insertion of excessive quantities of explosives in each borehole.

One of the violations pertained to failure to store explosives in the proper manner and place, but since the improperly stored explosives did not have anything to do with the explosion which occurred on January 20, 1982, MSHA did not recommend a large penalty for that alleged violation. Likewise, the alleged violation pertaining to the existence of cigarettes, cigarette lighters, and cigarette butts in the mine was not assigned a large penalty because there was no evidence that a lighted cigarette had contributed to the cause of the explosion. The motion for approval of settlement has appropriately allocated the largest portions of the settlement penalties to the alleged violations which seem to have contributed most to the cause of the explosion.

The above discussion shows that MSHA appropriately evaluated the two criteria of gravity and negligence in determining its proposed penalties. MSHA also considered the criterion of whether the operator showed a good-faith effort to achieve rapid compliance by noting that all of the alleged violations were abated when the respondent permanently abandoned and sealed the mine.

As to the criterion of the size of respondent's business, the proposed assessment sheet in the official file shows that the mine only produced 3,364 tons of coal on an annual basis. That amount of production warrants only a zero assignment of penalty points under the penalty formula described in 30 C.F.R. § 100.3. The sixth and final criterion to be considered is respondent's history of previous violations. The proposed assessment sheet indicates that respondent was cited for only one violation of the mandatory health and safety standards prior to the writing of the citations and orders involved in this proceeding. That is a very favorable history of previous violations and warrants assignment of zero penalty points under section 100.3(c) of the penalty formula used by MSHA.

The discussion above shows that the large penalties proposed by MSHA were based primarily upon the criteria of gravity and negligence associated with the alleged violations, but MSHA could hardly have proposed smaller penalties than it did in light of the disastrous consequences of the violations which were described in the citations and orders and in MSHA's accident report. Therefore, I conclude that MSHA appropriately proposed the penalties hereinbefore discussed and that the parties' settlement agreement should be approved for the reasons heretofore given.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement filed October 13, 1983, is granted and the parties' settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $10,000.00 which are allocated to the respective alleged violations as follows:

Citation No. 1196101 4/16/82 § 75.316	$ 1,400.00
Order No. 1196102 4/16/82 § 75.401	1,300.00
Order No. 1196103 4/16/82 § 75.1306	500.00
Citation No. 1196108 4/16/82 § 75.1702	160.00
Order No. 1196112 4/16/82 § 75.1303	2,350.00
Order No. 1196112 4/16/82 § 75.400	2,350.00
Order No. 1196112 4/16/82 § 75.403	1,520.00
Citation No. 1196141 4/16/82 § 75.304	420.00
Total Settlement Penalties in This Proceeding	$10,000.00

Richard C. Steffey
Administrative Law Judge

Distribution:

Edward H. Fitch IV, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Arnold Turner, Jr., Esq., Turner, Hall & Stumbo, P.S.C., Attorney for R.F.H. Coal Company, Hall-Ranier Building, 15 South Lake Drive, Prestonsburg, KY 41653 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 19 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-40
	:	A.C. No. 36-05018-03506
v.	:	
	:	Cumberland Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: David A. Pennington, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In the above proceeding, the Secretary seeks civil penalties for three alleged violations of mandatory safety standards. Each of the violations was originally cited as significant and substantial. However, at the hearing, the Secretary moved to have the significant and substantial designation removed from Citation No. 2011911, charging a violation of 30 C.F.R. § 75.400, and from Citation No. 2011829, charging a violation of 30 C.F.R. § 75.701. Pursuant to notice the case was heard in Pittsburgh, Pennsylvania, on August 30, 1983. Clarence Moats and Ferdinard Spoljarick testified on behalf of Petitioner; Charles Lemunyon and Barry Nelson testified on behalf of Respondent. Each party filed a posthearing brief. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS

1. Respondent is the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Cumberland Mine.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

3. The subject mine produces 1,175,000 tons of coal annually; Respondent produces approximately 15 million tons annually. Respondent is a large operator.

4. In the 24-month period prior to the issuance of the citations involved herein, 464 violations were assessed at the subject mine, 293 of which were designated significant and substantial. Seventy of these violations were of 30 C.F.R. § 75.400, 51 of which were designated significant and substantial. Two violations of 30 C.F.R. § 75.701 were cited during the same 24-month period. This is a moderate history of previous violations, and penalties otherwise appropriate should not be increased because of it.

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

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

8. The subject mine is classified as a gassy mine. It liberates in excess of 4,900,000 cubic feet of methane in a 24-hour period.

CITATION NO. 2011911

This citation, issued August 17, 1982, charges a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal. The accumulation ranged between 3 and 12 inches deep, was 16 feet wide and 16 feet long. It was inby the section dumping point crusher feeder. The area was dry. The surrounding area had been rock-dusted. The section was idle and the power was off. The accumulation was not present on the previous day. The hazard presented by this condition is the possibility that it could contribute to a mine fire if one should occur. Such an event was unlikely however. I conclude that a violation was established, which was not significant and substantial. The violation was moderately serious, and the evidence does not show that it resulted from Respondent's negligence. I conclude that an appropriate penalty for this violation is $50.

CITATION NO. 2011827

This citation, issued August 31, 1982, charges a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal and coal dust on and around the chain conveyor electric drive motor in the longwall section. The mine area was wet. The motor was dry and was hot to the touch. The motor is completely enclosed in an oblong compartment. There were vents on the side. The accumulation was on the top and partially covered and obstructed the vents on the side. I conclude this condition constituted a violation of 30 C.F.R. § 75.400. The hazard presented was that the motor could heat up and cause a fire. I conclude that the violation was significant and substantial since such an occurrence was likely if the motor continued running. The violation was serious, and since it had been present for some time, was the result of Respondent's negligence. I conclude that an appropriate penalty for this violation is $150.

CITATION NO. 2011829

This citation, issued September 2, 1982, charges a violation of 30 C.F.R. § 75.701, because the metal frame of a cable skid carrying approximately 100 feet of energized cable was not grounded. The standard requires that "metallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded . . . ." The cable skid involved here is used to convey the cable and to store it. It consists of a sled with two runners and a floor and pipes or standards on the side. I do not consider this to be a metallic frame or other enclosure of electric equipment covered by the standard. Therefore, I conclude that a violation was not established, and the petition will be dismissed with respect to this citation.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED

1. Citation No. 2011911 is AFFIRMED but the violation was not significant and substantial.

2. Citation No. 2011827 is AFFIRMED as properly charging a significant and substantial violation.

3. Citation No. 2011829 is VACATED and the penalty petition is DISMISSED with respect to it.

4. Respondent shall, within 30 days of the date of this decision, pay the following penalties for violations found herein to have occurred:

CITATION		PENALTY
2011911		$ 50
2011827		150
	Total	$200

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 24, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 83-207
	:	A.C. No. 15-02502-03507
v.	:	
	:	No. 18 Mine
SHAMROCK COAL CO., INC., Respondent	:	

DENIAL OF OPERATOR'S REQUEST TO WITHDRAW

ORDER TO SOLICITOR TO SUBMIT
SETTLEMENT MOTION OR INFORMATION

On May 5, 1983, the Solicitor filed a penalty proposal in the above-captioned action. The operator failed to answer and on September 14, 1983, I issued a show cause order.

By letter dated September 22, 1983, the operator advises it wishes to withdraw its request for hearing enclosing a copy of a memorandum dated September 6, 1983, written by the MSHA District Manager, Barbourville, Kentucky to an MSHA official stating that this order should not have been specially assessed. The District Manager requests that this item be assessed under the regular formula.

After the penalty proposal was filed by the Solicitor, this Commission had exclusive jurisdiction under the Act. The only way a penalty now can be approved and assessed is by the Commission under section 110 of the Act. The District Manager had no authority to act as he did. The operator's motion to withdraw must therefore be Denied.

It appears that the most expeditious way to handle this matter would be for the Solicitor to discuss the matter with the operator in order to determine if the matter can be appropriately settled. If so, the Solicitor then should file a settlement motion. If the matter cannot be settled, the Solicitor should advise me so the case can be assigned and set down for hearing.

Accordingly, it is Ordered that the Solicitor advise me of the status of this case within 45 days of the date of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Mr. Gordon Couch, Safety Director, Shamrock Coal Company, P. O. Box 130, Manchester, KY 40962 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 83-47
	:	A.C. No. 36-03425-03507
v.	:	
	:	Docket No. PENN 83-63
UNITED STATES STEEL MINING COMPANY, INC., Respondent	:	A.C. No. 36-03425-03509
	:	Maple Creek No. 2 Mine

DECISION

Appearances: David A. Pennington, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above docket numbers were consolidated for hearing and decision since they involve citations issued in September and October 1982, at the same mine. Two citations are included in Docket No. PENN 83-47, and three are involved in PENN 83-63. Pursuant to notice, the case was heard in Pittsburgh, Pennsylvania, on August 30, 1983. Francis E. Wehr, Sr., Alvin Shade, and Okey Wolfe testified on behalf of Petitioner; William K. Schlaupitz, Paul Shipley, Robert C. Tishman and Paul Gaydos testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS AND CONCLUSIONS COMMON TO BOTH DOCKET NUMBERS

1. At all times pertinent to these proceedings, Respondent was the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 2 Mine.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the subject mine, and I have jurisdiction over the parties and subject matter of these proceedings.

3. The subject mine has an annual production of more than 800,000 tons of coal. Respondent produces more than 15 million tons of coal annually. Respondent is a large operator.

4. The assessment of civil penalties in these proceedings will not affect Respondent's ability to continue in business.

5. In the 24-month period prior to the issuance of the citations involved herein, there were 498 assessed violations at the subject mine, 440 of which were designated significant and substantial. Of these, 47 were violations of 30 C.F.R. § 75.400, 88 were violations of 75.503. This history of prior violations is not such that penalties otherwise appropriate should be increased because of it.

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. The subject mine has been classified as a gassy mine. It liberates more than 1 million cubic feet of methane in a 24-hour period.

8. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

DOCKET NO. PENN 83-47

1. Citation No. 2011340, issued September 8, 1982, charges a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal along a belt line. The accumulation varied from 1 to 35 inches deep, was approximately 75 feet long and 12 to 36 inches wide. There is no dispute as to the existence of the accumulation, but the evidence is conflicting as to its nature. The inspector testified that it was wet on top but beneath the top layer there were layers of dry coal and coal dust. He also testified that the mine floor was dry. The assistant mine foreman testified that the accumulation was called muck, that it was "soupy" and could not be shovelled without being dried out. He also testified that the mine floor was wet. In order to abate the violation, rock dust had to be applied to soak up the water, before the accumulation could be handled by shovels. I find that there was an accumulation and that it was of combustible material. I further

find, however, that the accumulation was so wet that the likelihood of it contributing to a mine fire was low. I conclude that a violation was shown which was not significant and substantial. The condition should have been observed during the preshift examination and cleaned up. I conclude that an appropriate penalty for this violation is $50.

2. Citation No. 2011268, issued September 10, 1982, charges a violation of 30 C.F.R. § 75.503 because the conduit was pulled out of the packing gland on power wires on a shuttle car. The inspector testified that a permissibility hazard was unlikely because of the location of cable. The violation was originally designated as significant and substantial, but this designation was removed at the hearing. I conclude that a violation occurred which was not significant and substantial. The violation was not serious. Since Respondent has been cited for this condition on a number of occasions previously, I conclude that it resulted from negligence. I conclude that an appropriate penalty for this violation is $50.

DOCKET NO. PENN 83-63

1. Citation No. 2010997, issued October 4, 1982, charges a violation of 30 C.F.R. § 75.400, because of an accumulation of loose coal on the mine floor along the rib of the 48 room entry, and in the crosscut between 47 and 48 room along the inby rib. The accumulation was present along the entire entry and the entire crosscut. The accumulation averaged 18 inches wide and 20 inches deep. It had been left by the previous shift. The coal was damp. The roof bolter was in the crosscut and the other mining machinery had been in the area and would return to the area. The subject mine is gassy and has experienced face ignitions. Because of these factors, and the extent of the accumulation, I find that the violation was reasonably likely to contribute to a mine fire. It was a significant and substantial violation and was serious. The extent of the accumulation (80 feet) leads me to conclude that Respondent was negligent in not cleaning it up earlier. I conclude that an appropriate penalty for this violation is $250.

2. Citation No. 2010998, issued October 4, 1982, charges a violation of 30 C.F.R. § 75.503, because of a loose bolt on the headlight of a shuttle car. The bolt was one of four holding the headlight lens assembly to the body of the headlight. The hazard presented by this permissiblity violation is that a methane ignition in the compartment could escape to the mine atmosphere and cause a fire or explosion. Mining was not occurring at the time. The ventilation was sufficient on the section. Sparking occurs within the headlight. Normally the shuttle car does not approach within 20 feet of the face. I conclude that this permissibility violation was reasonably likely to cause an injury. It was significant and substantial. The violation was serious. There is

no evidence that it resulted from Respondent's negligence. I conclude that an appropriate penalty for this violation is $100.

3. Citation No. 2011000, issued October 7, 1982, charges a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal on the mine floor from rib to rib up to 3 feet deep and 8 feet wide in the 50 room entry. The accumulation had apparently been bulldozed up into a pile at the end of a prior shift. An idle shift followed and the accumulation was not cleaned up. The accumulation was more than is normally associated with one cut. The coal was dry with a layer of rock dust on top. The continuous mining machine had broken down while in the process of cleaning the accumulation during the last previous operating shift. I conclude that a violation of the standard was shown. This was an accumulation of combustible material. The hazard presented was that it could contribute to a mine fire. The accumulation was substantial and I conclude that the violation was significant and substantial because it was reasonably likely to result in serious injury. The violation was serious. Petitioner has not established that it was caused by Respondent's negligence. I conclude that an appropriate penalty for this violation is $100.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED

1. Citation Nos. 2011340 and 2011268 are AFFIRMED, but the significant and substantial designations are REMOVED.

2. Citation Nos. 2010997, 2010998 and 2011000 are AFFIRMED as issued. They charge significant and substantial violations.

3. Respondent shall pay within 30 days of the date of this decision civil penalties for the following violations found herein to have occurred:

CITATION		PENALTY
2011340		$ 50
2011268		50
2010997		250
2010998		100
2011000		100
	Total	$550

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 28 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 80-446-M MSHA Case No. 05-03415-05009 V
v.	:	C-SR-10 Mine
ENERGY FUELS NUCLEAR, INC., Respondent	:	

DECISION

Appearances: Robert Lesnick, Esq., Office of the Solicitor, United States Department of Labor, Denver, Colorado for Petitioner;
Timothy Borden, Esq., Energy Fuels Corporation, Denver, Colorado for Respondent.

Before: Judge Carlson

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), arose from a February 12, 1980 inspection of the C-SR-10 underground uranium mine of Energy Fuels Nuclear, Inc. (Energy Fuels). The Secretary of Labor seeks a civil penalty of $2,000.00 because Energy Fuels allegedly compelled miners to drive a 60 foot ventilation raise while working from ladders, in violation of the mandatory standard published at 30 C.F.R. § 57.7-52, which provides:

> Persons shall not drill from -
>
> (a) Positions which hinder their access to control levers;

(b) Insecure footing or insecure staying; or
(c) Atop equipment not suitable for drilling. 1/

Energy Fuels denies that any violation occurred. It claims that the inspector acted on misinformation and an erroneous belief that the technique used in the beginning stages of driving the raise was to be used throughout the entire construction process.

The case was heard in Denver, Colorado with both parties represented by counsel. The parties originally asked leave to submit post-hearing briefs, but later asked that the case be decided without briefs.

ISSUE

The issue to be decided here is whether Energy Fuels violated the mandatory standard cited, and, if so, what civil penalty should be assessed.

REVIEW OF THE EVIDENCE

The undisputed evidence of record shows that Energy Fuels, some months prior to the inspection in this case, foresaw a need to drive a vertical ventilation raise from a lower level drift to an abandoned room in an upper level. The planned height of the raise was to be approximately 60 feet. The drift itself was approximately seven feet

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1/ The inspector initially charged a violation of 30 C.F.R. § 57.3-20, a ground support standard. The citation was administratively modified by the inspector to charge a "safe access" infraction under 30 C.F.R. § 57.11-1. At trial, counsel for the Secretary moved for leave to amend a second time to charge violation of 30 C.F.R. § 57.7-52. While the government's indecision in selecting the appropriate standard is scarcely praiseworthy, all standards mentioned were arguably related to the nature of the hazard described in the citation, and it was apparent at trial that the final amendment occasioned no prejudice to the operator. The final amendment was therefore allowed, and the hearing proceeded upon a charge that 30 C.F.R. § 57.7-52 was violated. I also note that the inspector's initial action was designated an "order" under section 104(d)(1) of the Act, but was modified to a citation the next day when the inspector apparently recognized that there was no previous citation under that section which would serve as a proper predicate for a withdrawal order. This case was therefore tried as a citation matter.

from floor to back. The base of the raise was to be located in a cross-cut intersecting the main drift. The raise was to be approximately 5 x 5 feet in cross section and to rise at an approximate angle of 60 degrees.2/ Work on the drift was begun before the safety inspection on February 12, and was completed after that date. Beyond these few background facts, most of the evidence presented by the parties was in sharp conflict.

The government premised its case upon the understanding of its inspector, Rosendo Trujillo, that Energy Fuels intended to drive the entire raise with miners working from ladders. Since it was undisputed that miners working in the raise would remove the overhead rock by drilling and blasting, it followed that the supporting leg of the drill would have been rested on a ladder rung below the feet of the drill operator. This, according to Trujillo, would have imperiled the driller. Because of the weight of the drill, and vibrations caused by its operation, the operator could easily be dislodged from the ladder, causing a dangerous fall.

Two miners, Clifford Lynn and Leroy Lynn, testified for the Secretary. They had the same understanding as Inspector Trujillo about the techniques to be used in driving the raise.

The first to testify was Clifford Lynn, a shifter or lead miner. He maintained that Doug Mempa, the mine foreman, had asked him to drive the raise. Mempa, he testified, had informed the miners of the plan for the raise project about two weeks before the February 12 inspection. Lynn's understanding was that the entire raise was to be driven by one miner working from a ladder or ladders. The witness stated that he had never worked on a raise, but that he believed, along with other miners to whom the project was explained, that such a procedure was unsafe. According to Mr. Lynn, Mempa made no mention of the use of scaffolds or staging as work platforms for the contemplated drilling; nor were any scaffolding parts available in the mine. Mempa, he said, did mention that the miner would be tied off to a J bolt secured in the back or side of the raise.

Lynn refused to work in the raise, he testified, and was told by Mempa he would be fired. He was in fact discharged on the Monday before the Secretary's inspection.

2/ The Secretary's witnesses insisted that the raise was driven at a 90 degree angle, but I note that the Secretary's own narrative findings for a special assessment, a part of the file, describe the angle as 60 degrees.

Another miner, Leroy Lynn, a cousin of Clifford Lynn, left his employment as a miner with Energy Fuels sometime in "the first part of February." He, too, had refused to work in the raise because of a belief that it was to be driven from ladders. The termination of his employment, however, stemmed from reasons other than his refusal to work on the raise. According to Leroy Lynn, Doug Mempa, the foreman, had asked him to work on the raise, and he had refused. The witness had no experience in driving raises, but he testified that Mempa had explained that the 4 foot by 4 foot wide raise would be driven 65 feet at a 90 degree angle. At the time his employment ended he had not worked in the raise, Lynn testified, nor had he seen any other miner work there. At no time, he testified, did he see any timbering or other supplies which could be used to build scaffolding. The raise had been driven about 6 to 10 feet when he last saw it before his job at the mine was terminated, he said.

Inspector Trujillo came to the mine on February 12 in response to a telephone complaint. According to the inspector, most of his information came from interviews of the two former miners who testified and two other miners who were still on the job. These men gave him to understand that Foreman Mempa had informed them that the raise would be driven from ladders with the pneumatic drill and that the miner who operated the drill would be secured by lanyards to a J bolt anchored in the sidewall.

Trujillo testified that no one was in the raise when he saw it, but that at that time it had been driven to a distance of about 9 to 10 feet above the back of the drift. He also observed a muck pile in the raise which reached to a height of 8 to 9 feet from the back of the raise. The drift itself, he testified, was about 8 feet high (Tr. 100).

Inspector Trujillo also maintained that he had no doubts as to the accuracy of what the miners told him because Doug Mempa, who was present a part of the time, did not deny that management intended to drive the entire raise from ladders. Moreover, Trujillo observed a 10 foot wooden ladder lying in the drift near the raise, but he saw no materials for building a platform. He further testified that Mempa and two other representatives of management asked him, "What's wrong with driving a bald-headed raise?" (A bald-headed raise is one driven from ladders without the use of timbers, staging or platforms.)

The inspector assumed that a series of ladders would be tied or fastened together to achieve the height necessary to complete the entire raise. Use of ladders, he testified, would subject the miner drilling from the ladder to great risk of falling and thus serious injury. His chief concern was that the leg of the drill would necessarily rest upon a ladder step or rung. The vibrations from the

heavy drill (over 100 pounds) would quite likely break the ladder, Trujillo maintained, or would dislodge the miner from his precarious position even if the ladder did not break.

Energy Fuels' witnesses presented a far different version of the facts. They did agree that at the time of the inspector's visit no staging or platforms were in place. They contended, however, that such structures could not be installed until the raise had been driven several feet above the back of the drift. The stulls or timbers upon which the planking for the platforms were to rest must, of necessity, be fastened to the side-walls of the raise, they maintained.

The operator's general foreman, Robert Mussléman, testified that plans for driving the raise were frequently discussed with miners before the project was begun. According to Mussleman, management's plan had always called for the use of a form of scaffolding or staging which would be moved upward as the raise progressed. Metal supports known as Montgomery Ward hitches would first be inserted into the walls. These would support 8 x 8 inch timbers which in turn support the 2 x 8 inch lagging or planking which would serve as the drilling platform. According to the Mussleman's description, the miner would stand on the planking and rest the leg of the drill there. He would then proceed to drill the back above him with drill steels varying from 2 to 6 feet long. Charges would then be inserted, the planking removed, and charges detonated. The broken rocks would then fall to the floor of the crosscut below. As the raise advanced, new hitches and timbers would then be installed. Additionally, Mussleman asserted, separate safety lines attached to J bolts would be secured to both the miner and the heavy drill.

Mussleman testified that ladders were indeed to be used to allow access to the various levels of the staging as the raise advanced. He also indicated that the first few feet of the raise was, of necessity, to be "bald headed." Explosive rounds, he testified, would be fired to push the raise far enough to install timbers. No drilling, he asserted, would be done from a ladder. Rather, the miner doing the drilling would stand atop the large muck pile in the crosscut at the base of the raise. The top of the raise would be leveled, planking would be placed there to form a solid footing, and the drill leg would rest on the planking. A ladder would be used, he explained, only to insert the charges for the third round. (After the second round, the miner could reach the back of the raise with the drill steel from a fully extended drill to drill the holes, but could likely not reach that far by hand to insert the charges.)

Mussleman claimed that all necessary supplies for the stagings were in the mine by the time of the February 12 inspection. The Montgomery Ward hitches and the planking were at the mine from former projects, he testified, and the 8 x 8 inch timbers were brought in by him in January.

Mussleman recalled that the raise was between 6 and 12 feet high when the citation issued, and the muck pile was around 5 feet high. At one point he acknowledged that a miner could have stood on the ladder to drill, but that in any event the drill leg would have been rested on the muck pile. He insisted that the drill leg would break a ladder rung if rested there.

Mussleman acknowledged that no plan for the construction of the scaffolding systems had been placed on paper until after Inspector Trujillo's inspection (Tr. 123).

Bernie Willey, a miner whose employment at the mine ended in August of 1980, also testified for Energy Fuels. Willey indicated that he drilled the last 50 feet of the raise from scaffolding. His description of the technique used conformed to the description of the staging system which Mussleman claimed to be management's plan.

Willey also testified that he was present when Mussleman explained the raise plan, including the use of staging or scaffolding. The explanation took place before the inspection. The witness had understood that in the early stages, the miner would stand on a ladder but brace the drill leg on the muck pile (Tr 162). Willey's participation began, however, about a month after the citation. At that time the top of the raise was about 15 feet high.

Doug Mempa, the mine foreman at the times relevant to this case, testified that he explained the raise project to the miners before it began, and that he at no time represented that the raise would be driven from ladders. Moreover, he maintained that all necessary timbers, hitches, and planking were at the mine before the drilling began. The stulls or timbers were delivered by Mr. Mussleman, he testified, during a snowstorm in January; the other supplies were already present. Mempa asserted that he saw the raise daily from the time it was begun.

According to Mempa, a miner named Kenneth Chad did the first work. The first rounds fired by Chad "booted," leaving an uneven hole. Mempa then drilled and shot the next round to "square up" the raise. Mempa insisted that neither he nor Chad drilled from a ladder; it was done from the top of the muck pile. He did not believe a ladder was lying in the drift during Inspector Trujillo's visit, but conceded one could have been, because ladders were sometimes used in the drift.

Mempa testified that at the time of the inspection he measured the height of the raise from the top of the drift and found it to be 9 feet. The drift itself was 7 feet high. Therefore, the total height of the raise was 16 feet. He did not measure the height of the muck pile but estimated it to be about 5 feet. (Tr. 195-196.)

The drill, with the support leg fully extended reached 8 1/2 feet, according to Mempa, which, with a 6 foot drilling steel allowed a reach of approximately 14 feet (Tr. 222).

Richard D. Husted, mine safety and environmental engineer for Energy Fuels, testified that he saw the raise on February 12, 1980, or a day or two before. While there, he saw materials suitable for building scaffolding.

In rebuttal, Inspector Trujillo testified that in a subsequent visit to the mine on March 18, 1980 to check on abatement of the alleged violation, that it appeared that another round had been fired, making the raise about 2 or 3 feet higher. During his rebuttal testimony he made clear that he had never seen a miner working in the raise. He also acknowledged that if a miner had in fact been able to stand on a lower rung of the ladder to drill while resting the drill leg on the muck pile, such activity might not constitute a violation.

DISCUSSION

Even a cursory review of the record in this case reveals that the Secretary's evidence is wholly circumstantial. Neither the inspector nor any other witness for the government saw anyone at work in the raise. The question, then, is whether the circumstantial evidence is strong enough to establish violation. For the reasons which follow, I hold that it is not.

I have no doubt that if the inspector were correct, if the entire raise were to have been driven from ladders, the procedure would have been patently hazardous and a clear violation of the standard ultimately cited. More particularly, I am convinced that if the leg of the heavy drill were rested on a rung of the same ladder upon which the miner operating the drill was standing, a violation would occur, no matter what the height of the raise. I am not convinced, however, that any violation had occurred at the time of the inspector's citation. The circumstantial evidence presented by the Secretary was of two types: the words of two miners who related their understanding that the entire raise was to be driven from ladders without platforms, and the observations of these witnesses and the inspector of the raise itself up to February 12, 1980.

No one disputes that the raise was finished from platforms of the sort that the inspector approved. The government would suggest, of course, that the Lynns understood correctly that Energy Fuels originally intended to drive the entire raise from ladders, and altered that intent only after the inspector's visit and citation. Assuming that the drilling and blasting activity was done lawfully, up to the time of the inspection, the government's suggestion raises a troublesome question: what steps, if any, may the Secretary take under the Act to prevent a prospective violation?

I do not believe that that question need be addressed at any length here. As I read the Act, it contains no language which contemplates present sanctions to prevent possible future or intended violations of mandatory standards. That question need not be entertained because I find persuasive the operator's claims that it intended from the time of conception of the raise project to use platforms. In reaching this conclusion, I rely principally on the testimony of Bernie Willey, a miner whose employment with Energy Fuels had ended well before the hearing. He therefore lacked any discernable motive to shade or slant his testimony. Willey fully supported the management testimony that plans to use platforms were made clear to miners before the raise began. I make no judgments as to the good faith of the Lynns in professing otherwise, but I find that they were mistaken in that belief.

This leaves but a single issue to decide. Did the size and shape of the raise at the time of inspection reveal the use of a ladder as a drill rest in violation of the standard? As mentioned before, no witness testified that any miner used a ladder rung as a base for the drill leg. The Lynns inferred that someone did because they had been told that the entire raise would be drilled from ladders. Inspector Trujillo drew the same inference based upon what he was told by miners who never observed the actual work, and from his knowledge of the driving of "bald headed" raises in other mines at other times (Tr. 209-210).

Against these inferences I must weigh the evidence of Doug Mempa, the foreman who actually directed the other miners who worked in the raise before February 12, 1980, and who, himself, apparently did most of that work. He testified emphatically that all drilling was done using the muck pile as a base. He also provided the only testimony concerning the actual measurements of the raise on the date of inspection. I note that Mempa's measurements were generally consistent with the estimates of other witnesses. I further note that, given the height of the raise at the time of the inspection, Mempa's representations that drilling up to that time was done from the muck pile were plausible. Since the top of the raise was 9 feet above the back of the 7 foot drift, the top of the raise was but 11 feet above the muck pile. Thus, a drill which extended to 8 1/2 feet, used in conjunction with a 6 foot drill-steel, could have been rested on the muck pile to allow placement of the last charges detonated before the inspection. I therefore accept the first-hand testimony of Mempa, who actually directed and participated in this early phase of the project, over the speculations of those witness who did not see the work done.

In summary, no one seriously contends that any violation occurred unless a miner rested the drill leg on a ladder rung. No credible evidence demonstrates that the drill was handled in that way. Consequently, I must conclude that no violation was proved.

CONCLUSIONS OF LAW

Based upon the entire record and upon the factual determinations reached in the narrative portion of this decision, it is concluded:

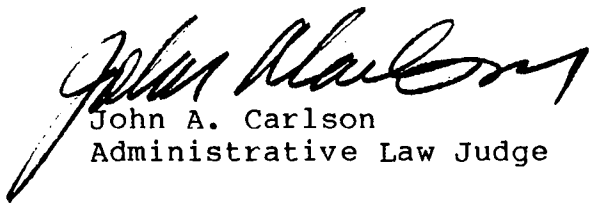
(1) That the Commission has jurisdiction to decide this case.

(2) That the credible evidence of record fails to establish that Energy Fuels violated the mandatory safety standard published at 30 C.F.R. § 57.7-52.

(3) That the Secretary's citation and attendant proposal of civil penalty must be vacated.

ORDER

Accordingly, the citation and petition for assessment of a penalty are hereby vacated.



John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 28 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-170
	:	A.C. No. 46-03140-03507
v.	:	
	:	Hampton No. 3 Prep. Plant
WESTMORELAND COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

The parties move for approval of a settlement of the captioned matter at 80% of the $1,000 amount initially assessed.

The record shows that as a result of the operator's unwarranted disregard for compliance a dangerous accumulation of float coal dust and loose coal was found in the operator's Hampton No. 3 Preparation Plant. The violation was of such a nature that it could significantly and substantially contribute to a mine fire if not promptly abated. The reduction in the penalty is predicated on the parties' claim that the chain of causation was physically attenuated by the absence of any obvious source of an electrical ignition and the ready availability of adequate fire suppression equipment.

Neither of these circumstances would preclude a fire that could result from roller friction and that could propogate an explosion of the float coal dust if the coal dust under and around the belt conveyors were cast into suspension as the result of other unforeseen circumstances. The potential of the violation as a contributing factor to a fire hazard is readily foreseeable, that to an explosion remote if not speculative.

Under the S&S criteria Congress intended an operator be held liable not only for the gravity and negligence involved in the immediate violation but also for its reasonably foreseeable consequences, i.e., its contribution to a significantly and substantially greater hazard or danger. Here, for example, the immediate hazard was a slipping hazard due to the presence of water mixed with the coal sludge. But if roller friction in the coal dust caused an ignition a mine fire could result.

It is possible perhaps even probable that the fire suppression system would render the fire harmless but on the other hand it might not. The redundancy in a protective or safety system cannot excuse a condition that could significantly and substantially contribute to a major hazard. A serious consequence was, therefore, readily foreseeable from the condition found. As I view it, the dispositive issue in applying the S&S criteria is one of reasonable foreseeability of a significant and substantial contribution by the underlying violation to a serious mine health or safety hazard. Reasonable probability that the hazard forseen will actually occur is merely another factor that adds to the substantiality of the hazard, not to its existence.

There is a widespread belief that unless a violation immediately creates a reasonable probability of a reasonably serious injury or illness it cannot be classified as significant and substantial and must perforce be classified as trivial. 30 C.F.R. 100.4. This constitutes a serious misreading not only of the statutory language but also of the Congressional intent. Congress intended violations be cited as significant and substantial where they are of such a nature as "could" significantly and substantially "contribute" to the "cause or effect" of a mine safety or health hazard. Sections 104(d), (e). This does not mean that the violation cited in a 104(d)(1) citation must, standing alone, present a "significant and substantial" hazard or even a "major" hazard or danger to safety and health. The S&S standard, written by miners for miners, was designed to provide an early warning or alert with respect to violations with an incipient potential for disaster. Compare, Scotia Coal Company, 4 FMSHRC 89 (1982); Sen. Rpt. 95-181, 95th Cong. 1st Sess. 32 (1977). Unless violations with the potential for contributing to such disasters as Scotia are prevented they will continue to recur as recent history amply attests.

S&S violations may be either serious or nonserious depending upon their immediate consequences. Thus, while there was little likelihood that the static condition observed in this case would result in a reasonably serious injury it was fully capable of contributing to a hazard with disasterous potential--a potential that was reasonably foreseeable if the condition was not promptly abated. It is precisely for this reason that nonserious violations may be of "such a nature" as to contribute to a serious mine hazard while a serious violation may have no potential for creating anything other than a need for prompt abatement. Here, for example, if it were convincingly shown that the fire suppression system was capable of dousing the fire before it became dangerous the violation would still be serious but would lack the potential for making a significant and substantial contribution to a hazard capable of causing death

or bodily harm. The operator, of course, has the burden of persuasion with respect to rebutting a prima facie violation is S&S. Miller Mining Co. v. FMSHRC, 3 MSHC 1017 (9th Cir. 1983); Old Ben Coal Corp. v. IBMOA, 523 F.2d 25, 39 (7th Cir. 1975).

Gravity always depends upon the potential for adverse consequences and must be evaluated in the light of the potential of a violation for such consequences. The immediate consequence of an ignition in the presence of a small quantity of even a 5% concentration of methane may be negligible but unless the condition, i.e., the "cause" of the ignition or the source of the bleeder, e.g., an impermissibility or a ventilation violation or both is eliminated and prevented the existence of each condition or violation is of "such a nature" as may, i.e., "could" significantly and substantially "contribute" to a much larger ignition, namely an explosion that may take out an entire section or an entire mine.

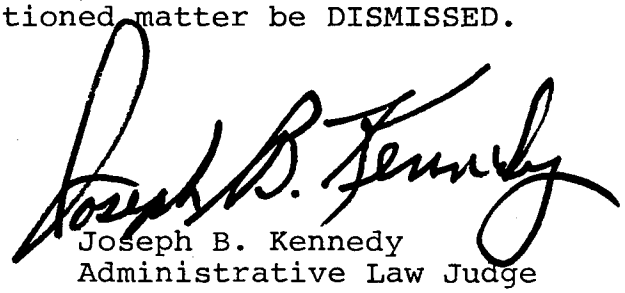
It is a misnomer and confuses analysis to refer to the "significant and substantial" hazard defined by Congress as an S&S "violation." Congress used the subjunctive mood and the present tense conditional, verb "could" to express its concept of a "hazard" that might materialize at some indefinite time if the underlying "violation," whether serious or nonserious in its immediate consequences were not abated and the hazard aborted.

While an S&S hazard is not an imminent danger because the certainty of its occurrence is less obvious and the time less definite, it is, as the Scotia case so dramatically demonstrated, just as deadly and dangerous. The difficulty in perception when coupled with the consequences of misperception are so grave as to argue strongly for resolving doubts in favor of the evidence or testimony that supports the S&S finding. Consequently, if a hazard is reasonably foreseeable it should be considered significant and if it is of such a nature that it is capable of "contributing" to a condition or practice that could result in serious physical harm it should be deemed substantial.

I firmly believe that if the S&S standard is to have the scope intended by Congress, it must be used to prevent the occurrence of violations that sow the seeds of disaster for either individual miners or groups of miners. Operators owe miners a duty not only to prevent serious violations but all violations of whatever gravity that may contribute to hazards with serious consequences for the health and safety of the industry's most important resource--the miner.

Applying the standard indicated, and based on an independent evaluation and de novo review of the circumstances, 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 amount of the settlement agreed upon, $800, on or before Friday, November 18, 1983, and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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