NOVEMBER

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

Secretary of Labor, MSHA v. Kerr-McGee Nuclear Corporation, DENV 79-201-P; (Judge Lasher, October 24, 1979)

Secretary of Labor, MSHA v. Scotia Coal Company, BARB 78-306, etc.; (Interlocutory Review)

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

Mid-Continent Coal & Coke Co., v. Secretary of Labor, MSHA, DENV 79-29-P; (Judge Broderick, October 1, 1979)

Secretary of Labor, MSHA v. Southern Ohio Coal Company, VINC 79-110-P & VINC 79-114-P; (Judge Koutras, October 19, 1979)

Secretary of Labor, MSHA v. Stash Brothers, Inc., PITT 79-44-P; (Judge Kennedy, May 24, 1979) Review was vacated.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 1979

SECRETARY OF LABOR,	:	Docket Nos. HOPE 78-469
MINE SAFETY AND HEALTH	:	HOPE 78-470
ADMINISTRATION (MSHA)	:	HOPE 78-471
	:	HOPE 78-472
and	:	HOPE 78-473
	:	HOPE 78-474
UNITED MINE WORKERS OF AMERICA	:	HOPE 78-475
(UMWA)	:	HOPE 78-476
v.	:	
	:	
MONTEREY COAL COMPANY	:	

DECISON

For the reasons stated in our decision in Old Ben Coal Company, No. VINC 79-119 (October 29, 1979), the decision of the administrative law judge is reversed and the case is remanded for further proceedings consistent with the above decision.

Jerome R. Waldie, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Backley, Commissioner, dissenting:

I would affirm the decision of Judge Michels for the reasons set forth in his decision and in my dissent in Old Ben Coal Co., No. VINC 79-119. The judge has rejected the absolute or strict liability theory and has found, after an extensive analysis of the evidence, that Monterey "neither supervised nor controlled the shaft-sinking activity performed by Frontier-Kemper." The improper manner of the "shaft-sinking activity," particularly the operation of the winches involved,

the lack of a loading platform and the presence of men under hoisted loads was the cause of the cited violations. The record clearly reflects that the judge's finding as to the lack of control over this activity by Monterey is supported by substantial evidence. Accordingly, I am unable to find the necessary relationship between the violations charged and Monterey which I would require as set forth in my dissent in Old Ben. I therefore must disagree with the all too brief opinion of the majority.

Richard V. Backley, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 14, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. DENV 79-201-P
KERR-McGEE NUCLEAR CORPORATION	:	

DIRECTION FOR REVIEW AND ORDER

The decision of the Administrative Law Judge is directed for review. It is found that the Judge's decision may be contrary to law or Commission policy, and that a novel question of policy is presented. The issue is whether the Judge's decision meets the requirements of Commission Rule 65(a), 29 CFR §2700.65(a).

This case arose when the Secretary of Labor sought the assessment of a civil penalty against Kerr-McGee Chemical Corporation for an alleged violation of a mandatory mine safety standard. The Judge held a hearing, and, at its conclusion, orally announced a decision from the bench that was read into the record. Several weeks later, the Judge's written decision was issued. That decision states:

> This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on September 27, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record. It was found that the violation charged in the withdrawal order did not occur.
>
> The petition having no merit, this proceeding is dismissed.

We conclude that this decision does not meet the requirements of Commission Rule 65(a), 29 CFR §2700.65(a). That rule requires judges' decisions to be written, requires that they "include findings of fact, conclusions of law, and the reasons or bases for them on all the material issues of fact, law, or discretion presented by the record ...", and states that "[i]f a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript." The Judge's written decision here, however, does not include findings of fact, conclusions of law, or the reasons or basis for them, nor was the bench decision included in the written decision.

79-11-8

The Judge's decision is therefore vacated. The case is remanded to the Judge for the entry of a decision in accordance with the Commission's Rules of Procedure.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank P. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 14, 1979

PEABODY COAL COMPANY	:	
	:	
v.	:	Docket No. VINC 77-40
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	
	:	
	:	
LOCAL UNION NO. 1670, DISTRICT 12, UNITED MINE WORKERS OF AMERICA	:	Docket No. VINC 77-50
	:	
v.	:	
	:	
PEABODY COAL COMPANY	:	

DECISION

These proceedings arise under the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §801 et seq. (1976)(amended 1977)["the 1969 Act"]. They involve an application for review of a withdrawal order (VINC 77-40) issued under section 104(a) and an application for compensation (VINC 77-50) filed under section 110(a). Both applications relate to the withdrawal order and were consolidated by the administrative law judge.

The judge held that the withdrawal order was validly issued and awarded compensation to 334 miners found to be idled by the order. The judge further ordered the payment of six percent interest "per month" from the date that the withdrawal order was issued to the date of his decision. The Commission granted Peabody's petition for discretionary review. For the reasons that follow, we affirm the judge's decision but modify his award of interest.

On Tuesday, November 23, 1976, Peabody discovered a "gob fire" 1/ at its River King Underground Mine No. 1. A Mining Enforcement and Safety Administration (MESA) inspector, who was present at the mine when the fire was detected, immediately issued a withdrawal order under section 103(f). 2/ The inspector ordered the withdrawal of miners, except those miners needed to remove equipment and to erect temporary seals. Later that day, a MESA supervisor arrived at the mine to monitor the fire.

The installation of temporary seals was completed on Wednesday, November 24th, and liquified carbon dioxide was pumped into the fire area to displace oxygen sustaining the fire. Because the next day was a holiday, Thanksgiving, the MESA supervisor decided to wait until Friday, November 26th, to test the atmosphere behind the temporary seals for carbon monoxide and oxygen.

On Friday, after additional carbon dioxide was pumped into the fire area, the MESA supervisor and inspector, together with Illinois State inspectors, took instrument readings and bottle samples of the air behind the temporary seals. Because the instrument readings showed that the carbon monoxide and the oxygen levels in the fire area were "still high", the inspection team decided to wait until Monday, November 29th, to conduct further tests of the atmosphere. In the meantime, the bottle samples were sent to the state laboratory for analysis.

Later on Friday, the MESA supervisor was notified of the laboratory results concerning the bottle samples. The supervisor stated that the results were "very close" to the instrument readings and that this indicated to him that the mine fire was more extensive than first believed. The supervisor then called the inspector and instructed him to proceed to the mine on Saturday to issue a withdrawal order under

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1/ A "gob fire" is defined in A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines (1968), as:

> a. Fire originating spontaneously from the heat of decomposing gob [i.e., the refuse or waste left in the mine] .... b. A fire occurring in a worked-out area, due to ignition of timber or broken coal left in the gob .... c. Fire caused by spontaneous heating of the coal itself, and which may be wholly or partly concealed ....

2/ Section 103(f) provided in part:

> In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine ....

section 104(a). 3/ The inspector went to the mine on Saturday but was unable to issue the order because at the time only a watchman was there. At sometime on Saturday, additional carbon dioxide was pumped into the fire area.

On Monday, November 29th, after receiving further instructions from his supervisor, the inspector returned to the mine and issued the section 104(a) withdrawal order at 7:10 a.m. In the order, the inspector described the alleged imminent danger as follows:

> A mine fire (gob) existed in the area of rooms nos. 1 through 8 off of A entry No. 3 West, sub Main North. Management did detect the fire and voluntarily withdrew the men from the mine.

Because the miners had been withdrawn from the mine following the discovery of the fire on the previous Tuesday, no miners were working on the 12:01 a.m. to 8:00 a.m. shift when the section 104(a) order was issued. Eight miners reported for work, however, for the succeeding 8:01 a.m to 4:00 p.m. shift. In order to resolve a possible contractual dispute over reporting pay, Peabody permitted the eight miners to work the first four and one-half hours of their shift.

On Thursday, December 2nd, after completion of the permanent seals and of tests indicating that the concentrations of carbon monoxide and oxygen were within "acceptable limits", the section 104(a) withdrawal order was modified to permit mining operations in all unsealed areas of the mine.

On review Peabody advances several arguments as to why the judge erred in holding that the withdrawal order was validly issued. Peabody argues that the order is "fatally defective" because it failed to adequately describe the imminent danger in accordance with the requirements of section 104(e) of the 1969 Act. That section provided in part:

> Notices and orders ... shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger ... and, where appropriate, a description of the area of the coal mine from which persons must be withdrawn and prohibited from entering.

3/ Section 104(a) provided:
If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) 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 imminent danger no longer exists.

Peabody's argument is without merit. On its face the order informs Peabody that a gob fire existed in a specified area of the mine. The order complied with section 104(e) and sufficiently apprised Peabody of the alleged imminent danger. We also note that Peabody has not suggested any additional information that the order, in its view, should have contained.

Peabody also argues that the judge erred in upholding the withdrawal order because the order lacked a "sufficient factual basis". Peabody asserts that the order, issued on Monday, November 29th, was based upon stale data obtained by MESA on Friday, November 26th. It asserts that neither the MESA supervisor nor the inspector was aware of the actual conditions that existed in the mine at the time that the section 104(a) order was issued. In this regard, Peabody states that the MESA representatives failed to take into account the fact that additional carbon dioxide was pumped into the fire area after the tests were conducted on Friday, November 26th.

We reject this argument. The MESA supervisor and the inspector testified that the conditions created by the mine fire constituted an imminent danger. The supervisor stated that an imminent danger exists anytime there is a fire in the mine, regardless of its size. With respect to the tests conducted on Friday, he stated that they confirmed the existence of a fire, as well as the fact that the fire was larger than originally believed. The supervisor also testified that the fire presented the danger of an explosion because both oxygen and an ignition source were present in the mine and only a fuel was needed. He testified that there were cavities in the mine roof in the area of the fire that could have contained pockets of such a fuel--methane--and that due to the inaccessibility of the fire area it was impossible to determine what concentrations of methane were present. He further testified that the temporary seals would not have withstood the force of an explosion "with any size at all", and that such an explosion would have disrupted the mine's ventilation system and introduced carbon monoxide into the mine. On the basis of these conditions, the supervisor concluded that an imminent danger existed and that it was not necessary for the inspector to have conducted additional tests for carbon monoxide and oxygen before issuing the withdrawal order. The inspector testified that in view of the area of the mine involved, he believed that the fire was still burning when the order was issued on Monday, November 29th. He further stated that, even if the fire was not burning at that time, it could reignite if the carbon dioxide were removed and oxygen reintroduced into the sealed area. It was the inspector's conclusion that an imminent danger existed as long as there was a fire behind the temporary seals.

In view of this evidence, we cannot agree with Peabody that the withdrawal order was based on "stale information" and "speculation and conjecture". The circumstances known at the time that the withdrawal order was issued were more than sufficient to warrant the issuance of a section 104(a) withdrawal order.

Peabody also raises several arguments concerning the manner in which the order was issued. First, it asserts that the order is invalid because it was issued by the inspector, even though it was the inspector's supervisor who made the determination that an imminent danger existed. This argument is unpersuasive. Section 104(a) should not be read to require that the Secretarial representative who determines that an imminent danger exists be the same representative who issues the withdrawal order. Such a restrictive reading would unnecessarily frustrate the protection of miner safety and health. The facts of this case amply illustrate the weakness of this argument. Here, the MESA supervisor determined that an imminent danger existed, but the circumstances warranted that the inspector issue the order. At the time that the supervisor received the results of the lab analysis and instructed the inspector to issue the order, the inspector was about five to ten miles from the mine, while the supervisor was approximately seventy miles away. In any event, the inspector testified that he too believed that the mine fire constituted an imminent danger.

Second, Peabody argues that the order is invalid because it was not issued "forthwith" as required by section 104(a) and therefore is invalid. We disagree. The order was issued for an imminently dangerous condition believed to exist at the time when it was issued. The fact that the order was not issued at the time that the fire was initially discovered, or when the instrument readings showed the carbon monoxide and oxygen levels were high, does not render the order fatally defective. Therefore, we conclude that the order was timely issued.

Third, Peabody contends that in issuing the section 104(a) order the MESA representatives were motivated by a desire to aid the UMWA to obtain compensation for the miners, rather than by safety and health considerations. We reject this contention. The evidence does not establish any such motive. Rather, the evidence establishes that the order properly was issued upon a finding of an existing imminent danger.

For these reasons, we affirm the judge's conclusion that the withdrawal order was validly issued. We now turn to the issues raised concerning the judge's award of compensation.

The judge granted the UMWA's application for compensation. He awarded one hour of compensation to the miners who were scheduled to work the 12:01 a.m. to 8:00 a.m. shift on the day that the section 104(a) withdrawal order was issued and four hours of compensation to the miners who were scheduled to work the succeeding 8:01 a.m. to 4:00 p.m. shift. The eight miners who worked the first four and one-half hours of the succeeding shift were awarded three and one-half hours of compensation. For the following reasons, we affirm the judge's conclusion that the miners were entitled to compensation under section 110(a) of the 1969 Act. 4/

Peabody argues that the judge erred in awarding one hour of compensation to the miners who were scheduled to work the 12:01 a.m. to 8:00 a.m. shift, contending that section 110(a) expressly limits the awarding of compensation to miners who are "working during the shift" when a withdrawal order is issued. In the present case, as a result of their previous withdrawal, no miners were in fact working when the order was issued. Therefore, Peabody submits the miners are not entitled to compensation. We disagree. The miners normally scheduled to work the 12:01 a.m. to 8:00 a.m. shift were idled within the meaning of section 110(a) for the last hour of their shift by the section 104(a) withdrawal order. After the section 104(a) withdrawal order was issued, the miners were prevented from working the balance of their shift by that order, even though a section 103(f) order was concurrently in effect. Therefore, the miners are entitled to compensation under section 110(a). See Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (1976); Clinchfield Coal Co., 1 IBMA 33 (1971).

4/ Section 110(a) provided in part:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

Peabody also argues that the judge erred in awarding four hours compensation to miners normally scheduled to work the succeeding 8:01 a.m. to 4:00 p.m. shift because the miners were notified several days beforehand not to report for work. For the reasons stated above, we also reject this argument. When the section 104(a) order was issued, the miners normally scheduled to work the next shift were idled by that order and are entitled to four hours compensation under section 110(a).

With respect to the eight miners who worked the first four and one-half hours of the 8:01 a.m. to 4:00 p.m. shift, Peabody argues that the judge erred in awarding three and one-half hours of compensation. Peabody submits that miners on the shift after a withdrawal order is issued are entitled to be compensated only for the first four hours of the shift. Because these miners worked and were paid for the first four and one-half hours of the shift, Peabody contends that they were not idled by the order and are not entitled to compensation. We rejected a similar argument in Local Union 5869, District 17, UMWA v. Youngstown Mines Corp., 1 FMSHRC 990 (1979). In Youngstown, we observed that section 110(a) does not limit the award of compensation to only the first four hours of the succeeding shift, and held that miners who worked for the first four hours of their shift were entitled to compensation for the final four hours because the withdrawal order was still outstanding at the time that the miners were sent home. See also Local Union No. 3453, District 17, UMWA v. Kanawha Coal Co., No. HOPE 77-193 (September 4, 1979), petition for reconsideration denied, September 25, 1979. Therefore, we reject Peabody's argument and hold that the judge was correct in awarding the eight miners three and one-half hours of compensation.

Peabody further contends that the judge erred in awarding compensation because the UMWA failed to affirmatively show that all of the miners to whom compensation is due elected the UMWA to proceed on their behalf. We find no such requirement in either the 1969 Act or the procedural rules under which the application for compensation was filed. 5/ Furthermore, as it is undisputed that the UMWA was the "authorized representative" of the miners at the mine, to require the affirmative showing suggested by Peabody would be to place an additional procedural impediment to the filing of an application for compensation and frustrate the remedial purpose of section 110(a).

5/ 43 CFR §4.560 et seq. (1977).

Finally, the judge properly determined that interest is awardable under section 110(a) of the 1969 Act. Youngstown Mines Corp., supra. We modify the judge's decision, however, and award interest at a rate of six percent per year from the date compensation was due to the date payment is made. Peabody's argument that the UMWA's failure to specifically request interest until its post-hearing brief was filed renders the interest award improper is rejected. In its application for compensation the UMWA requested "such other relief as may be deemed just and proper." Also, this objection was not raised before the judge even though the UMWA requested interest on November 28, 1977, and the judge's decision was not issued until March 1, 1978. Furthermore, to deny interest would be to award the miners less than the full compensation mandated by section 110(a).

As modified, the judge's decision is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 15, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PITT 79-44-P
STASH BROTHERS, INC.	:	

ORDER

On June 22, 1979, the Commission directed this case and Cut Slate, Inc., No. WILK 79-13-P, for review sua sponte, to consider and set forth our policy on hearing site locations. The Commission's policy on this matter was fully addressed in our decision in Cut Slate, 1 FMSHRC 796 (July 25, 1979). Our concern in directing review has therefore been satisfied, and it is unnecessary to consider this case further. Accordingly, the direction for review is vacated.

Jerome A. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

79-11-10

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 15, 1979

BECKLEY COAL COMPANY	:	
	:	
v.	:	Docket No. HOPE 77-92
	:	IBMA No. 77-52
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C.A. §961 (1979). The administrative law judge found a violation of 30 CFR 75.307-1 which requires in pertinent part that an examination for methane be made at the face of each working place "immediately prior" to the entry of electrical equipment into the working place. He assessed a penalty of $300. We affirm the judge's decision.

On February 4, 1976, a MESA inspector issued a notice of violation of 30 CFR §75.307-1. He had observed a roof bolting machine move into a working place, and had not seen anyone conduct a methane test prior to the machine's entry. The inspector made a methane examination at the face about five minutes before the roof bolting machine was moved into the working place. The section foreman also made a methane examination at the face before telling the roof bolter operator to proceed to the working place. The parties disputed the exact time of the section foreman's test.

Beckley argues that the MESA inspector's methane examination fulfilled the requirement of the regulation. We disagree. The statute imposes a duty upon the operator to comply. 1/

Beckley also argues that the foreman's examination was made "immediately prior" to moving the roof bolter into the working place. The judge disagreed and found that it "was made at some point in time prior to the immediate movement of the roof bolter inby the crosscut, that is, prior to the time that it took the roof bolter to move out of the [old] working place and into the [new] working face", and therefore did not meet the "immediately prior" requirement of the regulation. J.D. at 23. As the judge held, "I find that lapse of time and the time interval does not meet the 'immediately' test of the regulation and constitutes a violation." Id. We agree.

1/ 30 U.S.C. §801(g)(2)(1976)(amended U.S.C.A. 1979). See also 30 U.S.C. §817(c)(amended U.S.C.A. 1979).

79-11-9

Finally, Beckley argues that the notice of violation does not adequately describe a violation, and that consequently it was prejudiced in preparing its defense. We also reject this argument. The notice contained the standard allegedly violated along with a written description of the condition leading to its issuance. 2/ In light of this Beckley was fully apprised of the allegations against it.

Accordingly, the judge's decision is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ The notice of violation stated in relevant part:
James Richardson, roof bolter operator, supervised by Tom Cochran was observed tramming the roof bolting machine into the no. 47 crosscut ... before making an examination for methane ...

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 21, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION	:	
v.	:	Docket No. PITT 79-11-P
THE HELEN MINING COMPANY	:	

DECISION

The question here is whether a mine operator must pay a miners' representative for the time he spends accompanying a mine inspector during a "spot" inspection required by section 103(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. ["the 1977 Act" or "the Act"]. Administrative Law Judge Merlin answered that question in the negative. We affirm.

I.

On April 3, 1978, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) began a lengthy inspection of the entirety of an underground mine operated by Helen Mining. The inspection was completed almost three months later, on June 27, 1978. This type of inspection, which is commonly called a "regular inspection" or "regular entire mine inspection", is required to be made at least four times a year by the third sentence of section 103(a) of the 1977 Act. 1/

On April 6, 1978, the inspector interrupted the regular inspection to conduct a spot inspection required by section 103(i). That section requires the Secretary of Labor to conduct at least one "spot" inspection during every five working days at irregular intervals of every mine that liberates excessive quantities of methane. This was such a mine. The inspector concentrated his efforts on areas where methane could accumulate, and attempted to determine the amount of ventilation in those areas. He tested for methane concentrations with a methanometer and for air velocity with an anenometer; these are generally the only tests made during a spot gas inspection.

1/ Section 103(a) of the 1977 Act is reproduced at pages 2-3, infra.

Before the spot inspection began, the inspector notified Helen Mining officials and representatives of the miners of his intention to interrupt the regular inspection to conduct a spot inspection. Helen Mining's safety director told the miners' representative, Mr. McAfoos, that he would not be paid for the time he spent accompanying the inspector on the spot inspection. Mr. McAfoos decided to accompany the inspector anyway because he thought that his union would compensate him. The spot inspection consumed about five hours; Mr. McAfoos, a mechanic, left after three hours to assist in the repair of a continuous mining machine.

Helen Mining did not include payment in Mr. McAfoos' next pay check for the three hours he spent accompanying the inspector. When the inspector learned of this from Mr. McAfoos, he issued a citation under section 104(a) alleging a violation of section 103(f). When Helen Mining again declined to compensate Mr. McAfoos, the inspector issued a withdrawal order under section 104(b) for failure to abate; the withdrawal order did not require the withdrawal of miners from mining operations, however. The Secretary later sought from the Commission the assessment of a penalty against Helen Mining for its alleged violation of section 103(f), and a hearing was held before Administrative Law Judge Merlin. Helen Mining argued to Judge Merlin that because section 103(f) required "walkaround pay" only for inspections made pursuant to section 103(a), and the spot inspection here was made under section 103(i), it was not required to pay Mr. McAfoos. The Judge concurred in this view; he held that no violation had occurred and he therefore did not assess a penalty. The Secretary filed a petition for discretionary review, which the Commission granted on April 11, 1979. On July 31, 1979, we heard oral argument.

The first and third sentences of section 103(f) of the 1977 Act read as follows:

> [1] Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any...mine made pursuant to the provisions of subsection (a) [of section 103]. ... [3] Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. [Sentence numbers and emphasis added.]

Section 103(a) reads in part as follows:

> [1] Authorized representatives of the Secretary ... shall make frequent inspections and investigations in ... mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of

accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. [Second sentence omitted.] ... [3] In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground ... mine in its entirety at least four times a year, and of each surface ... mine in its entirety at least two times a year. [4] The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. [5] For the purpose of making any inspection or investigation under this Act, the Secretary, or any authorized representative of the Secretary, ... shall have a right of entry to, upon, or through any...mine. [Sentence numbers added.]

Before Judge Merlin, the Secretary relied upon an MSHA interpretative bulletin, 43 Fed. Reg. 17546 (1978), to argue that the spot inspection here was made pursuant to section 103(a) because it was made for purposes stated in the first sentence of section 103(a)--to determine whether imminent dangers or violations existed. The Judge, however, concluded that if this view were adopted, all inspections would be inspections under section 103(a) and that the phrase "pursuant to the provisions of [section 103(a)]" in the first sentence of section 103(f) would be rendered meaningless. He held that the MSHA interpretative bulletin was not binding upon him, 2/ and he further found that the Secretary's position was contrary to a clear statement on this point in the legislative history of section 103(f).

II.

We examine at the outset the Secretary's objection that Judge Merlin failed to accord "proper deference" to MSHA's interpretative bulletin. The Secretary relies primarily on Certified Color Manufacturers Ass'n v. Mathews, 543 F.2d 284, 294 (D.C. Cir. 1974), where the court stated that "review is guided by the considerable deference traditionally owed the interpretation of a statute by the head of the agency charged with its administration", and NYS Department of Social Services v. Dublino, 413 U.S. 405 (1973), where the Supreme Court observed that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." Id. at 421, quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); and Dandridge v. Williams, 397 U.S. 471, 481-482 (1970).

2/ The Judge cited Bituminous Coal Operators Ass'n v. Marshall, 82 F.R.D. 350, 353 (D.D.C. 1979), appeal docketed, No. 79-1279 (D.C. Cir., March 13, 1979).

The difficulties with the Secretary's argument are that it ignores the language and structure of the 1977 Act, that it fails to recognize the proper roles of the Commission and the Secretary, and that it would, if adopted, frustrate the purposes for which Congress established the Commission as a wholly independent agency. Under the Secretary's view, the Commission could not study a problem afresh and make an independent judgment on matters of law and policy. Its task would be little more than to find the facts, accord considerable deference to the Secretary's position, and determine whether there are compelling indications that his construction of the 1977 Act is wrong. Congress, however, invested the Commission with the authority to decide questions of both law and policy (sections 113(d)(2)(A)(ii) and (d)(2)(B)), and it intended that the Commission do so independently.

The Senate committee that drafted the bill from which the 1977 Act was largely derived, S. 717, 95th Cong., 1st Sess. (1977), considered several alternatives to the establishment of an independent Commission. It considered and rejected the arrangement under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 (1976)(amended 1977)["the 1969 Act"], in which adjudication as well as prosecution, investigation, and standards-making were all placed in the hands of the Secretary of the Interior. Although the Secretary of the Interior had delegated his adjudication responsibilities under the 1969 Act to the Office of Hearings and Appeals and the Board of Mine Operations Appeals, the Board nevertheless was not independent of the Secretary of the Interior. 3/

The Senate committee followed instead the example that Congress had set under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. That statute established the Occupational Safety and Health Review Commission, which has been recognized as an independent

3/ For example, the Board held that it was not free to apply its own precedent in the face of a Secretarial Order expressing a contrary view. Republic Steel Corp., 5 IBMA 306, 309-311, 1975-76 OSHD ¶20,233 (1975) ("policy of the Department, as established by the Acting Secretary"), rev'd on other grounds, 581 F.2d 868 (D.C. Cir. 1978), withdrawal order aff'd on remand, 1 FMSHRC 5, 1 BNA MSHC 2002, 1979 OSHD ¶23,455 (1979), pet. for rev. filed, No. 79-1491 (D.C. Cir., May 11, 1979); Cowin & Co., 6 IBMA 351, 365, 1976-77 OSHD ¶21,171 (1976), remanded on other grounds, No. 76-1980 (D.C. Cir., May 26, 1978), withdrawal order aff'd, 1 FMSHRC 20, 1 MSHC 2010, 1979 OSHD ¶23,456 (1979). When the Board decided a group of major cases against the Mining Enforcement and Safety Administration, the Secretary of the Interior stayed the Board's decisions and proceedings under the "supervisory powers" he reserved to "render the final decision [in any case]." 43 CFR §4.5 (1977); Secretarial Order of January 19, 1977, staying effect of Eastern Associated Coal Corp., 7 IBMA 133, 1976-77 OSHD ¶21,373 (1976)(on reconsideration en banc), and staying proceedings in nine other cases.

agency with a law- and policy-making role. See, e.g., Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1262, 1266-1267 (4th Cir. 1974). The Senate committee bill thus established this Commission under the 1977 Act as an independent agency with an express policy role. 4/ Senator Williams, the chief architect of the Senate bill, confirmed the important role of the new Commission, when, while introducing the Senate bill, he stated to the Senate that under the bill "[t]he procedure for determining operator responsibility and liability is assigned to a truly independent... Commission...." 1977 Legis. Hist. at 89. 5/

The cases cited by the Secretary are inapposite. They deal with the deference that federal courts often accord to those administrative agency heads who alone have been entrusted by Congress with all administrative and policy functions under a statute. The Commission, however, is not entirely in the position of a court and the Secretary is not in the position of most agency heads. Inasmuch as the 1977 Act divides administrative and policy responsibilities between the Commission and the Secretary, neither has exclusive expertise in the subject matter covered by the 1977 Act. See our decision in Old Ben Coal Company, No. VINC 79-119 (October 29, 1979)(slip op. at 5).

4/ See S. Rep. 95-181, 95th Cong., 1st Sess., at 47 (1977)["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 653 (1978)["1977 Legis. Hist."].

5/ We also note Senator Williams' statement during our confirmation hearings as indicative of the Commission's intended role. Senator Williams stated:

* * *

> One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility for assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.
>
> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

* * *

Nomination Hearing, Members of Federal Mine Safety and Health Review Commission, Before the Senate Committee on Human Resources, 95th Cong., 2d Sess., 1 (1978).

Our position is buttressed by the conclusion reached by the Fourth Circuit when it examined the similar relationship between the Occupational Safety and Health Review Commission and the Secretary of Labor. In Gilles & Cotting, supra at 5, the court rejected an attempt by the Secretary to reduce that Commission to "little more than a specialized jury, an agency charged only with fact finding." It found that that Commission "was designed to have a policy role and its discretion therefore includes some questions of law." 504 F.2d at 1262. The Occupational Safety and Health Review Commission has itself adopted a similar view of its role under OSHA. United States Steel Corp., 5 BNA OSHC 1289, 1294-1295, 1977-78 OSHD ¶21,795 (1977).

Finally, the Secretary relies upon the legislative history of the 1977 Act for support for his position. Although that history states that the Commission is to accord weight to the Secretary's views, it does not support the more far-reaching result that he seeks here. The Senate committee report states only that because the Secretary "is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. at 49; 1977 Legis. Hist. at 637. The most apposite and well reasoned precedent does not require the Commission to accord to the Secretary's view of the statute the degree of deference he claims here, however. Moreover, the Senate committee did not state that the Secretary's views are entitled to "considerable deference" or are to be controlling unless there are compelling indications that they are wrong. The Senate committee stated only that "weight" is owed. The Secretary's broader reading is inconsistent with the Senate committee's and Congress' intention that the Commission be truly independent of the Secretary and with the policy role that the 1977 Act entrusted to the Commission.

In accordance with this expression of congressional intent, we will accord special weight to the Secretary's view of the 1977 Act and the standards and regulations he adopts under them. His views will not be treated like those of any other party, but will be treated with extra attention and respect. Although this weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution, or standards-making activities, it will not rise to the inappropriate level the Secretary has sought here. The issue in this case is one of statutory interpretation. Resolution of such questions is a primary role of the Commission. With this in mind, we now turn to the merits of this case.

III.

The starting point of our discussion of this matter of first impression is the language of the statute. Southeastern Community College v. Davis, 99 S.Ct. 2361, 60 L.Ed. 2d 980, 987-988 (1979). Both parties claim that the plain language of the statute unambiguously supports their opposing views. 6/ We find that the statute is ambiguous and does not clearly favor either position.

As Judge Merlin observed, adoption of the Secretary's view would render meaningless the phrase "pursuant to the provisions of subsection (a)" in the opening sentence of section 103(f). The Secretary has also offered no satisfactory explanation of why Congress used the phrase "any inspection" in sections 103(a), 104(g)(1) and 107(a) of the 1977 Act, why it did not carry over that phrase from the walkaround provision of the 1969 Act, 7/ and why it instead used "pursuant to the provisions of subsection (a)" in the 1977 Act.

Even if we were to overlook this infirmity in the Secretary's argument, the text and structure of the 1977 Act would still not clearly support his view. Several different types of inspections are described in sections of the 1977 Act other than section 103(a). See sections 103(g)(1), 103(i), 202(g), and 303(x). 8/ The only inspection that section 103(a) describes specifically, however, is the regular inspection, which is not described elsewhere in the Act. Thus, even if the Secretary were correct in arguing that the third and fourth clauses of the first sentence of section 103(a) encompass all types of inspections, one could still reasonably believe that the phrase "pursuant to the provisions of subsection (a)" in section 103(f) was intended to accord the right to walkaround pay to the only inspection specifically and exclusively described in section 103(a)--the regular inspection.

6/ Inasmuch as both parties also claim that the legislative background or history favors their positions, we need not in any event consider only the plain language of the Act no matter how clear it may appear on superficial examination. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 9-10 (1976).

7/ Section 103(h) of the 1969 Act read as follows:

> At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

8/ Section 103(g)(1) requires the Secretary to conduct a "special" inspection if a miner or miners' representative has reasonable grounds to believe that a violation or imminent danger exists, and gives written notice to the Secretary. Section 103(i) requires the Secretary to make "spot" inspections at stated intervals of mines liberating excessive quantities of explosive gases, of mines in which a gas ignition or explosion has occurred in the past five years that caused death or serious injury, and of mines with some other especially hazardous condition. Section 202(g) requires the Secretary to make frequent "spot" inspections to obtain compliance with the health standards in Title II of the Act. Section 303(x) requires the Secretary to inspect a formerly inactive or abandoned mine before mining operations commence.

The construction offered by the operators is also problematic, however. Helen Mining conceded during oral argument that if its construction of the statutory language is followed, miners would have no right to accompany inspectors even without pay in other than regular inspections. Under this construction, miners would have fewer walkaround rights under the 1977 Act than coal miners had under the 1969 Act. We share the Secretary's grave doubts that this was what Congress intended.

The legislative history of the walkaround provisions of the 1977 Act clarifies the matter, however. Although a walkaround pay right had been written into the Senate bill, the House bill merely continued the right in the 1969 Act to accompany the inspector and did not expressly provide for walkaround pay. 9/ The conflicting bills were referred to a conference committee which reported its bill to the House and Senate. The conferees' written report stated only that "[t]he conference substitute conforms to the Senate bill." 10/ The conference committee did, however, change the opening sentence of what is now section 103(f) by striking the phrase "physical inspection of any mine under subsection (a)" and substituting "physical inspection of any coal or other mine made pursuant to the provisions of subsection (a)". 11/

Although there are no definite indications of how the Senate construed the conference or Senate bills on this point, there is clear evidence of how the Senate and House conferees construed the conference bill. Representative Perkins, the chief House conferee and the chairman of the House committee that drafted the House bill, made the customary oral report to the House describing the agreement reached by the conference committee. His statement on this point was as follows:

* * *

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference [bill] that seems to be somewhat ambiguous.
>
> Section 103(a) of the conference [bill] provides [in part] that....

9/ S. 717, §104(e)(as passed by Senate), Legis. Hist. at 1115; H.R. 4287, 95th Cong., 1st Sess., at 78-81 (1977)(as reported), reprinted in 1977 Legis. Hist. at 266, 343-346; same, as substituted for Senate bill, 1977 Legis. Hist. at 1260, 1263-1265.
10/ S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. (1977)["Conf. Rep."]; reprinted in 1977 Legis. Hist. at 1279, 1323.
11/ Conf. Rep. at 10; 1977 Legis. Hist. at 1288.

[i]n carrying out the requirements of clauses (3) and (4)--concerning imminent dangers or compliance with standards--the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year and of each surface coal or other mine in its entirety at least two times a year.

In addition to the regular inspections of each mine in its entirety as specified in section 103(a), section 103(g)(1) provides that whenever a representative of a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further, section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.

Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference [bill] reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-[inspection] conferences, at no loss of pay only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety including pre- and post-inspection conferences.

* * *

Section 103(h) of the 1969 act provided generally that--

At the commencement of any inspection ... the authorized representative of the miners at the mine ... shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Since the conference [bill] does not refer to any inspection, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator.

* * *

1977 Legis. Hist. at 1356-1358 (emphasis added). The thrust of Mr. Perkins' statement is that it was the intention of the Senate and House conferees to preserve the right under the 1969 Act to accompany the inspector on all inspections, but to accord a walkaround pay right for only regular inspections.

The Secretary argues that Mr. Perkins' statement cannot be resorted to for the purpose of construing a statute contrary to its plain terms or its purpose. He also argues that Mr. Perkins' statement should be disregarded because it is only "an isolated remark by a single Congressman".

We are unable to share this reasoning. First, the literal language of section 103(f) does not clearly favor the Secretary's interpretation. Second, the modern rule is that legislative history can be resorted to even if statutory language is thought to be clear. See note 6, supra. Third, Representative Perkins was not merely setting forth his personal opinion of how section 103(f) should be interpreted. He was stating the intention of the conference committee, and was therefore speaking as more than a "single Congressman". Moreover, as the Secretary and others familiar with mine safety and health legislation are well aware, Representative Perkins has always been more than a "single Congressman" in this field. As a principal sponsor of both the 1969 and 1977 Acts, chairman of the House Committee on Education and Labor during their consideration and passage, and chief conferee for the House when both statutes were given final form in conference committees, Mr. Perkins was instrumental in the passage of the 1969 Act and highly influential in the passage of the 1977 Act. Mr. Perkins' statement was clear, detailed, and prepared with obvious care. It was carefully delivered solely to inform the House of the conferees' agreement. We also note that the Secretary has not pointed to, nor have we found, a subsequent statement by any conferee or other member of Congress that the walkaround pay right extends beyond regular inspections, or disavowing Mr. Perkins' statement of the conferees' intention. Compare Train v. Colorado Public Interest Research Group, 426 U.S. 1, 23 (1976), with American Smelting & Refining Co. v. O.S.H.R.C., 501 F.2d 504, 510 (8th Cir. 1974).

We conclude that Mr. Perkins' statement of the conference committee's intention is dispositive here. Not only is Mr. Perkins' statement the only passage in the legislative history that speaks specifically to this question and clarifies an ambiguity in the statute,

but, more importantly, it reflects the conferees' understanding of the walkaround pay right and is therefore the basis upon which the conferees agreed to it. 12/ Inasmuch as our purpose is to ascertain and effectuate the legislative intent (Philbrook v. Glodgett, 421 U.S. 707, 713 (1975)), and Mr. Perkins' clear and unequivocal statement of the conference committee's understanding is the best guide to that intent, we follow it here.

Accordingly, the judge's decision is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Marian Pearlman Nease, Commissioner

12/ When the two Houses of the 95th Congress were considering mine safety and health legislation, there were not, as there sometimes is, identical or closely similar bills reported out of committee in each House. The House and Senate bills were in many respects quite different. On the matter of walkaround pay, they were very different, for the bill passed by the House had no walkaround pay provision. When these very different bills were referred to a conference committee, the conferees were faced with reconciling many important differences between the two bills. The complexity of the task is indicated by the length and detail of the 31-page report. It is therefore quite understandable that not all conferees' agreements or understandings were discussed in the conference report, especially on a point that did not go to the heart of the proposed legislation. The conference report itself stated that the "principal differences between the Senate bill, the House [bill] and the [conference bill] are noted below." Conf. Rep. at 37; 1977 Legis. Hist. at 1315 (emphasis added). And inasmuch as the House conferees largely receded and agreed to the Senate bill over the House bill, it is quite understandable that when Mr. Perkins introduced the conference bill to the House he felt it necessary to make to the House a more detailed presentation of the conferees' actions.

Jestrab, Commissioner, dissenting:

In the Petition for Discretionary Review granted by Order dated October 29, 1979 in Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Arnold J. Sparks, Jr., Applicant v. Allied Chemical Corporation, Respondent, Docket No. WEVA 79-148-D (September 27, 1979), now pending before the Commission, the Petitioner, Allied Chemical Corporation argued that that case and Kentland-Elkhorn Coal Corporation v. Secretary of Labor, PIKE 78-339 (March 8, 1979), likewise pending before the Commission, and this case contain a common question of law. I think this is correct. Allied argued extensively in its petition that based upon a reading of the statute and its legislative history, the decision of Judge Merlin here was correct, and that the decision of Judge Kennedy in Allied was wrong. I disagree. I dissent here for reasons set out in the Decision and Order of Administrative Law Judge Kennedy in Allied Chemical Corporation above. For convenience of counsel in this case, the Commission's administrative law judges, and the Bar the portion of Judge Kennedy's opinion which I think relevant, follows:

> ....
>
> At issue in this litigation is the extent of miner's walkaround rights, i.e., the right to accompany an inspector and to receive normal compensation while doing so. This right is recognized in section 103(f), 30 U.S.C. §813(f), of the Act, which provides that a representative of the miners shall be given an opportunity to accompany an inspector for the purpose of aiding in the "inspection of any coal or other mine made pursuant to [section 103(a)]." 2/ Any such representative of the miners who is also an employee of the operator "shall suffer no loss of pay during the period of his participation in the inspection." Respondent contends that there are certain types of inspections to which the right to compensation does not attach, in particular, spot inspections for extrahazardous conditions pursuant to the mandate of section 103(i).

2/ Section 103(f), 30 U.S.C. §813(f), of the Act provides:

"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also

> The scope of the Secretary's mine inspection authority is delimited by section 103(a), 3/ which directs "frequent" inspection of all mines for four purposes: (1) to obtain information relating to health and safety conditions and the causes of accidents; (2) to gather information relating to mandatory standards; (3) to determine whether imminent dangers exist; and, (4) to determine compliance with mandatory standards, citations, orders, or decisions. With respect to imminent dangers and compliance, the Secretary is directed to inspect each mine "in its entirety at least" four times per year for underground mines and two times per year for surface mines. In addition to this minimum requirement for complete inspections, the Secretary is directed to establish guidelines for additional inspections based on his experience under the Mine Act "and other health and safety laws."

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fn. 2 (continued)

an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

3/ Section 103(a), 30 U.S.C §813(a), of the Act reads in pertinent part:

"Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this

Thus, it is apparent that the substantive authority for carrying out inspections for the purpose of obtaining information and insuring compliance is to be found in section 103(a). The regular compliance inspections are to be carried out frequently, but, in no event less than two or four times yearly.

In addition to the minimum requirements for compliance inspections, two other subsections establish special procedures for triggering inspections for compliance and information. Section 103(g)(1) 4/ provides that at the request of a representative of the miners who has reasonable grounds to believe that a violation or imminent danger exists an immediate special inspection may be had. Section 103(i) 5/ provides for "spot" inspections for methane accumulations in gassy mines and for "other especially hazardous conditions" on an accelerated schedule.

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fn. 3 (continued)

subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws."

4/ Section 103(g)(1), 30 U.S.C. §813(g)(1), of the Act reads in pertinent part:

"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."

5/ Section 103(i), 30 U.S.C. §813(i), of the Act reads:

"Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his

Respondent takes the position that the compensation right under section 103(f) extends only to the minimum of four mandatory inspections "of the mine in its entirety," and that any other or additional inspections are without the coverage of the section. Maintaining that these "regular" inspections are the "only inspections made pursuant to Section 103(a)" (Brief, p. 5), respondent asserts that only a representative of miners participating in such a "regular" inspection is entitled to be paid. Respondent claims that since the inspection giving rise to the instant complaint was made pursuant to section 103(i), and since "there is no requirement in Section 103(i) that the operator pay a representative of miners for participation in such a spot inspection" (id.), the miner Sparks is not entitled to compensation.

The Secretary, on the other hand, takes the position that the language of the compensation provision of section 103(f) clearly and unambiguously encompasses all inspections carried out for the purposes enumerated in the four clauses of the first sentence of section 103(a). Relying on the Interpretative Bulletin of April 25, 1978, 43 F.R. 17546, the Secretary maintains that the "inclusion of a statutory minimum number of inspections at

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fn. 5 (continued)

authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, 'liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals."

each mine is no more than an additional requirement, clearly directed at the Secretary, which does not affect the participation right." 43 F.R. at 17547. Therefore, the Secretary concludes that because they are carried out for the purpose of obtaining information or determining whether imminent dangers, violations or especially hazardous conditions exist, the inspections triggered by sections 103(i) and (g)(1) "are clearly conducted 'pursuant to' section 103(a)." Id.

In support of its position, respondent cites two previous decisions by administrative law judges which concluded that operators are not required to pay employees who accompany MSHA inspectors on other than the "regular", i.e., entire mine inspections. Kentland-Elkhorn Coal Corporation v. Secretary of Labor, PIKE 78-339 (March 8, 1979), appeal pending; Secretary of Labor v. Helen Mining Company, PITT 79-11-P (April 11, 1979), appeal pending.

In Kentland-Elkhorn, an MSHA electrical specialist conducted an inspection of the operator's preparation plant. At the time of this inspection, another inspector was in the process of carrying out one of the "regular" inspections of the mine in its entirety. That inspector was accompanied by a miner who was paid. The electrical specialist was also accompanied by a representative of the miners, and upon the operator's refusal to pay that miner, a citation and subsequently a withdrawal order issued. In a review proceeding, the operator contended that section 103(f) only grants miner representatives the right to participate in an inspection without suffering loss of pay during a "regular" inspection of the entire mine and since the inspection at issue was a spot electrical inspection, it had properly refused to pay the miner. The administrative law judge agreed with these contentions and held that the right to participate without loss of pay is limited to "regular" inspections of the entire mine.

A similar conclusion was reached in Helen Mining Company, supra, with respect to a spot inspection required by section 103(i). Since the mine involved in that case was particularly gassy, it had to be frequently inspected for possible accumulations of methane. The inspector involved had been in the process of making one of the "regular" inspections of the mine in its entirety during the previous 3 days, but he interrupted this inspection so that he could investigate areas where accumulations of methane might exist in order to determine whether those areas were adequately ventilated. The inspector was informed that the representative of the miners who accompanied him on the methane inspection would not be paid, whereupon a citation and subsequently a withdrawal order issued. At the hearing, the operator contended that section 103(f) only requires that the miner representative who participates in an inspection of the entire mine must be paid. 6/ Again, the administrative law judge agreed with these contentions and vacated the citation and order.

Both these cases turned on the authority ascribed to certain remarks made by Congressman Perkins, Chairman of the Committee on Education and Labor. These remarks were made after the Conference Committee had made its

6/ The operator's argument proves too much, because if accepted it would lead to the conclusion that the miner initially requested must accompany the inspector during the whole of the entire mine inspection. Recognizing that in many cases such complete inspections take a considerable amount of time, even weeks or months, it is unrealistic to assume that one particular miner would be assigned to accompany the inspector exclusively, especially considering that no one miner possesses the expertise to assist the inspector in investigating all the areas of a large and complex mine.

final report and 21 days after the Senate had passed the bill. 7/ In attempting to clarify what he considered to be an ambiguity in this aspect of the Conference Report, he stated that:

> Section 103(f) provides that a miner's representative * * * shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the federal inspector, including pre- and post-conferences, at no loss of pay only during the four regular inspections of each underground mine in its entirety * * *.
>
> Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess (July 1978) at 1357 (hereinafter cited as Leg. Hist.)

7/ The Conference Committee voted to accept the Conference Report on October 3, 1977 (Leg. Hist. at 1279), the Senate vote to accept the Conference Report on October 6, 1977 (Leg. Hist. at 1347), and a Concurrent Resolution to effect corrections was agreed to on October 17, 1979 [sic] (Leg. Hist. at 1351). It was not until October 27, 1977, that Congressman Perkins made his remarks to the House. (Leg. Hist. at 1354). There is no evidence that Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate.

This seemingly unequivocal statement concerning the intended scope of section 103(f) was, however, followed by a comparison of the cognate provisions of the 1969 Act which indicates some possible confusion on Congressman Perkins' part. He recognized that section 103(a) of the 1969 Act did not include the provision directing the Secretary to "develop guidelines for additional inspections of mines based on criteria including, but not limited to, * * * his experience under this act and other health and safety laws." (Emphasis added.) He then correctly pointed out that the participation right section of the 1969 Act, section 103(h), provided that a representative of the miners may accompany an inspector on "any" inspection, but that the 1969 Act did not have a compensation provision. He then went on to state:

> Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 fact, but rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the Act. [Emphasis added.]

Leg. Hist. at 1358.

Thus, a fair reading of the whole of Congressman Perkins' statement concerning the seeming ambiguity found in section 103(f) indicates that his real concern was that the right to pay for exercise of the walkaround right not be extended to the "additional inspections" permitted under the new section 103(a), but would be limited to the "frequent inspections" authorized and required by the first sentence of that section. Thus, it appears that when Congress limited the right to pay to inspections "pursuant to subsection (a)," it may have intended to exclude from that right inspections made under

guidelines issued by the Secretary calling for "additional inspections," i.e., inspections other than those mandated by the statute. In other words, there are two categories of inspections, statutory section 103(a) inspections and nonstatutory Secretarial inspections. Congress may well have wished to protect the operators from an unlimited expansion of the right to pay based on "additional inspections" authorized only by the Secretary and particularly where they were for the purpose of aiding in the exercise of his responsibilities under "other health and safety laws."

Indeed, the greater weight of the legislative history supports this interpretation. First, it should be noted that the provision at issue was included in the Senate version of the bill and the Joint Explanatory Statement of the Conference Committee clearly indicates that "to encourage miner participation * * * one such representative of miners, who is also an employee of the operator, [shall] be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions. The conference substitute conforms to the Senate bill." Leg. Hist. at 1323. It is significant to note that nowhere in the Conference committee statement is the purported limitation on the compensation right advanced by Congressman Perkins discussed or alluded to.

In the Senate's consideration of the 1977 Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits, one of the managers of the bill, explained the critical importance of the walkaround right as part of a comprehensive scheme to improve both safety and productivity in the mines:

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.

> In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.
>
> In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property to go around with an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

Leg. Hist. at 1054-1055.

Senator Williams, Chairman of the Committee on Human Resources, also discussed the importance of the walkaround right in the context of improving safety consciousness on the part of both miners and management:

> It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

Leg. Hist. at 616-617.

In light of the broad policy expressed in the Act of protecting miners and making inspections more effective, it is difficult to understand why the isolated remarks of Congressman Perkins have been accorded so much weight. In contrast, similar remarks by other members of the House and Senate are conspicuous by their absence. It would seem that if Congress had intended by section 103(f) to create two separate categories of statutory walkaround rights, one compensable and one non-compensable, there would have been at least some debate on this departure from the general scheme of the Act. Otherwise, there exists an arguably invidious discrimination.

In any event, it is questionable whether resort to legislative history has a place in the application of the statutory language in question. T.V.A. v. Hill, 437 U.S. 153, 184 n. 29 (1978). On its face, section 103(f) is clear and unambiguous, and therefore reliance on the explanatory comments of a single Congressman appears unnecessary. Schiaffo v. Helstoski, 492 F.2d 413, 428 (3rd Cir. 1974).

It has been consistently held that as a matter of statutory construction it is error to place undue emphasis on a portion of the legislative history where to do so sacrifices the object of the legislation. "Not even formal reports - much less the language of a member of a committee - can be resorted to for the purposes of construing a

a statute contrary to its plain terms." Committee for Humane Legislation v. Richardson, 414 F. Supp. 297, 308 (D.D.C. 1976), modified 540 F.2d 1141 (D.C. Cir. 1976); citing Pennsylvania Railroad Company v. International Coal Mine Company 230 U.S. 184, 199 (1912); F.T.C. v. Manager, Retail Credit Company, 515 F. 2d 988, 995 (D.C. Cir. 1975). It must be remembered that the proper function of legislative history is to resolve ambiguity, not to create it. United States v. Missouri Pacific Railroad Company, 278 U.S. 269, 278 (1929); Montgomery Charter Service v. W.M.A.T.A., 325 F.2d 230, 233 (D.C. Cir. 1963); Elm City Broadcasting Corporation v. United States, 235 F.2d 811, 816 (D.C. Cir. 1956).

It should be noted that these sections of the Mine Safety Act serve a broad remedial purpose, and as such should be given a liberal construction, and any asserted exceptions to those provisions should be given a strict, narrow interpretation. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 430 U.S. 938 (1975). Finally, when a statutory interpretation that promotes safety conflicts with one that serves another purpose, the first must be preferred. District 6, UMWA v. IBMA, 562 F.2d 1260, 1265 (D.C. Cir. 1977).

Accordingly, whether based on an analysis of the relevant legislative history or through application of accepted canons of statutory construction, I find that the reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of that subsection, and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of that subsection.

....

I would reverse the decision of the Administrative Law Judge and remand this case for further proceedings.

Frank F. Jestrab, Commissioner

Commissioner Lawson, dissenting:

Although I am not in disagreement with my colleague, Commissioner Jestrab, my analysis of the case before us is somewhat different from that set forth by Judge Kennedy in Secretary of Labor et al v. Allied Chemical Corporation, Docket No. WEVA 79-148-D. I am therefore setting forth my individual reasons for joining in the dissent from the views of the majority herein.

My colleagues in the majority conclude that the right to walkaround pay does not extend to all inspections made to discover violations or imminent dangers. Their holding is inconsistent with both the language and the purpose of the 1977 Act, and rests upon a single statement in the legislative history that, in the circumstances here, cannot be considered authoritative. I would hold that the right to walkaround pay applies to all inspections made to discover violations or imminent dangers and would accordingly reverse and remand this case for further proceedings.

The language of section 103(f) is straightforward. It gives miners' representatives the right to accompany the inspector "during the physical inspection of any ... mine made pursuant to the provisions of subsection (a)" of section 103, and guarantees that the representative of miners "shall suffer no loss of pay during the period of his participation...." Section 103(f) thus accords a right to compensation coextensive with the right to accompany. 1/ The majority's bifurcation of these rights is flatly inconsistent with this statutory language.

1/ The only exception to this principle is of no consequence here. Section 103(f) contains an express limitation on the number of miners' representatives entitled to walkaround pay when more than one miners' representative accompanies an inspection party.

The question is, then, how broad is the right to accompany the inspector? Helen Mining maintained during oral argument that the right to accompany does not extend to all inspections. None of my colleagues accept this reading of the statute, nor do I. Like them, I do not believe that Congress intended to narrow the broad right to accompany granted by the 1969 Act. The 1969 Act's walkaround provision granted a right to accompany the inspector on all inspections. The purpose of the 1977 Act was to promote rather than weaken mine safety and health, and to encourage rather than discourage miner participation in inspections. The Senate committee that drafted the walkaround provisions of the 1977 Act stated not only that the right to accompany in the 1977 Act is "based on that in the [1969] Coal Act" (S. Rep. at 28; 1977 Legis. Hist. 616)(reproduced at 28, infra), but that the purpose of the 1977 Act was to establish "a strengthened mine safety and health program." S. Rep. at 13; 1977 Legis. Hist. at 601 (emphasis added). 2/ The phrase "pursuant to the provisions of subsection (a)" should be read in light of this indisputable congressional purpose. Inasmuch as there can be no dispute that this was not intended to limit the miner's right to accompany the inspector, it cannot be read to limit the right to walkaround pay.

Other considerations buttress this reading of the Act. Even if I were to consider the language of the 1977 Act without reference to the 1969 Act, or to the expressed congressional intention to strengthen the mine safety laws, I would not construe the phrase "pursuant to the provisions of subsection (a)" as has Helen Mining. First, the phrase appears to be a simple cross-reference to the provision that describes all inspections--section 103(a)--rather than a limitation. Second, even if considered as a limitation, the inspection here is not excluded by that phrase. The Secretary argues that simply because a type of inspection is specifically treated in another provision of the Act does not mean that it is outside section 103(a). I agree. Although the spot gas inspection in this case was required to be conducted with a certain frequency by section 103(i), it was conducted "pursuant to the provisions of subsection (a)" since its purpose was to determine "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards."

2/ The legislative history relied on by my colleagues confirms that no diminution of the right to accompany was intended. See 1977 Legis. Hist. at 1358, reproduced in the majority decision at 9.

This point is best illustrated by supposing that section 103(i) did not exist at all. In that case, if the Secretary were to adopt a schedule of spot gas inspections identical to that mandated by section 103(i), there would be no question that the inspection fell within the provisions of section 103(a). Yet, because Congress decided instead to enhance miner health and safety by statutorily mandating the frequency of such inspections, the right to walkaround pay is limited. This is senseless. Not only does this result bear no relationship to the purpose for the inclusion of section 103(i), it contravenes that purpose. Section 103(i) covers not only gassy mines, which present great dangers of fires and explosions and in which ventilation and methane control are critical, but also mines in which there are "some other especially hazardous conditions". The majority has thus discouraged miner participation in inspections of those mines that are among the most dangerous to miner health and safety. Under the majority's holding, a miner who requests a special inspection pursuant to section 103(g)(1), would not be paid for participating in the inspection to, for example, personally show the inspector the condition that he or she requested be inspected, or explain why the miner believed the condition is dangerous.

My colleagues maintain that section 103 is ambiguous and does not "clearly" support the Secretary's position. I find it plain and unambiguous on its face and would therefore deem it unnecessary to look at legislative history as a guide to its meaning. 3/ I do so here only because the majority relies almost entirely on a statement by Congressman Perkins (supra) to support its position. That some sections of the 1977 Act use the phrase "any inspection" merely reflects the different sources of the statutory language,4/ rather than ambiguity. That the language of the 1969 Act was not copied precisely, and that section 103(a) refers specifically and exclusively to only regular inspections, are ambiguities only if one believes--which the majority apparently does not--that Congress intended to accord miners fewer walk-around rights under the 1977 Act than under the 1969 Act. When section 103 is read in historical context and in consonance with the entire statute, these alleged ambiguities disappear.

3/ TVA v. Hill, 437 U.S. 153, 184 n.29 (1978)

4/ Much of section 103(f), including the phrase "under subsection (a)" in the Senate bill, was derived from 29 U.S.C. §657(e), section 8(e) of the Occupational Safety and Health Act of 1979, 29 U.S.C. §651 et seq. The last sentence of section 103(a) and the first sentence of section 107(a) were derived from sections 103(b)(1) and 104(a) of the 1969 Act.

The authoritative portions of the legislative history of section 103(f) also support the Secretary's interpretation of the walkaround pay right. The Senate committee that drafted the walkaround pay provisions of the 1977 Act stated in its report the reasons for according the right to walkaround pay:

> The right of miners and miners' representatives to accompany inspectors.
>
> Section 104(e) contains a provision based on that in the [1969] Coal Act, requiring that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection. The opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties. The Committee also recognizes that in some circumstances, the miners, the operator or the inspector may benefit from the participation of more than one representative of miners in such inspection or conferences, and this section authorizes the inspector to permit additional representatives to participate.

S. Rep. at 28-29; 1977 Legis. Hist. at 616-617. The Senate report does not limit either the rights to accompany or to walkaround pay. Indeed, it states that the right to accompany is "based on that in the [1969] Coal Act", which, as noted above, extended to all inspections. It states a legislative purpose applicable to all inspections and nowhere evidences so much as a suggestion that the right to walkaround pay is not coextensive with the right to accompany.

The conference committee's report summarized the Senate bill's provisions, and declared that its purpose was "to encourage miner participation". The committee made only a technical, non-substantive change in the first sentence of section 103(f), and stated that "[t]he conference [bill] conforms to the Senate bill." Conf. Rep. at 45; 1977 Legis. Hist. at 1323. 5/

These Senate and conference reports therefore provide no support for the majority position. In short, the Act makes inseparable the right of miners to accompany inspectors on walkaround and to receive pay.

5/ The conference report states:

> Both the Senate bill and the House amendment contained provisions permitting miners' representatives to accompany inspectors on mine inspections. The House amendment did so by adopting Section 103(h) of the Coal Act. The Senate bill permitted miners' representatives to participate not only in the actual inspection of the mine itself, but also in the pre- or post-inspection conferences held at the mine. Under the House amendment this right was limited to the actual inspection of the mine. The Senate bill required the Secretary to consult with a reasonable number of miners if there was no authorized representative of miners. The House amendment did not contain this protection for unorganized miners. The Senate bill permitted the Secretary's representative to permit more than one miner representative to participate in such inspection and conferences, and further, to encourage miner participation, provided that one such representative of miners, who is also an employee of the operator, be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions.
>
> The conference substitute conforms to the Senate bill.

The majority, however, reaches beyond the Act and even the Senate and conference reports. It seizes upon a statement made by Representative Perkins on the floor of the House and construes the Act in a manner inconsistent with both its language and purpose.

Assuming arguendo that Mr. Perkins' statement reflected the intent of the conference committee, it does not follow that those views are determinative here. If the views of the conference committee are presented to or are available to both Houses before they vote to accept a conference bill, such views would no doubt be of more significance than is here the case. The joint explanatory statement in the conference report, or the oral presentation by the chief conferee of each House, ordinarily provides each House with an explanation of the conferees' agreement. 6/ The members of each House can therefore be informed of the reasons why the final bill has been shaped in a certain way or resembles a bill of one House. It is primarily for this reason that in the ordinary case the intention of the conferees can be safely said to be a convincing guide to the intention of the entire Congress.

This is not the ordinary case, however. The conference report did not mention the agreement later attested to by Representative Perkins; to the contrary, it conveyed the distinct impression that the broad walkaround pay right granted by the Senate bill was unchanged, for it stated that the conference bill "conforms to the Senate bill." Senator Williams, the primary architect of the Senate bill and the chief conferee for the Senate, did not mention the point during his presentation of the conference bill to the Senate. The conference bill itself could not plausibly be said to have put the Senate on notice of the conferees' agreement because the language of the conference bill unmistakably grants a right to walkaround pay which is coextensive with the right to accompany the inspector; the same is true of the Senate report and the Senate bill.

6/See 2 U.S.C. §109c(a)(Senate rule), and House Rule XXVII(1)(c), requiring that conference bills be accompanied by a joint explanatory statement that is "sufficiently detailed and explicit to inform the [House and Senate] as to the effect which the amendments or proposition contained in such report will have upon the measure to which those amendments or propositions relate." See also, Jefferson's Manual §542 at 276 (1977).

Finally, and fatal to the majority's contention, Representative Perkins' statement of the conference committee's contrary understanding was made 21 days after the Senate voted. 7/ Therefore, when the Senate voted to accept the conference bill, there was no indication before the Senate, nor would the Senate have had reason to suspect, that the conference bill, the conference report and the Senate report were not reliable guides to the conference committee's agreement. The Senate could have only believed that the conference bill meant what it said. Although arguably the vote of the House may have reflected the view of the conference committee, the same cannot be said of the vote of the Senate.

It is a basic principle that the content of the law must depend upon the intent of both Houses, not of just one. Department of the Air Force v. Rose, 425 U.S. 352, 366-368 (1976), quoting Vaughn v. Rosen, 523 F.2d 1136, 1142-1143 (D.C. Cir. 1975). Cf. K. Davis, Administrative Law Treatise §3A.31 at 175 (1970 Supp. to 1st ed.). In this case, to follow the conferees' interpretation would violate this principle, for the Senate cannot be said to have been aware of or suspect, let alone assent to, the conferees' interpretation. What is equally paradoxical, however, is that not to follow the conference committee's view may perhaps fail to give effect to the House's intention.

Congressional intent can best be determined, however, by looking to the stated purpose of the walkaround pay right as expressed in bills and documents that were available to both Houses before they voted, and most importantly, the language of the statute that the entire Congress passed. Cf. Department of the Air Force v. Rose, 425 U.S. at 365-367; Jordan v. Department of Justice, 591 F.2d 753, 768 (D.C. Cir. 1978)(en banc); Vaughn v. Rosen, 523 F.2d at 1142-1143; Hawkes v. IRS, 467 F.2d 787, 794, 796-797 (6th Cir. 1972); Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971). See also March v. United States, 506 F.2d 1306, 1314 & n.33 (D.C. Cir. 1974).

7/ These remarks were made on October 27, 1977; the Senate had voted to accept the Conference Report on October 6, 1977. 1977 Legis. Hist. at 1347, 1354.

The right to walkaround pay is clearly expressed in the Senate report and the conference report. Congress insisted upon miners' participation in inspections, in order that safety and health hazards be exposed, brought to the attention of the Secretary and eliminated promptly. This would also aid the inspector and result in a valuable reciprocal benefit to the miners, who would thereby learn more about health, safety and mine hazards. Assuring that miners' representatives are paid during all inspections serves these purposes. In so observing, I give weight to the Secretary's opinion that his inspectors will be aided by the miners' participation in these inspections.

Most importantly, section 103(f) is simply not susceptible to the construction urged by the operators. As noted, the language of the statute clearly makes the right to walkaround pay coextensive with the right to accompany the inspector, and it is impossible to hold that Congress intended to deny miners the right to accompany the inspector. I therefore dissent.

A. E. Lawson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 21, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. BARB 77-266-P BARB 76X465-P
JIM WALTER RESOURCES, INC., and COWIN AND COMPANY	:	

DECISION

These cases arise under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) [1969 Act]. The administrative law judge vacated a notice of violation and dismissed penalty assessment petitions. We granted the Secretary's petition for discretionary review.

On June 9, 1975, an accident occurred in the production shaft at Jim Walter Resources' Brookwood No. 4 Mine. Cowin and Company, an independent contractor, was sinking the shaft. One of the tugger ropes broke which was operating a clamshell used in excavation. Over 1,000 feet of wire rope fell, striking and killing a Cowin employee who was working at the shaft bottom.

A notice of violation was issued to Jim Walters by an inspector of the Mining Enforcement Safety Administration (MESA). The notice alleged a violation of 30 CFR §77.1903(b) and described the allegedly violative condition or practice as follows:

> The American National Standards Institute "Specifications for the use of wire ropes for mines" M11.1-1960 was not used as a guide in the use, installation and maint. of wire ropes used for hoisting at the three shafts under construction at the No. 4 mine.

The notice was terminated after the condition had been abated. On August 2, 1976, MESA filed a petition for assessment of civil penalty pursuant to section 109(c) of the 1969 Act, alleging that Cowin and Company, as statutory agent of Jim Walter Resources, "knowingly authorized, ordered or carried out" a violation of the mandatory safety standards set forth in 30 CFR §77.1903(b). On July 13, 1977, MESA filed a petition for assessment of civil penalty against Jim Walter Resources under section 109(a) of the 1969 Act.

The administrative law judge disposed of the cases on the ground that the notice of violation was not sufficiently specific on its face to satisfy the requirements of section 104(e) of the 1969 Act. 1/ We reverse and remand.

The judge concluded that any notice charging a violation of 30 CFR §77.1903(b) should set out "the specific ANSI standard allegedly violated, as well as the circumstances which led MSHA (MESA) to believe compliance was not being achieved so that an adequate defense can be made." He emphasized that this was particularly true in a civil penalty case filed under section 109(c), where a respondent is charged with a knowing violation.

In holding that the lack of specificity was fatally defective to the notice, the judge relied in part on Armco Steel Corp., 8 IBMA 88, 1977-78 OSHD CCH ¶22,089 (1977), aff'd on reconsideration, 8 IBMA 245, 1978 OSHD CCH ¶22,550. In that decision the Interior Board of Mine Operations Appeals (Board) held that section 104(e) of the 1969 Act required each notice and order to contain a specific written description of the pertinent conditions or practices. A withdrawal order in that case was vacated for failing to adequately describe the conditions which allegedly constituted an imminent danger. The Board refused to look beyond the "four corners" of the withdrawal order and held that they could not consider any other written or oral communication of the description concerning the hazardous conditions in determining whether the requirements of section 104(e) had been met. Armco, supra, 8 IBMA 88 at 96; 8 IBMA 245 at 252. Although the judge in Armco had ruled that MESA's failure to meet the requirements of section 104(e) could be treated as a technical defect since the operator had suffered no prejudice as a result of the nonspecificity, the Board reversed this ruling and held that a lack of prejudice was not dispositive of the issue. The Board emphasized that the specificity standards of section 104(e) were also applicable to the requirements of section 107 of the Act. Section 107(b) requires that a copy of any notice or order be mailed immediately to a representative of the miners and state mine officials. Section 107(a) requires that the miners be notified immediately by posting a copy of the notice or order on the mine bulletin board.

1/ Section 104(e) provided in part:

> Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard ....

Returning to the facts before us in the instant case, we hold that even if the notice itself was insufficiently specific, 2/ this defect alone would not render the notice invalid.

The primary reasons compelling the statutory mandate of specificity is for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter. We find that these purposes of section 104(e) have been satisfied here. The operators do not claim any difficulty in being able to identify and thereby abate the allegedly violative condition. Nor does it appear that either Jim Walter or Cowin was deprived of notice sufficient to enable them to defend at hearing. They did not request more specific notice of the alleged violations in prehearing motions, nor did they request a continuance when evidence regarding alleged noncompliance with specific ANSI standards was introduced at the hearing. Instead, they defended on the merits. The operators did not claim prejudice in preparing a defense until the post-hearing brief where the claim appears in a perfunctory footnote.

Although the judge concluded that MESA's failure to cite the specific ANSI standard deprived the respondent of reasonable notice as to the violation charged, his analysis was confined to the "four corners" of the notice as required by Armco. The judge noted that MESA could have easily modified the notice to include the particular ANSI standards involved. The judge further noted that the June 9, 1975, accident report prepared by the same MESA inspector who issued the subject notice of violation,

> included therein a specific reference to an ANSI recommendation pertaining to the minimum ratio of drum or sheave diameter to the rope diameter and a finding that the ratios in use were one-third less than the recommended minimum. [Dec. at p. 36.]

The accident report, which was received by the operators long before the hearing, also notes excessive wear on the wire rope. These two conditions described in the accident report compose the essential elements of the testimony at the hearing regarding alleged non-compliance with ANSI standards. We read the notice of violation in conjunction with the accident report, and conclude that the operators were not prejudiced in preparing their defense. Therefore, any lack of specificity on the face of the notice does not affect its validity.

2/ The Secretary appears to argue that the notice was sufficiently specific because it alleged that the ANSI standards were not used as a guide. 30 CFR §77.1903(b) states that the ANSI standard "shall be used as guide in the use, selection, installation, and maintenance of wire ropes used for hoisting." The judge did not accept the Secretary's argument. Because of our holding today, we find it unnecessary to pass upon this point.

We believe the notification requirements of section 107 should play little, if any, role in interpreting the minimum standards mandated by section 104(e). The objective of healthful and safe mines may be advanced when miners, their representatives, and state mine officials are fully informed of mine conditions by notices and orders utilizing specific written descriptions of the pertinent conditions or practices. However, an overly restrictive interpretation of section 104(e) will invalidate notices and orders where no prejudice has resulted to the mine operator. Because this will, on balance, hinder rather than promote mine safety and health, we decline to follow the Board's approach in Armco.

We accordingly reverse and remand this case for further proceedings. In so doing we note that while numerous standards and regulations have been promulgated in implementation of the 1969 Act, a civil penalty sanction is authorized under section 109(a) only for a violation of a mandatory standard or other provisions of the Act. In addition to the the other issues raised, in remanding we instruct the judge to address the threshhold question of whether 30 CFR §77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed or whether the regulation is merely advisory.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. MORG 79-26-P
COALTRAIN CORPORATION	:	

DECISION

On November 22, 1978, the Secretary of Labor filed a petition for assessment of civil penalty against Coaltrain Corporation seeking penalties totaling $625 for seven alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq. (1978). On December 11, the president of Coaltrain, a strip mine operator with five employees, answered pro se, denying the alleged violations and requesting a hearing. On May 1, 1979, the administrative law judge issued a notice of hearing and pretrial order which set forth extensive prehearing requirements. Initial responses to the pretrial order were timely filed on May 25 by Coaltrain and the Secretary. In its response, Coaltrain set forth its version of the facts and circumstances concerning each alleged violation, as requested by the pretrial order, and again requested a hearing. On June 15, the Secretary timely responded to the second portion of the pretrial order, listing his intended hearing witnesses and exhibits. Coaltrain did not respond to the second portion of the order. On June 20 the judge sua sponte entered a default decision against Coaltrain for failing to "fully respond to the pretrial order ... or to show cause why such failure should be excused." 1/ The judge ordered Coaltrain to pay a penalty of $625. On July 20, we directed review sua sponte.

We reverse. The record contains no indication that this small, pro se operator was not acting in good faith in attempting to comply with the pretrial requirements by setting forth its position on each of the

1/ The judge did not conduct a show cause proceeding, pursuant to interim procedural rule 26 prior to entering the default. Rather, he apparently acted upon a statement in the pretrial order that "except for good cause shown in advance thereof, any failure to comply in full and on time with the provisions of this order shall be deemed cause for the issuance of an order of dismissal or default."

seven alleged violations in this relatively uncomplicated penalty case. In the circumstances of this case, we find that Coaltrain substantially complied with the pretrial order and that the judge erred in defaulting the operator. 2/

Accordingly, the judge's decision is reversed and the case is remanded for further proceedings.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ The Secretary, who did not move before the judge to default the operator, took essentially this position in his brief to the Commission on review.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1979

KENTLAND-ELKHORN COAL CORPORATION,	:	
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. PIKE 78-399
and	:	
UNITED MINE WORKERS OF AMERICA	:	

DECISION

The question here is whether a mine operator must pay a miners' representative for the time he spends accompanying a mine inspector during a special electrical inspection of a mine. Administrative Law Judge Lasher answered that question in the negative. We affirm.

On May 23, 1978, Vernon Hardin, an inspector from the Department of Labor's Mine Safety and Health Administration, began a specialized electrical inspection of a coal mine and preparation plant operated by Kentland-Elkhorn Coal Corporation. The purpose of the inspection, which lasted at least 21 days, was to make a "complete electrical examination of the ... mine and preparation plant." The inspector used equipment such as voltmeters and ohmmeters for testing electrical circuits. By coincidence, the electrical inspection took place when another inspector was making a "regular inspection", i.e., one of the four inspections of an entire mine that the third sentence of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. ["the 1977 Act"] requires the Secretary to conduct every year. Judge Lasher found, and it is not disputed, that the specialized electrical inspection was not conducted as a part of the regular inspection, and that the regular inspection was conducted independently by the other inspector.

On May 23 and 24, 1978, Douglas Blackburn, a miner employed by Kentland-Elkhorn accompanied inspector Hardin during the electrical inspection as the miners' representative. Before the inspection began, Kentland-Elkhorn officials informed Hardin that Blackburn would not be paid for the time he spent accompanying Hardin. Blackburn was not paid, and on June 20, 1978, Hardin issued to Kentland-Elkhorn a citation under section 104(a) of the 1977 Act alleging a violation of section 103(f). The alleged violation was not abated by the time fixed in the citation, and, on June 23, 1978, Hardin issued a withdrawal order under section 104(b). The order, which did not require the withdrawal of miners from mining operations, was terminated 20 minutes after its issuance, after Kentland-Elkhorn officials paid Blackburn for his time.

Kentland-Elkhorn then sought Commission review of the citation and withdrawal order, and a hearing was held before Judge Lasher. Kentland-Elkhorn argued to Judge Lasher that the right to "walkaround pay" granted by section 103(f) is confined to regular inspections, and cited the language and the legislative history of section 103(f) to support its argument. The Judge concurred in this view, and vacated the citation and withdrawal order. The Secretary filed a petition for discretionary review, which we granted on April 11, 1979. On July 31, 1979, we heard oral argument in this case and in Helen Mining Co., No. PITT 79-11-P, decided on November 21, 1979.

In Helen Mining, we decided a question similar to this one. We found that section 103(f) of the 1977 Act is ambiguous and did not clearly point to a solution to the problem raised there. We examined the portion of the legislative history upon which Kentland-Elkhorn relies here--a statement by Representative Perkins to the House of Representatives stating the intention of the conference committee to limit the right to walkaround pay to regular inspections--and found it dispositive of the question there. We arrive at the same conclusion here. As in Helen Mining, the words of the statute standing alone do not clearly support the position of any party, and we believe that the intention of Congress to limit walkaround pay to regular inspections was most clearly evidenced by Mr. Perkins' statement.

Accordingly, the judge's decision is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Marian Pearlman Nease, Commissioner

Commissioner Jestrab, dissenting:

I join my colleague, Commissioner Lawson, in dissenting from the majority opinion. There is no inspection described as "regular" in the 1977 Act. The statutory authority for the inspection here is section 103(a). Section 103(f) expressly requires the payment of walkaround pay. A fortiori, my dissent in Helen Mining Company, No. PITT 79-11-P, is applicable here.

Frank F. Jestrab, Commissioner

Commissioner Lawson, dissenting:

In Helen Mining Company, No. PITT 79-11-P, the majority denied walkaround pay "during a 'spot' inspection required by section 103(i)" of the 1977 Act. In the present decision the majority, without determining the statutory authorization for the electrical inspection, appears to be extending its holding in Helen and to deny walkaround pay for all inspections except so-called "regular inspections."

For the reasons stated in my dissent in Helen Mining, I find section 103(f) of the Act to be clear and unambiguous in mandating walkaround pay for all inspections made pursuant to section 103(a) without regard to their frequency. This inspection is authorized by section 103(a) and a miner accompanying the inspector is therefore entitled to walkaround pay.

I therefore dissent.

A. E. Lawson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

NOVEMBER 1 - 30, 1979

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket Nos. Assessment Control Nos.
	:	PIKE 79-42-P 15-14315-02012V
v.	:	Stone No. 7 Mine
	:	
EASTERN COAL CORPORATION, Respondent	:	PIKE 79-43-P 15-04316-02013V
	:	Stone No. 8 Mine

DECISION APPROVING SETTLEMENT

Counsel for the Mine Safety and Health Administration filed on October 22, 1979, in the above-entitled proceeding motions for approval of settlements. Under the settlement agreement reached by the parties in Docket No. PIKE 79-42-P, respondent has agreed to pay civil penalties totaling $30,000 instead of the penalties totaling $77,000 proposed by the Assessment Office. Under the settlement agreement reached by the parties in Docket No. PIKE 79-43-P, respondent has agreed to pay a civil penalty of $3,000 instead of the penalty of $10,000 proposed by the Assessment Office. The Assessment Office arrived at its proposed penalties in both dockets by waiving the formula provided for in 30 CFR 100.3 and making findings with respect to the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977. All of the nine violations involved in this proceeding are based on orders of withdrawal written under the unwarrantable failure provisions of Section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. The Assessment Office determined that exorbitant penalties of $10,000 should be assessed for eight of the alleged violations and and that a penalty of $7,000 should be assessed for the ninth alleged violation. As will hereinafter be shown, respondent's agreement to pay a total of $33,000 in both dockets instead of the $87,000 proposed by the Assessment Office is an appropriate settlement which should be approved.

General findings with respect to four of the six criteria can be made and those findings will be considered to be applicable for determining penalties with respect to all nine of the alleged violations. The remaining two criteria, namely, the negligence and gravity associated with the alleged violations, should be specifically considered with respect to each alleged violation. Respondent demonstrated a good faith effort to achieve rapid compliance with respect to all of the orders of withdrawal because the violations cited in the nine orders were abated on the same day the orders were written with respect to seven orders and the violations cited in the remaining two orders were abated by the next day after the orders were written. The computer printouts accompanying the motions for approval of settlement show that respondent is controlled by the Pittston Company. On the basis of that information, I find that respondent is a large operator

and that penalties should be assessed in an upper range of magnitude insofar as they are based on the criterion of the size of respondent's business. Since there are no data in the file showing otherwise, I find that payment of penalties will not cause respondent to discontinue in business. The computer printouts show that respondent has a significant history of previous violations and that criterion was taken into consideration by the parties in arriving at the large penalties which respondent has agreed to pay in settling the two cases involved in this proceeding.

Docket No. PIKE 79-42-P

Order No. 1 RHH (6-28) dated August 19, 1976, cited respondent for a violation of Section 75.400 because oil, grease, loose coal, and coal dust had been allowed to accumulate on the continuous-mining machine. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation of Section 75.400. In order for a penalty of $10,000 to be warranted, the evidence would have to show that larger accumulations than the ones described in the order existed and there would have to be an indication that a very hazardous ignition source existed, such as a bare wire. Additionally, the presence of methane should be shown. Finally, in order to prove that a violation of Section 75.400 existed, the inspector's testimony would have to satisfy the tests established by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), namely, that the accumlations had existed for an unreasonable period of time and that the operator had failed to clean them up within a reasonable time after becoming aware of the existence of the accumulations or after the operator should have become aware of them if the operator had been duly diligent in inspecting its equipment. The fact that the parties agreed to settle the issues raised with respect to this alleged violation of Section 75.400 is a fair indication that the inspector would not have been able to show the existence of all the serious factors required to sustain the assessment of a maximum penalty of $10,000. Respondent's agreement to pay a penalty of $3,000 for accumulations of combustible materials on the continuous-mining machine is a reasonable amount to pay for the violation of Section 75.400 alleged in Order No. 1 RHH.

Order No. 3 RHH (6-50) dated August 23, 1976, cited a violation of Section 75.518 because the fuse for a water pump had been bridged over with a piece of copper wire with the result that the pump was not provided with short circuit or overload protection. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation of Section 75.518. I have always looked upon the bridging of fuses as being a matter of gross negligence because the person who bridges a fuse knows that he is destroying the protection against shock and fires which a fuse is designed to provide. The gravity of the violation, however, depends on whether an actual shock hazard existed at the time the order was written and on the likelihood that a fire would have occurred. In view of the fact that the order shows only potential hazards, the degree of gravity associated with the alleged violation is not so great as to

warrant assessment of a maximum penalty. Therefore, I find that respondent's agreement to pay a penalty of $5,000 is reasonable and should be approved.

Order No. 1 CGW (6-55) dated August 19, 1976, cited respondent for a violation of Section 75.400 because loose coal, coal dust, grease, and oil had been allowed to accumulate on a continuous-mining machine. The Assessment Office proposed that a penalty of $10,000 be assessed for this violation of Section 75.400. Order No. 1 RHH, supra, alleged the occurrence of an identical violation in a different section of the mine at the same time on the same day as the instant order was written. The observations made with respect to the violation of Section 75.400 cited in Order No. 1 RHH are equally applicable to the violation cited in the instant order. There is no explanation in the motion for approval of settlement for the fact that respondent has agreed to pay only $2,000 in settlement of the violation of Section 75.400 alleged in the instant order, but agreed to pay $3,000 for settlement of the violation of Section 75.400 alleged in Order No. 1 RHH. The conditions which existed in one section of the mine probably were more hazardous than those which existed in the other section and I am concluding, in the absence of any information to the contrary, that the inspector who wrote the prior order would have been able to show greater negligence or gravity, or both, than the inspector who wrote the instant order. In any event, I would not normally assess more than $2,000 for an alleged violation of Section 75.400 when the accumulations were cited on a single piece of mining equipment. Therefore, I find that respondent's agreement to pay a penalty of $2,000 for having a dirty mining machine is reasonable and should be accepted.

Order No. 2 CGW (6-57) was written on August 19, 1976, and cited respondent for a violation of Section 75.400 because loose coal, coal dust, grease, and oil were allowed to accumulate on a roof-bolting machine. The accumulations here involved are alleged to have occurred on the same day and in the same section as the accumulations which were cited on the continuous-mining machine in Order No. 1 CGW, supra. The existence of accumulations on two different pieces of equipment in the same section of the mine on the same day adds to the hazards to which respondent's miners would have been exposed. Nevertheless, in the absence of any showing of actual ignition hazards and the possibility that the inspector would not have been able at a hearing to prove the elements constituting a violation of Section 75.400 as they were set forth by the former Board in the Old Ben case, supra, I find that respondent's agreement to pay a penalty of $2,000 for this alleged violation of Section 75.400 is reasonable and should be approved. It should be noted that when Order No. 2 CGW was written, it also alleged the occurrence of other violations, but the order was subsequently modified by the inspector to allege a violation of only Section 75.400. Consequently, there is no need for me to consider in this case the other violations which were originally cited by the inspector.

Order No. 1 FIJ (6-92) dated October 12, 1976, cited respondent for a violation of Section 75.200 because the roof-control plan was not being complied with in that the operator of the continuous-mining machine had advanced 4 feet inby permanent support and because the pillar was being split from both the side and the end. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation of Section 75.200. Violations of the roof-control plan are generally the most hazardous of all violations because roof falls kill and injure more miners than any other single occurrence in underground mines. I am willing to accept respondent's agreement to pay a penalty of $4,000 in this instance in the absence of any facts showing that there were broken places in the roof or other signs indicating that the roof was in immediate danger of falling.

Order No. 2 FIJ (6-94) dated October 12, 1976, cited respondent for a violation of Section 75.601 because the fuse for the hoist at the loading ramp had been bridged over with wire. The comments made with respect to Order No. 3 RHH, supra, apply to the violation of Section 75.601 alleged in the instant order. Respondent has agreed to pay $5,000 for this alleged violation in lieu of the penalty of $10,000 proposed by the Assessment Office. In both instances, respondent has agreed to pay a penalty of $5,000 which should be approved on the basis of the comments which have already been made in considering Order No. 3 RHH above.

Order No. 3 FIJ (6-96) dated October 12, 1976, cited respondent for a violation of Section 75.701-3 because the roof-bolting machine had not been provided with a frame ground in that the frame ground wire was disconnected in two poorly made temporary splices and was disconnected in the cable reel. The primary hazard to which miners are exposed by the nonexistence of a frame ground is electrocution. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation. There are no facts in the file which show that the floor in the vicinity of the roof-bolting machine was damp or that there were bare wires which would almost certainly have exposed the miners to electrocution. In the absence of specific facts showing that the alleged violation was extremely grave, I find that respondent's agreement to pay a penalty of $4,000, instead of the penalty of $10,000 proposed by the Assessment Office, should be approved.

Order No. 1 FIJ (6-112) dated October 27, 1976, cited respondent for a violation of Section 75.301 because a volume of only 6,375 cubic feet of air per minute was reaching the last open crosscut instead of the minimum volume of 9,000 cubic feet per minute required by Section 75.301. The Assessment Office proposed that a penalty of $7,000 be assessed for this alleged violation. The fact that respondent was providing over 2/3 of the required volume of air would not have made the circumstances associated with this violation serious enough and would not have involved enough negligence, to warrant a proposed penalty of $7,000 unless there had been in existence a combustible concentration of methane. In the absence of

any factors showing that the violation was unusually hazardous, respondent's agreement to pay a penalty of $5,000, instead of the $7,000 proposed by the Assessment Office, is reasonable and should be approved.

Docket No. PIKE 79-43-P

Order No. 1 FIJ (7-31) dated May 2, 1977, cited respondent for a violation of Section 75.200 because respondent was not complying with the provisions of its roof control plan in that roadway posts were not being set, the proper sequence of mining was not being followed, and reflectorized devices were not being used to warn miners of the existence of unsupported roof. The comments which have been made above in considering Order No. 1 FIJ (6-92) in Docket No. PIKE 79-42-P are applicable to the instant order. The Assessment Office proposed that a penalty of $10,000 be assessed for this violation. The fact that the operator of the continuous-mining machine had advanced 4 feet inby permanent support makes the violation of Section 75.200 alleged in Order No. 1 FIJ (6-92) more serious than the violation of Section 75.200 alleged in the instant order and justifies respondent's agreement to pay $3,000 for the violation of Section 75.200 alleged in the instant order in lieu of the payment of $4,000 agreed upon with respect to the violation of Section 75.200 alleged in Order No. 1 FIJ (6-92), supra. Therefore, respondent's agreement to pay a penalty of $3,000 should be approved.

WHEREFORE, it is ordered:

(A) For the reasons hereinbefore given, the motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, Eastern Coal Corporation, shall, within 30 days from the date of this decision, pay civil penalties totaling $33,000 which are allocated to the respective alleged violations as follows:

Docket No. PIKE 79-42-P

Order No. 1 RHH (6-28) 8/19/76 § 75.400	$ 3,000.00
Order No. 3 RHH (6-50) 8/23/76 § 75.518	5,000.00
Order No. 1 CGW (6-55) 8/19/76 § 75.400	2,000.00
Order No. 2 CGW (6-57) 8/19/76 § 75.400	2,000.00
Order No. 1 FIJ (6-92) 10/12/76 § 75.200	4,000.00
Order No. 2 FIJ (6-94) 10/12/76 § 75.601	5,000.00
Order No. 3 FIJ (6-96) 10/12/76 § 75.701-3	4,000.00
Order No. 1 FIJ (6-112) 10/27/76 § 75.301	5,000.00
Total Settlement Penalties in Docket No. PIKE 79-42-P	$ 30,000.00

Docket No. PIKE 79-43-P

Order No. 1 FIJ (7-31) 5/2/77 § 75.200	$ 3,000.00
Total Settlement Penalties in Docket No. PIKE 79-43-P	3,000.00
Total Settlement Penalties in This Proceeding	$ 33,000.00

Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-301-P
	:	A.O. No. 15-10364-03002
v.	:	
	:	Preparation Plant
GOLDEN R COAL COMPANY, Respondent	:	

DECISION

Appearances: George Drumming, Jr., Attorney, U.S. Department of Labor, Office of the Regional Solicitor, Nashville, Tennessee, for the petitioner;
Byron W. Terry, Safety Director, Seymour, Indiana, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), on March 6, 1979, charging the respondent with one alleged violation of the provisions of 30 CFR 77.1605(k).. The alleged violation was cited on September 18, 1978, by an MSHA inspector in Citation No. 400123, which states as follows:

> Berms or guards are not provided on the outer bank of the elevated roadway at the dumping location. The elevated roadway extends 75' outby the hopper and is approximately 15'-20' high at the highest point. Trucks using this roadway are in reverse operation. If over travel were to occur overturning could result in a serious or fatal injury.

Respondent filed an answer to the petition on April 6, 1979, taking exception to the citation, and defending on the following grounds:

> (1) The mine area in question had been previously inspected by MSHA and no mention was ever made of the existence of any hazard.

(2) In the respondent's opinion, the outside limit of the backing area, although not protected by a guard rail or high berm, did have a roll that a truck driver could "feel" and known that he was approaching the outside of the road, thus eliminating any hazard.

(3) The inspector would not permit the construction of a berm but would only accept a guard rail.

By notice of hearing issued May 9, 1979, the matter was scheduled for hearing on August 24, 1979, and the parties appeared on that date and presented evidence and testimony in support of their respective positions.

Issues

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

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

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

Stipulations

The parties stipulated to the following (Tr. 5, 6):

1. Respondent's prior history of violations consists of seven violations which were assessed against, and paid by, the respondent.

2. Respondent's average daily coal production is 250 tons and respondent employs two production employees.

3. Any civil penalty assessed by me in this matter will not adversely affect respondent's ability to remain in business.

4. Respondent's mining business is subject to the requirements of the Act.

Petitioner's Testimony

MSHA inspector Earl T. Leisure testified that he conducted a safety and health inspection, including the roads, records, and equipment, at the preparation plant in question. During the inspection, Inspector Leisure testified that he examined a roadway that was used by contract coal trucks to dump coal into a hopper. The roadway is approximately 125 feet long, 15 or 16 feet high at its maximum point, and elevated for some 75 feet at its highest point. The degree of the slope of the elevated roadway varied from 35 to 45 degrees, and the roadway was constructed of crushed limestone adjacent to a coal stockpile (Tr. 15). The roadway did not have berms or guards as required by mandatory safety standard section 77.1605(k), which requires that elevated roadways be provided with berms or guards along the outer banks in order to prevent coal trucks from accidentally overturning (Tr. 18). The trucks back up along the entire length of the roadway, and in the event of rain, coal spillages, and dust, the roadway tends to become slick, narrow and hazardous (Tr. 20). Although truck drivers use the rearview mirror in backing up along the righthand side of the elevated roadway, they cannot see directly behind them in dumping coal into the hopper (Tr. 18). Having a spotter to direct drivers in dumping the coal may provide some protection against accidents; however, the spotter would not provide the safety protection that section 77.1605(k) provides. Serious injuries and fatalities are likely to occur at the elevated roadway, especially when large moving trucks may faill or overturn 15 feet to the ground level. If the truck load is 20 tons or more, the chances for serious injuries and fatalities are increased substantially (Tr. 19). Inspector Leisure took pictures of the roadway, the adjacent slope, and the hopper facility, after the citation was abated (Exh. P-14, Nos. 1-5).

After issuing the citation, Inspector Leisure discussed the requirements of section 77.1605(k) with the respondent, and the inspector believed that guards along 75 feet of the roadway were better than berms because the width of the roadway is too small to accommodate berms. Respondent abated the citation by installing

125-foot guards along the entire 125 feet of the roadway and did an exceptional job in achieving compliance within the time fixed for abatement (Tr. 25). Mr. Leisure believed the respondent should have been aware of the condition cited and the hazard presented because it was obvious that the roadway was elevated (Tr. 23). Responding to questions as to whether the five photographs were accurate descriptions of the coal-dumping operation when the citation was issued, Inspector Leisure testified that the coal stockpile depicted in photograph Nos. 1 and 2 did not exist when the citation was issued, and that 15 or 20 feet of the existing guardrail was not included in photograph No. 2 (Tr. 33).

On cross-examination, Inspector Leisure testified that if coal trucks were to run off the road, they were likely to overturn on the elevated roadway, and he was aware of an accident at another mine where a coal truck overturned when the driver backed into a 2-foot hole (Tr. 41). Although he has not driven coal trucks on elevated roadways, Inspector Leisure testified that truck drivers normally use their rearview mirrors in backing up to the hopper, and at other mines he has observed truck drivers open the door and look out the left side of the truck in backing up to the hopper (Tr. 45). On the question of driver visibility, Inspector Leisure testified that the trucks are approximately 25 feet in length and if a driver operating in reverse were to open the door and look to his left, he would be unable to see on the right side of the truck (Tr. 49).

On recross-examination, Inspector Leisure testified that he spoke with Mr. C. J. Rust on the telephone about the citation after it was issued and informed him that the condition cited constituted a violation and that he could not allow the respondent to install a guardrail without being cited for a safety violation (Tr. 50).

On bench examination, Inspector Leisure testified about the coal dumping operation at the preparation plant owned by Mr. Rust, and he indicated that a guardrail was located near the hopper which was used by the drivers as a guide in positioning the trucks before dumping coal into the hopper. Once the 20-ton trucks are in position, drivers dump the locally-produced coal into the hopper. When he issued the citation, Inspector Leisure testified that he did not see any work activity, including spotters, workmen, coal, stockpiled along the elevated roadway, and no trucks were using the road or dumping coal into the hopper (Tr. 59). During his 3-1/2 years as a Federal coal mine inspector, Inspector Leisure testified that he does not have knowledge of any truck accidents or near misses at respondent's preparation plant (Tr. 60).

Responding to a question as to how a mine inspector determines when a facility is an elevated roadway, Inspector Leisure testified that there are no statutory criteria, customary guidelines or manuals to assist in making that kind of determination. He also stated

there are no statutory criteria, customary guidelines, or manuals that are used by coal inspectors in determining whether the facility is a roadway, ramp, dumping location or haulage road (Tr. 91-94).

Respondent's Testimony

Mine operator Chester J. Rust testified that his company had installed a 15- to 20-foot galvanized steel guardrail at the hopper to prevent trucks from overturning or overbacking (Tr. 63). Previous MSHA inspections were conducted at the tipple area in question but no previous comments were ever made about the lack of guards or that the roadway in question was considered to be an elevated roadway. He believes a haul road is one where trucks travel to the mine or on a road at some speed and he never considered the road leading up to the hopper in question as a roadway. He considered the use of a spotter, who is there much of the time, and a "roll" at the edge of the roadway, which would give the driver a "feel" that the truck were starting to slide, as sufficient safety precautions. Further, he did not install guardrails because he did not believe they were required, and this was based on the fact that the area was strictly a "back-up" area for the trucks and not a hual road. Previous inspectors had not cited the violation (Tr. 64-65).

Mr. Rust identified 11 photographs which were taken of the roadway and hopper area in question, all of which were taken after the condition was abated (Exhs. R-1 - R-11), and he described what each photograph depicted (Tr. 70-74). In response to bench questions, he indicated that in the event a truck backed off the slope adjacent to the hopper, it would take an inexperienced driver for it to overturn. He also indicated that he was given no option to erect a berm rather than a guardrail, and he would have considered a berm since it is cheaper, but a berm would have reduced the size of the coalyard (Tr. 76). He did not discuss the matter of any option with the inspector but was simply told he had to install a guardrail (Tr. 87).

On cross-examination, Mr. Rust defined a "roadway" as any place that trucks travel in forward gear, and a "ramp" was defined as any place that trucks travel in reverse (Tr. 78). He would consider the ramp to be elevated for at least half the distance of the 125 feet described as a "road." A spotter is not always present and it is possible that one is not there when the trucks travel up in reverse (Tr. 78-80).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of 30 CFR 77.1605(k), which states: "Berms or guards shall be provided on the outer bank of elevated roadways."

The initial question presented is whether petitioner has established that the location cited is in fact an elevated roadway. As for the question of whether the alleged "roadway" was elevated, I find that the testimony of the inspector with respect to the surrounding topography, terrain, slope, etc., of the area cited, including the photographs introduced by the parties, establishes that the unprotected portion of the roadway in question is in fact elevated. In my view, the location and elevation of the hopper from the bottom of the incline where the trucks begin their ascent by backing up along the 125-foot area described by the inspector is of sufficient height above the adjacent terrain to create a hazard in the event a truck ran off the unprotected elevated portion of the roadway in question.

The question as to whether the area characterized by the inspector as a "roadway" was in fact a roadway within the meaning of the cited safety standard is in dispute. During the course of the hearing, respondent argued that the area cited was not in fact a roadway, but a portion of the dumping facility covered by section 77.1605(1), which requires berms or other devices to prevent overtravel and overturning at dumping locations (Tr. 94-106). In support of its argument in this regard, respondent suggests that the area characterized as a "roadway" is in fact a ramp and part of the dumping facility where trucks simply turn around and back up to unload. Petitioner obviously believes that the area is in fact an extension of the main roadway leading to that area, and that the portion leading to the hopper is in fact a roadway. Petitioner seeks a broad interpretation of the cited standard to include the area where the trucks actually back up in reverse along the entire length of the "roadway."

Although the term "roadway" is is not further defined by statute or regulation, the Dictionary of Mining, Minerals and Related Terms (1968) at page 931, defines it in part as "[a]n underground passage, whether used for haulage purposes or for men to travel to and from their work." While we are dealing in the instant case with a surface roadway, I find the definition equally applicable even though the dictionary definition refers to underground. Webster's New World Dictionary of the American Language, Second College Edition, defines the term "road" in part as "a way; path; course." The term "roadway" is defined as "that part of a road used by cars, trucks, etc; traveled part of a road."

After careful consideration of all of the testimony and evidence adduced in this proceeding, including the arguments presented by the parties in support of their respective positions, I conclude that petitioner has the better part of the argument and that its interpretation and application of section 77.1605(k) is correct and I find that the area cited by the inspector was in fact a roadway within the meaning of section 77.1605(k). Although it is true that subsection

(l) requires berms and other protective devices to prevent overhaul and overturning at dumping locations, and may be interpreted to require only berms, that subsection is limited to dumping locations. On the facts presented here, I construe this to mean the hopper location and not the elevated portion of the roadway which is used by the trucks as a means of access to the hopper. Although at the time of the inspection respondent had already installed guardrails at the entrance to the hopper (see photograph exhibits), it apparently did so in compliance with subsection (l) and not (k). Further, I take note of the fact that subsection (i) dealing with ramps and dumps, and sections 77.1608(a) and (b) dealing with dumping locations and haulage roads, and truck spotters, distinguish between the actual dumping location and the actual hazards which may be encountered by a truck while it is traveling or using the haulage road to reach the actual dumping area. In the circumstances, I cannot conclude that petitioner's interpretation of subsection (k) is overly broad. It seems clear to me that the roadway is regularly used by coal haulage trucks transporting coal onto mine property for dumping and processing at the hopper, and the only means of travel to that point is by way of the roadway used by the trucks to back up to the hopper. After dumping their loads, the trucks travel back down the roadway and leave. The purpose of the cited safety regulation is to protect the truck drivers and to prevent injuries to men traveling the roadway in the course of their mining duties. It is clear from the evidence presented that the roadway is elevated and that the failure to provide some means of protection along the unguarded elevated portion of the roadway constitutes a violation of section 77.1605(k). The citation is AFFIRMED.

Gravity

The unprotected portion of the elevated roadway in question presented a potential hazard to the truck driver in the event that his loaded coal truck were to go over the elevated portion while backing up to the hopper. Although the inspector saw no trucks on the roadway at the time the citation issued, the fact is that the trucks backed up the incline on a regular basis to dump their loads and the hazard was ever-present. Respondent's testimony reflects that a spotter is not always present and that not all truck drivers are experienced and have the "feel" for the road. The roadway is in fact elevated, and not withstanding the fact that the grass along the embankment may have been cut without incident, it seems clear that in the event a loaded coal truck were to go over the ebankment while backing up, serious injury would result. In the circumstances, I find that the violation is serious.

Negligence

Respondent takes the position that it made a good-faith effort at compliance when it determined that the area cited was a ramp and not

a roadway. However, the fact remains that the roadway in question was in fact elevated for at least 75 feet and respondent should have recognized the potential hazard and installed a protective barrier of some sort, whether it be a berm or guardrail. The fact that previous MSHA inspectors had not cited the location is immaterial. The question presented is whether the inspector who issued the citation was correct in his interpretation of the cited standard, and I believe that he was. Further, while there was a dispute as to whether the inspector gave the respondent any option as to how to achieve compliance, that is, whether to install a berm or guardrail, the fact is that respondent accepted the guardrail and went beyond the minimum requirements to achieve compliance, and I am not convinced that respondent really disagreed with the inspector or that the inspector acted arbitrarily. Further, while the respondent may have in good faith misinterpreted the application of section 77.1605(k), the fact is that a potential hazard was presented by not having the roadway guarded, and respondent's failure to take reasonable precautions in the circumstances to correct a condition which it reasonably should have recognized constitutes ordinary negligence.

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

The parties stipulated that respondent's daily coal production averages 250 tons and that respondent employs two production people at its facility. I find that respondent is a small coal mine operator. In addition, the parties stipulated that any civil penalty assessed in this matter will not adversely affect respondent's ability to remain in business, and that is my finding.

History of Prior Violations

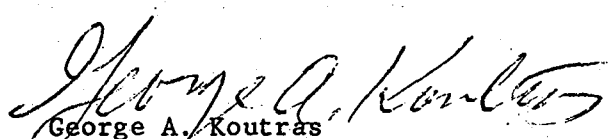
The seven previous citations for which respondent has paid a total of $630 in civil penalties does not constitute a significant history of prior violations. I have also considered the fact that this is the first citation for a violation of section 77.1605(k).

Good Faith Compliance

The conditions cited in this case were promptly abated by the respondent within the time fixed by the inspector. In addition, having viewed the mine operator on the stand during the course of his testimony, and considering the presentation of the safety director during the course of the hearing, I am favorably impressed with the fact that the respondent is safety-conscious, and while respondent may not agree with the interpretation placed on section 77.1605(k) by MSHA on the facts of this case, I find that it made a good-faith effort at compliance and not only installed protective guardrails at the elevated areas of the roadway in question, but installed such protective barriers along the entire length of the roadway. These factors have been considered by me in assessing a civil penalty in this case.

ORDER

In view of the foregoing findings and conclusions, and taking into account the statutory requirements of section 110(i) of the Act, I find that a civil penalty in the amount of $85 is reasonable for the violation which has been established and respondent is ORDERED to pay that amount for Citation No. 400123 within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter should be dismissed.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PITT 78-412-P
	:	A.C. No. 36-00958-02027 V
v.	:	
	:	Somerset No. 60 Mine
BETHLEHEM MINES CORPORATION, Respondent	:	

DECISION

Appearances: Leo J. McGinn, Esq., Trial Attorney, Office of the Solicitor, Division of Mine Safety and Health, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203, for Petitioner;
T. W. Ehrke, Esq., Room 1871 Martin Tower, Bethlehem, Pennsylvania 18016, for Respondent.

Before: Judge Fauver

This case was brought by the Secretary of Labor under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., 1/ for assessment of civil penalties for alleged violations of mandatory safety or health standards. The case was heard at Pittsburgh, Pennsylvania, on January 29, 1979. Both sides were represented by counsel, who have submitted their proposed findings, conclusions and briefs following receipt of the transcript.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent, Bethlehem Mines Corporation, operated an underground coal mine known as the Somerset No. 60 Mine, in Washington County, Pennsylvania, which produced coal for

1/ In 1977, Congress passed the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., which superseded the 1969 Act. This proceeding arose under the original statute. The "Act" for the purpose of this decision, therefore, refers to the 1969 Act before amendment.

sales in or affecting interstate commerce. The mine produces about 4,000 tons of coal per day and employs about 500 people. The annual production of Bethlehem Mines Corporation is about 10 million tons of coal.

2. About 7:45 on the morning of August 30, 1977, a federal mine inspector, John N. Poyle, began a regular inspection of the Somerset No. 60 Mine, accompanied by Robert Swarrow, an inspector-trainee, Clinton Cantini, a federal mine inspector, and George Kupar, a company inspector.

3. The group began its course along the belt haulage system at the point where coal was discharged from the conveyor belt into 7-ton mine cars. They walked up two crosscuts, at which point Inspector Cantini went through isolating doors into the intake escapeway while the others continued along the belt system.

4. Although production had not yet begun on the day shift, they noticed that the belt ran intermittently. At the first belt-to-belt transfer point, about 800 feet inby the discharge point, walking toward the stage loader, Inspector Poyle began to find loose coal and dust. When he reached the stage loader, another 1000 feet from the first transfer point, he noticed that the bottom rollers, which were about 12 inches off the ground, were submerged in fine, dry coal dust for a distance of about 25 feet and that loose coal was accumulated underneath the stage loader at the point where it dumped unto the No. 3 belt.

5. Inspector Poyle tested the coal for thickness and moisture content with his hand and determined it was dry. The company inspector took no measurements and made no tests of the coal and coal dust.

6. The accumulation of loose coal and coal dust ranged in depth from 4 inches to 2-1/2 feet. Inspector Poyle measured the depth and length of the accumulations using a 6-foot rule and a 25-foot tape.

7. Inspector Poyle indicated in his underground notes, but not in his order, that the "belt rollers" were stuck. The ends of the belt were frayed and the strands of the belt were getting caught in the rollers.

8. At the point where the stage loader joined the face conveyor, about 20 feet from the first accumulation, Inspector Poyle observed another accumulation of loose coal and coal dust--ranging in depth from 6 inches to 3 feet for a distance of about 20 feet, with a maximum height of about 3 feet. The coal was rather damp at this location, probably because of the water sprays on the shearing equipment, and it was somewhat larger in size. There was also coal dust on the stage loader.

9. Inspector Cantini rejoined the group at this point where Kupar, Swarrow, Poyle, and six men were standing on the opposite side of the belt. He observed both of the accumulations described by Inspector Poyle.

10. Inspector Poyle issued a section 104(c)(1) order of withdrawal, which stated:

> There was an accumulation of loose coal and coal dust on the belt haulage for 53 D face (longwall) section (023) at the face conveyor ranging in depth from 6 inches to 3 feet for approximately 20 feet and accumulations of loose coal and coal dust at the stage loader ranging in depth from 4 inches to 2-1/2 feet for a distance of approximately 25 feet. The bottom belt was running in loose coal and coal dust. Electrical components and power wires a source of ignition were near the accumulations.

11. On November 4, 1977, this order was modified to a notice of violation under section 104(c)(1) of the Act because the inspector's supervisor determined that the necessary antecedent to a 104(c)(1) order, a notice of violation, had not first been issued.

12. The longwall machine at the time of the inspection had 160 chock-type roof supports, each one capable of supporting 400 tons of force against the roof. The longwall machine had a 20-ton shearing mechanism with cutter bits, which rip the coal from from the face. As the cutter moved back and forth along the face, a path of about 30 inches of coal was mined off. At the completion of each sequence, the conveyor with the shearing machine would "jump" 30 inches to be in place for the next pass. The 160 roof supports advanced one at a time until the panel was mined down about 600 square feet. When sufficient pressure and stress on the roof were reached, the roof would cave in, leaving a gob area.

13. As the coal was sheared off (at a rate of about 14 tons per minute), it landed on the face conveyor, which transported it across the face and dumped it at a 90-degree angle onto the stage loader, which was another chain conveyor (about 70 feet long). The face conveyor was attached to the tail end of the stage loader by a sliding bracket, allowing it to move and slide along the tailpiece. Ideally, they were to be in direct line with each other but there was no piece of equipment designed to keep them aligned.

14. Sideboards were often placed on the stage loader to prevent spillage of the coal received from the face conveyor, however, neither mine safety standards nor company rules required sideboards at this location.

15. The stage loader was in a direct line with the No. 3 belt conveyor, which carried coal successively to the No. 2 belt and the No. 1 belt, which finally discharged it into 7-ton mine cars for rail haulage out of the mine.

16. Behind the cutting drum of the longwall machine there was a mechanism called a "cowl," which scraped all but a small percentage of the coal onto the face conveyor. Part of the longwall apparatus itself was also designed to pick up coal spillage as the machine advanced.

17. Around the stage loader, where the roof was supported, miners shoveled up the loose coal, but because the roof ahead of the chock canopy was unsupported, they did not, as a practice, go out into that area to clean up what the machine had missed.

18. At times, due to pressures and stresses in the rock, the roof would break and fall before the supports were advanced. When this occurred, pieces of rock would often be very large, sometimes several feet long, 25 to 30 inches wide, and 6 to 8 inches thick. The rocks would move down the face conveyor, and at the intersection with the stage loader a bridging action would occur with large pieces of rock bridging over the top of the stage loader and preventing the material from being carried away. When rocks started spilling out into the entry on both sides of the face conveyor and on both sides of the stage loader, the condition would worsen until it was noticed and the machinery was shut down. At this point the large pieces of rock would be broken up with sledge hammers, and the spillage would be cleaned up.

19. Before the inspection Respondent had designed a special cleanup program, in addition to its MSHA approved program, specifically for the Somerset No. 60 Mine.

20. This cleanup plan was part of a standard book developed as a guideline for the foremen, and was used in the level "one" training program. The subject of cleaning up combustible materials was part of weekly employee safety meetings, and part of the monthly management safety meetings.

21. At the time of the inspection, there were 10 people on the longwall face, all of whom at sometime during the working day were involved in some cleanup activity. In the stage loader area, there were two "headgate" operators, one of whom had a primary responsibility to be at the control panel at all times. The other did utility-type work, including breaking rocks, shoveling, and rock dusting, and was generally responsible for cleaning the stage loader area.

22. There were also four "utility men" on the longwall, who worked only on the day shift, whose primary responsibility was to clean around the belt conveyors of the longwall and to keep that area rock dusted.

23. One of the duties of the section foreman was to keep the headgate operator alert, so that the very moment he saw a piece of rock large enough to cause a bridging effect he would shut down the conveyor.

24. Routine cleanup was normally done at the end of a production shift, before the next shift began production.

25. Before the inspector's arrival, the day foreman, Bob Jacobson, had arrived on the section and observed that there were accumulations along the belt haulage system and that no one was cleaning them up. He immediately instructed his men to clean up this condition.

26. These accumulations should not have gone unnoticed by the previous shift foreman (who failed to report the condition in the books).

27. After Bob Jacobson gave instructions to his men, he began his daily run through the mine while they went to their breakfast. By the time he returned, the inspector had arrived and issued the withdrawal order. Inspector Poyle was unaware that a cleanup assignment had been given, and that the men were on a breakfast break, when he arrived and when he later issued the order.

28. When Inspector Poyle arrived on the section, the six men were standing around the stage loader, none of them was shoveling, and they complained to him about the previous shift's failure to clean up accumulations.

29. Inspector Poyle observed the men just standing around talking, and no one appeared to be eating.

30. Where there are accumulations of fine, dry coal and coal dust, friction caused by stuck rollers could ignite the fine coal and propagate a mine fire. If a methane ignition occurred, the dust could be lifted up into the air, dried out by the heat and travel through the mine in a ball of fire. At the longwall, there were about 10 or 12 people who could have been affected immediately by an explosion or mine fire.

31. Power wires, electrical components, and stuck rollers were possible sources of ignition or fire.

DISCUSSION

The conditions cited in the notice of violation were observed by Inspector Poyle at about 9:30 a.m., shortly after the day shift had arrived on the section. The belt was being run intermittently, in an apparent effort to correct a problem. The inspectors testified that the accumulations described in the notice had existed at least from the previous shift, and possibly had been allowed to build up over a longer period.

Respondent's defense that friction between the section crews resulted in the refusal by the day shift to clean up accumulations left by the previous shift must be rejected. It is the responsibility of the Respondent to prevent the accumulation of substantial quantities of loose coal and coal dust, and to oversee its employees to see that this is done whether or not there is friction between crews. Moreover, there is no solid evidence supporting Respondent's speculation that the failure to clean up the accumulations was the result of friction between the crews.

Respondent's explanation that the accumulation at the face conveyor-stage loader juncture was caused by unusual rock conditions encountered during the longwall operations is also rejected. Both inspectors testified that they observed no large pieces or rock. This observation supports the inspectors' expert opinion that this accumulation was due to the failure to control spillage as the coal came off the pan line onto the stage loader. Inspector Poyle testified that no side boards were provided and that the stage loader was not lined up properly to catch the coal as it came off the pan line. Even if were assumed that large rock pieces might have caused the accumulations, the evidence plainly shows that Respondent allowed sizeable accumulations as described in the notice to build up over a period of time and not to be cleaned up from one shift to another. In addition, the explanation concerning unusual rock conditions is not relevant to the unwarranted accumulation found along the stage loader-belt No. 3 site.

CONCLUSIONS OF LAW

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

2. Respondent violated 30 CFR 75.400 by allowing accumulations of loose coal and coal dust as alleged in the Notice of Violation.

3. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $1,000 for the above violation.

WHEREFORE IT IS ORDERED that Bethlehem Mines Corporation shall pay the Secretary of Labor the assessed civil penalty, in the amount of $1,000, within 40 days from the date of this decision.

William Fauver
WILLIAM FAUVER, JUDGE

Distibution:

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T. W. Ehrke, Esq., Room 1871 Martin Tower, Bethlehem, PA 18016 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 9 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. HOPE 79-72-P
	:	A.C. No. 46-01477-03003
v.	:	
	:	Docket No. HOPE 79-73-P
SEWELL COAL COMPANY,	:	A.C. No. 46-01477-03004
Respondent	:	
	:	Docket No. HOPE 79-74-P
	:	A.C. No. 46-01477-03005
	:	
	:	Docket No. HOPE 79-114-P
	:	A.C. No. 46-01477-03006V
	:	
	:	Docket No. HOPE 79-115-P
	:	A.C. No. 46-01477-03008
	:	
	:	Docket No. HOPE 79-147-P
	:	A.C. No. 46-01477-03010
	:	
	:	Docket No. HOPE 79-148-P
	:	A.C. No. 46-01477-03012
	:	
	:	Docket No. HOPE 79-149-P
	:	A.C. No 46-01477-03016
	:	
	:	Sewell No. 4 Mine

DECISION AND ORDER APPROVING
SETTLEMENT OF CIVIL PENALTY PROCEEDINGS

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Michels.

These proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitions for assessment of civil penalties were filed by the

Mine Safety and Health Administration on October 17, 1978, November 9, 1978, and December 13, 1978. Thereafter, answers were filed by the Respondent. A hearing was held on October 9, 1979, in Charleston, West Virginia, at which both parties were represented by counsel.

Evidence was received on Citation No. 44827 (June 19, 1978), which is docketed in HOPE 79-149-P (Tr. 4-92). After the conclusion of the taking of evidence on this citation, the parties advised the court that they had agreed to a settlement of all the citations in all of the dockets, including the citation upon which evidence had been taken (Tr. 92). The settlement, it was stated, computed out to 75 percent of the proposed assessment (Tr. 92).

Upon questioning from the bench, the parties placed the following general representations on the record as to the justification for the settlement:

> MR. KRAMER: Well, Your Honor, one of the areas, of course, as you are aware, I think, it's approximately thirteen violations in this case that involves sanding devices and many of those are assessed -- they're just common citations assessed at as much as eight hundred dollars. And being realistic about it I wouldn't expect Your Honor to assess anything approaching that high an assessment on those particular citations.
>
> I would expect violations to range more in the four to five hundred dollar range. So I would expect Your Honor to reduce those.
>
> JUDGE MICHELS: In other words, you believe as to that group which constitutes eleven of the twenty-two citations that the assessment may have been excessive?
>
> MR. KRAMER: Yes, I do, Your Honor.
>
> JUDGE MICHELS: All right. Do you have any other reasons?
>
> MR. KRAMER: There are some other individual violations which I believe fall in the same category, mostly which in my view are slightly overassessed.
>
> I believe with respect to the three withdrawal orders, those assessments are reasonable. I believe there were three withdrawal orders assessed for a total of a little over seven thousand dollars. I felt from the facts in those cases that those were pretty fair assessments and so those I would not propose to reduce very significantly.

JUDGE MICHELS: Is this HOPE 79-114-P with citations 046376, 043421, and 043461?

MR. KRAMER: That's correct, Your Honor.

JUDGE MICHELS: You would not reduce those significantly?

MR. KRAMER: That's correct. And I think that is primarily my feelings on the cases, Your Honor.

JUDGE MICHELS: Do you have anything to add to that, Mr. Callahan?

MR. CALLAHAN: Your Honor, not other than my general feeling that a good number of these citations were over-assessed. There are some factual difficulties that might arise during trial, if we were to try the cases involving sanding devices. I believe, however, there is enough question on both parts that we can reasonably settle these cases without going into those facts per se, and that a settlement would certainly be proper in this instance.

(Tr. 95-97).

Thereupon, a decision was issued from the bench approving the proposed settlement, subject to the submission by Petitioner of more detailed information on the amounts allocated for the individual citations and the reasonableness of the proposed disposition.

JUDGE MICHELS: Thank you very much, gentlemen.

The sum of it is then, for the dockets, for all of the dockets which I previously identified for the record, and all of the citations therein, the parties have agreed to settle for seventy-five percent of the assessments made by the Office of Assessment.

As Mr. Kramer has explained, certain of these citations dealing with sanding devices may have been, and it's his view were, overassessed and would not bear in all probability an assessment of that amount after a hearing.

Furthermore, as I understand, Mr. Kramer would not reduce significantly at least those citations which deal with the float coal and loose dust which are in HOPE 79-114-P.

Furthermore, Mr. Kramer will in due course submit a final proposed settlement in which he will allocate or proposes to allocate among all of the citations the amount agreed upon in settlement * * * [and] as to each of the individual citations, he will there further express his view as to why the settlement is fair and reasonable.

Considering all of those circumstances, it is my view that the settlement proposed for all of these citations, including that citation which has been heard here today, would be fair and reasonable.

I do not believe that it would be an undue lowering or lessening of the penalties.

Accordingly, I will accept the agreement, or the settlement, that the parties have entered into.

(Tr. 97-98).

On October 24, 1979, counsel for Petitioner submitted its motion which allocates the total settlement in the following manner which is hereby incorporated as part of the agreement:

CITATION NO.	STANDARD	ASSESSMENT	SETTLEMENT
HOPE 79-72-P			
43415	75.1403	$ 420	$ 100
43416	75.1403	590	200
43418	75.316	395	100
HOPE 79-73-P			
43436	75.1403	530	400
43437	75.1403	530	400
43438	75.1403	530	400
43439	75.1725(a)	530	200
43443	75.1403	530	300
43446	75.200	590	590
HOPE 79-74-P			
43455	75.323	240	100
43470	75.200	470	470
HOPE 79-114-P			
46376	75.400	3,000	3,000
43421	75.400	1,000	1,000
43461	75.400	3,000	3,000

CITATION NO.	STANDARD	ASSESSMENT	SETTLEMENT
HOPE 79-115-P			
44009	75.302-1	$ 420	$ 100
HOPE 79-147-P			
44055	75.1403	395	395
HOPE 79-148-P			
44443	75.1403	590	400
44457	75.1403	800	400
44458	75.1403	800	300
44459	75.1403	800	300
HOPE 79-149-P			
44827	75.1103-1	920	655
		$17,080	$12,810

In its motion, Petitioner made the following statements with reference to the settlement:

> Citation 43415 was reduced since the left inby sanding device and the two outby sanding devices were still operational. Thus sand could be delivered to the two left wheels while traveling inby and sand could be delivered to all 4 wheels while traveling outby. Consequently, the degree of gravity is small.
>
> Citation 43416 was reduced since it was the emergency brake which was inoperative due to low brake fluid. The main system was operational and the gravity was therefore small.
>
> Citation 43418 was reduced since this citation was based upon the fact that 2 of the water sprays had been intentionally plugged with wood -- apparently to increase the water pressure to the other sprays. The inspector inferred, therefore, that the spray system could not have been adequately checked and, if necessary, serviced at the beginning of each shift and after each cut of coal is mined as required by the methane and dust control plan. Thus, MSHA would not be able to directly establish negligence on the part of the Respondent other than for the 2 sprays intentionally plugged.

Citation Nos. 43436, 43437 and 43438 were reduced since the gravity of the violations does not appear to be as high as that assigned by the assessment office.

Citation 43439 was reduced, since it was the emergency brake which was inoperative and the main braking system was operational. Thus the gravity was reduced.

Citation 43443 was reduced, since only 2 of the 4 sanding devices were inoperative and the inspector did not remember which they were. Thus there may have been an operational sander for each direction of travel reducing the gravity.

Citation 43455 was reduced because there is some question of whether the condition described by the inspector constitutes a violation of 75.323.

Citation 44009 was reduced because there is some question of whether the condition described by the inspector constitutes a violation of 74.302-1.

Citation Nos. 44443, 44457, 44458 and 44459 were reduced, since they appear to have been over assessed by the assessment office and only 2 of the 4 sanding devices were defective for 44458 and 44459.

Citation No. 44827 was reduced, since the testimony at the hearing seemed to indicate that the Respondent did make some effort to abate the violation within the time given. Thus there was not a total lack of good faith abatement on their part.

Other than Citation No. 44827, the Respondent demonstrated a good faith abatement effect. Other considerations are that the Respondent is a large operation and has a previous history of violations. MSHA believes that this settlement fairly reflects the six criteria and that the penalties are adequate to promote future compliance.

Respondent orally advised the court that it does not object to the allocations or the supporting statements made by counsel for MSHA.

After considering the above, I hereby AFFIRM my approval of the settlements for these dockets.

ORDER

IT IS ORDERED that Respondent pay total penalties of $12,810 within 30 days of the date of this decision.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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

SECRETARY OF LABOR,	:	Complaint of Discrimination
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 79-64-D
	:	(CD 78-268)
on behalf of Eugene Marshall,	:	
Applicant	:	McClure No. 2 Mine
v.	:	
	:	
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	

RULING ON MOTION AND
ORDER OF DISMISSAL

This is a discrimination complaint filed by the Secretary on behalf of Eugene Marshall, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. By order dated August 3, 1979, the parties were placed on notice that this matter was scheduled for hearing on October 10, 1979. The record shows that all parties, including the Applicant, Mr. Marshall, were served in a timely manner with this notification of hearing 1/. Thereafter, on September 7, 1979, at a telephone conference in which counsel for both parties participated, the Secretary's motion to continue the hearing date was granted and, as counsel for the parties were then advised, the hearing was rescheduled to begin on October 23, 1979. The parties were again advised of this date by my order dated September 21, 1979. A copy of this order was sent by certified mail to all the parties. The copy sent to Mr. Marshall was returned, stamped by the Postal Service "Moved, left no address." A copy of a subsequent order issued on October 5, and sent to Mr. Marshall by certified mail was also returned by the Postal Service stamped "Moved, left no address."

On October 12, the Secretary filed with the undersigned a copy of a letter dated October 10, addressed to Mr. Marshall in which the Secretary outlines in detail his unsuccessful efforts to make contact with Mr. Marshall from September 6 until the date of the letter.

1/ The record contains a certified mail return receipt signed by Mr. Marshall dated August 7, 1979, stamped "Clintwood, Virginia" with the same date.

Also, in that letter the Secretary advised Mr. Marshall that if he did not make contact with the Solicitor's Philadelphia Office by a certain date, a motion would be filed requesting that the proceeding be dismissed.

On October 19, 1979, the Secretary filed such a motion. Therein, the Secretary requests that the proceeding be dismissed without prejudice. As grounds for the proposed action, the motion states:

> a. Applicant's undersigned trial attorney has been attempting since September 6, 1979 on an almost daily basis, to contact the complainant in this case, Eugene Marshall. He has made in excess of 20 telephone calls to Mr. Marshall's home phone, which is not being answered. He has contacted District 28 of the United Mine Workers of America, Mr. Marshall's local post office, and miners at Respondent's McClure No. 2 mine. No one knows of Mr. Marshall's whereabouts. In addition, further investigation by MSHA has failed to disclose Mr. Marshall's whereabouts.
>
> b. Without the testimony of Mr. Marshall, Applicant can make no prima facie showing of discrimination.
>
> c. On October 10, 1979 Applicant's attorney mailed a letter to Mr. Marshall's home address informing him that his case would be dismissed unless he contacted the office of the undersigned attorneys.
>
> d. On October 12, 1979 the letter was returned to the office of the undersigned attorneys as undeliverable because Mr. Marshall had moved, yet had provided no forwarding address to his post office. [A copy of the envelope containing that letter was attached to the motion as Exhibit 1.]
>
> e. As of October 17, 1979, Mr. Marshall has provided no forwarding address to his post office, and has informed no official of District 28 and, to Petitioner's knowledge, no employee of the McClure No. 2 Mine of his whereabouts.

Thereafter, on October 29, 1979, Respondent filed a response to the Secretary's motion in which it simply requests that Mr. Marshall's complaint be dismissed with prejudice. Respondent does not advance any argument in support of its request.

ORDER

From a review of the record and filings in this proceeding, it is apparent that the Secretary has expended considerable effort in pursuing this action on Mr. Marshall's behalf. It is equally apparent that the Respondent has expended a considerable effort in

preparing its defense to Mr. Marshall's claim. The record is clear that Mr. Marshall was on notice as to an October hearing date. Further, the Secretary has provided sufficient information from which a conclusion can be drawn that Mr. Marshall has acted in such a manner as to effectively negate the efforts of the Secretary to pursue this cause of action on his behalf. Under these circumstances, I conclude Mr. Marshall has had the opportunity to avail himself of the Commission's discrimination remedies under section 105(c)(2) and he has chosen not to cooperate with the Secretary in pursuing this 105(c)(2) action. It would impose an unreasonable burden on the Respondent to dismiss this case without prejudice, thus allowing the Secretary to pursue this same claim on Mr. Marshall's behalf at a later date against Respondent. There should be, and the parties have a right to expect, some degree of finality to these proceedings. Accordingly, under the specific facts of this case, I hereby DISMISS this proceeding WITH PREJUDICE.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-330-PM
Petitioner	:	A.C. No. 45-00365-05001
v.	:	
	:	Republic Unit Mine
DAY MINES, INCORPORATED,	:	
Respondent	:	

RULING ON MOTION
AND
ORDER OF DISMISSAL

This is a civil penalty proceeding brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). On February 12, 1979, the Mine Safety and Health Administration (MSHA) filed a petition for the assessment of a civil penalty against Respondent alleging a violation of 30 CFR 57.5-50(b), which concerns employee exposure to excess noise. Thereafter, Respondent filed its answer contesting the alleged violation. In due course, a prehearing order was issued and the parties were given notice that the hearing for these matters was scheduled for the week of June 12, 1979. 1/ Both parties filed their responses to the prehearing order on May 21, 1979. Thereafter, on May 29, 1979, Petitioner filed its first motion to dismiss this case stating "[f]urther investigation has revealed that there is insufficient evidence to sustain a showing of a violation of the standard in question."

On June 4, 1979, Petitioner filed a motion requesting permission to withdraw this motion to dismiss asserting therein that "further investigation has revealed that evidence is available to support the allegations in Citation No. 0034644, dated July 26, 1978." No statement in opposition or other response was filed by Respondent with respect to either motion.

Thus, on June 29, 1979, well beyond the 10-day period for filing a statement in opposition, an order was issued granting Petitioner's motion to withdraw its earlier motion to dismiss. The parties were

1/ This scheduled hearing was later continued to another date.

also advised that the case would proceed to hearing in late August as previously scheduled. Thereafter, an order was issued on July 23, 1979, scheduling the hearing date for August 28, 1979, in Spokane, Washington. 2/

On August 23, 1979, 5 days before the scheduled hearing date, Petitioner filed its second motion to dismiss this case. As grounds for the motion, counsel asserts:

> MSHA, through its undersigned attorneys, hereby states that additional review of the above-entitled case has indicated that there is insufficient evidence to sustain the validity of the citation issued on July 26, 1978. Accordingly, MSHA hereby moves to dismiss the petition for the assessment of civil penalty filed on February 12, 1979.

Respondent filed no objection to the proposed dismissal.

On September 5, 1979, Respondent filed a motion requesting: (1) an order for an offset against further penalties which may be assessed against it for alleged violations of the Act to the extent of costs and expenses incurred in preparing to defend this action, and, (2) an order prohibiting the Department of Labor from filing further charges involving noise violations "until it [the Department of Labor] can specify and prove the feasibility of some engineering or administrative controls which would do as effective a job of employee protection as present personal protection devices and at comparable cost." Respondent has supported its motion by a memorandum and an affidavit of Kenneth Schmick, Assistant Comptroller of Day Mines, Inc., concerning the expenditures which Respondent asserts it incurred in its defense against the citation which is the subject of this proceeding. These expenditures are broken down in the following way:

Legal Cost Incurred	$2,443.94
W. C. Cohen Time	1,908.00
Benefits	397.47
Typing, Xeroxing and Telephone Charges	150.00
	$4,899.41

The affidavit further asserts that $3,229.13 of the above figure was incurred between June 1, 1979, and August 20, 1979. These dates approximately cover the time period between when Petitioner's two motions to dismiss were filed.

2/ The record indicates that from May 17 through approximately August 17 the parties pursued discovery through requests for admissions and interrogatories.

On October 5, 1979, Petitioner filed a memorandum in opposition to Respondent's motion. Thereafter, Respondent made a further filing in response to Petitioner's memorandum.

After considering the arguments and reviewing the legal precedents cited by both parties, I conclude that Respondent's motion should be denied. The present procedural posture of this case, along with numerous factual differences, removes this matter from the narrow sphere of cases in which the former Board of Mine Operations Appeals allowed or considered offsets under the 1969 Act. 3/ The main thrust of Respondent's argument is that facts exist in this case which support a conclusion that Petitioner continued to prosecute under conditions which constitute bad faith. Although it is somewhat of a puzzle as to why Petitioner filed and then retracted its first motion to dismiss, there is absolutely nothing on the record, as it presently exists, to lead me to believe that bad faith was involved. There is also no indication of wrongdoing or that this proceeding was deliberately prolonged. Because of factual differences, I do not believe that my decision in Climax Molybdenum Company (Applications for Review, DENV 79-102-M through DENV 79-105-M, August 14, 1979), is precedent for the requests Respondent has made. 4/

Under these circumstances, I hereby DENY Respondent's requests for an offset and for an order against the Department of Labor prohibiting it from filing further charges on noise violations except as it can prove some feasibility of engineering or administrative controls.

ORDER

It is hereby ORDERED that this proceeding be DISMISSED.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

3/ See, generally, North American Coal, 3 IBMA 93 (April 17, 1974); Zeigler Coal Company, 3 IBMA 366 (September 26, 1974); North American Coal Corporation, 3 IBMA 515 (December 30, 1974); and Zeigler Coal Company, 5 IBMA 356 (December 19, 1975).

4/ This decision is currently before the Commission for review. Therein, I recommended to the Commission that in the particular circumstances of that case some offset be granted against possible future penalties for violations.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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NOV 15 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-199-PM
Petitioner	:	A.O. No. 10-00088-05002
v.	:	
	:	Lucky Friday
HECLA MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the petitioner;
Fred M. Gibler, Esquire, Kellogg, Idaho, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on January 11, 1979, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for one alleged violation of the provisions of 30 CFR 50.10. Respondent filed an answer and notice of contest and a hearing was held in Wallace, Idaho, on July 12, 1979. The parties submitted posthearing proposed findings, conclusions, and supporting briefs, and the arguments presented have been considered by me in the course of this decision.

Issues

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

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

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated that the citation was received by the respondent, that the respondent is a large mine operator, and that any civil penalty assessed in the matter will not impair respondent's ability to continue in business (Tr. 2-3).

Discussion

Citation No. 348002, July 6, 1978, 30 CFR 50.10, states as follows:

> A serious shaft accident occurred in the #2 shaft. A miner was critically injured June 22, 1978, and has been hospitalized in an intensive care unit. The accident was not reported to MSHA officials in the Bellevue, Washington Subdistrict Office, the Western District Office, or the 24 hour answering service in Washington, DC.

30 CFR 50.10, states as follows:

> Immediate Notification.
>
> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

The term "accident" is defined by 30 CFR 50.2(h)(1) through (12). The pertinent definition of the term here is section 50.2(h) (2) which defines "accident" as: "An injury to an individual at a mine which has a reasonable potential to cause death."

Petitioner's Testimony

John T. Langstaff, respondent's assistant personnel director, was called as an adverse witness by the petitioner. At the time the citation was issued, he was employed as Director of Safety and training. He is familiar with the accident which occurred on the afternoon of June 22, 1978, and first learned about it on the night of June 22, when it was reported to him by telephone by one of his safety men, Bert Fetter. Mr. Fetter advised him that Mr. Cliff Miller had been involved in an accident at the mine and had been taken to the East Shoshone Hospital in Silverton, some 8 miles from the mine by a local ambulance service. Mr. Fetter further advised him that Mr. Miller had sustained "a lot of facial marks and bruises about the face, and that his left arm was bruised badly", but that Mr. Miller was conscious. Mr. Langstaff attempted to contact his supervisors to notify them about the accident, but they had already heard about the incident, but he did not know how they learned about it. That same evening, Mr. Langstaff called the hospital and spoke with a Doctor Gnaedinger, who informed him that Mr. Miller sustained bruised arms, cuts and bruises, and three fractured vertebrae, but he could not recall which vertebrae were fractured. The doctor advised that "Cliff is a tough little guy and he is okay" (Tr. 17-21).

Mr. Langstaff testified that 4 days later he learned that Mr. Miller had been moved from the Silverton Hospital to a hospital in Spokane some 80 miles away and that he was moved there because he had gotten worse the evening of June 22. He then called the hospital in Spokane to inquire about his condition, but since he was not a family member, the nurse with whom he spoke would release no information as to Mr. Miller's condition. He later spoke again with Mr. Fetter, and he subsequently learned about Mr. Miller's condition through the receipt of a doctor's report from Dr. Gnaedinger which he did not have with him at the hearing. In addition, he also received additional reports from the attending hospital doctors. Mr. Fetter advised him that Mr. Miller was in the intensive care unit and that there was a problem with internal bleeding or internal damage. At that time, Mr. Langstaff did not report the accident to MSHA. Thereafter, he kept track of Mr. Miller's condition through daily conversations with Mr. Fetter. He finally reported the accident to MSHA on Standard Form 7000-1, an accident reporting form, on June 29, 1978. He did not report the accident when he first heard from Mr. Fetter that Mr. Miller was in intensive care because 5 days had elapsed from the time of the accident and he believed it was no longer immediate. At the immediate time of the accident, he did not believe there was a reasonable chance that death would result, and when he learned that the accident was serious, it was no longer immediate (Tr. 22-32).

On cross-examination, Mr. Langstaff testified that during the week following the accident, he felt that the injuries sustained by Mr. Miller presented a reasonable potential for death, but this would have been at the end of the week when he reported the accident. He did not feel that way earlier in the week, but only after Mr. Miller's condition got progressively worse. At the time he filed the report with MSHA, he was following his normal routine of waiting for doctor's reports since he likes to have all of those reports before sending in the MSHA report. Mr. Langstaff indicated that he has no medical training and believed he was entitled to rely on doctor's reports in these matters. He reiterated that he spoke with Dr. Gnaedinger on June 22, who informed him that the injuries were not serious at that time, and his attempts to follow up on Mr. Miller's condition the following week were not successful because the hospital in Spokane would release no information (Tr. 32-34).

In response to subsequent questions, Mr. Langstaff testified that he filed MSHA Form 7000-1 by mail, and that is his usual practice. He did not report the accident by telephone (Tr. 39). Someone from MSHA came to see him the week following the accident, but he could not recall whether that visit predated the mailing of the report. As a matter of course, he relies on the doctor's opinion to determine whether or not an accident has occurred (Tr. 40).

Milbert Fetter, testified that in June 1978, he was employed by respondent as a safety man. He learned about the accident by a telephone call on June 22, while at home. He went directly to the hospital and spoke with Dr. Gnaedinger who advised him that after examining Mr. Miller, his left arm looked bad, but was not broken, and that his injuries were not serious. He then reported this to Mr. Langstaff, and the next day learned that Mr. Miller had been transferred to the hospital in Spokane, and he went there to visit him on Sunday where he spoke with some nurses who reported that he was "fine." The following Tuesday he visited the hospital again, and Mr. Miller's wife told him that Mr. Miller had taken a "turn for the worse." He called Mr. Langstaff the next day, on a Wednesday and informed him that Mr. Miller's condition was getting worse, but he did not know how serious he was (Tr. 40-44).

On cross-examination, Mr. Fetter testified that the accident happened after he and Mr. Langstaff's normal duty hours and that is why he was at home. Part of his duties do not include notifying MSHA about accidents, and he took an interest in Mr. Miller's condition because he is his cousin. He was at the hospital when they brought Mr. Miller in and the doctor advised him that "Cliff's tough, he is young. The arm and the knot on his head and his back. There is a problem. He will come out of it okay." He observed Mr. Miller at the hospital and spoke with him, and Mr. Miller complained about a sore arm and back. Dr. Gnaedinger came back to

see Mr. Miller two times the evening of June 22, and the doctor never advised him that Mr. Miller was in critical condition and did not indicate that he had taken a turn for the worse, nor did he express concern that there was a reasonable potential for death (Tr. 45-47).

On redirect, Mr. Fetter testified that he first learned that Mr. Miller was in the hospital the Saturday following the accident, but did not learn why. He called Mr. Langstaff either the following Monday or Tuesday, and he did so because it is his duty to report on the condition of personnel (Tr. 48). Mr. Miller's injuries were not fatal (Tr. 49).

Jurisdictional Arguments Made Orally at the Hearing

During the course of the hearing, respondent's counsel moved for dismissal of the case for lack of jurisdiction. In support of his motion, counsel pointed out that the reporting requirements of Part 50 became effective on January 1, 1978, 42 Fed. Reg. 65534, December 30, 1977. The accident in question occurred on June 22, 1978, and the citation was issued on July 6, 1978. However, counsel argues that at the time of the passage of the 1977 Amendments to the 1969 Coal Mine Health and Safety Act, section 50.10 was not a mandatory standard and therefore did not become a mandatory standard upon enactment of the 1977 Act. Since section 50.10 was not a mandatory standard in effect on November 9, 1977, the date of enactment of the 1977 Amendments, counsel argues that it was not an effective mandatory standard subject to MSHA enforcement at the time the citation was issued. In support of this argument, counsel cited section 301(b)(1) of the 1977 Act, 30 U.S.C. § 961(b)(1) which states as follows:

> The mandatory standards relating to mines, issued by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act and standards and regulations under this chapter which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines and to coal mines respectively under this chapter until such time as the Secretary of Labor shall issue new or revised mandatory health or safety standards applicable to metal and nonmetallic mines and new or revised mandatory health or safety standards applicable to coal mines. [Emphasis added.]

Respondent's jurisdictional defense was not previously raised by the answer filed to the petition for assessment of civil penalty. When asked why it had not been previously raised, counsel asserted that respondent had retained new counsel and that he had raised it at the hearing since it was his understanding that a jurisdictional defense could be raised at any time and was not subject to any waiver

(Tr. 11). In view of the fact that the jurisdictional argument was raised for the first time at the hearing, the motion was taken under advisement, and while petitioner's counsel complimented respondent's counsel on his diligence in advancing the argument, he requested that I not rule on the motion from the bench in order to give him an opportunity to research the question and to file a posthearing memorandum on the question (Tr. 11). This request was granted, and petitioner was afforded an opportunity to file any additional arguments on the question (Tr. 59). However, the parties were afforded an opportunity to make a record on the merits of the citation in the event that the motion to dismiss was ultimately denied.

Respondent raised a second jurisdictional argument in defense of the petition. Counsel argues that a section 104(a) citation can only be issued for an alleged violation of a mandatory health or safety standard, and that a civil penalty assessment pursuant to section 110 can only be levied for a violation of a mandatory standard. Since section 50.10 was not a duly promulgated mandatory standard, respondent's counsel contends that respondent cannot be cited for such a violation, and cannot now be subjected to a civil penalty assessment for the asserted violation (Tr. 12-13).

In response to respondent's second argument, petitioner asserted that a citation pursuant to section 104(a) may be issued not only for a violation of any mandatory standard, but also for any violation of any rule, order, or regulation promulgated pursuant to the Act, and that a civil penalty under section 110(a) may be assessed for any violation of any other provision of the Act. Therefore, if it can be said that respondent violated section 104(a), then respondent may be assessed a civil penalty pursuant to section 110(a) for that violation (Tr. 12-13).

Respondent's Written Posthearing Jurisdictional Arguments

The Regulation Containing 30 CFR 50.10 Was Not in Effect on November 9, 1977, the Date of Enactment of the 1977 Act.

Respondent argues that section 301(b)(1) of the Act, 30 U.S.C. § 961(b)(1), provides that the mandatory standards issued by the Secretary of the Interior under the Metal and Nonmetallic Mine Safety Act and the standards and regulations under the 1969 Coal Mine Health and Safety Act which were in effect on November 9, 1977, the date of enactment of the 1977 law, remained in effect as mandatory standards under the 1977 Act until such time as the Secretary of Labor issues new or revised standards. However, since the effective date of section 50.10 was January 1, 1978, it was not in effect on November 9, 1977, and therefore was not retained as an effective standard under the 1977 Act. Additionally, respondent argues that section 50.10 was promulgated by the Department of the Interior, and not the Labor Department as required by 30 U.S.C. § 961(b)(1).

The Regulation is Not a Mandatory Health or Safety Standard, Therefore No Civil Penalty May be Imposed for a Violation.

Respondent concedes that a citation pursuant to section 104(a) of the Act may be issued for violations of mandatory health or safety standards, rules, orders or regulations, but maintains that it may only be issued in the cases of a duly promulgated mandatory standard pursuant to the 1977 Act and only if it is so promulgated by the Secretary of Labor, not the Secretary of the Interior. Since section 50.10 was not a duly promulgated mandatory standard issued by the Secretary of Labor pursuant to his authority under the 1977 Act, respondent maintains that any citation issued pursuant to section 104(a) is invalid.

With respect to the proposal for assessment of civil penalty, respondent maintains that under section 110 of the Act, 30 U.S.C. § 820, which allows the imposition of civil penalties, there can be no penalty for a violation of a regulation which is not a mandatory health or safety regulation or a part of the Act itself. Since section 110(a) only allows the imposition of a civil penalty for a violation of a mandatory health or safety regulation or a violation of the Act itself, a penalty may not be imposed for noncompliance with section 50.10 because it is not a mandatory safety standard. Further, respondent asserts that the petitioner cannot be heard to argue that the regulation in question was part of the Act because to do so would render the "mandatory health or safety standard" language in section 110(a) meaningless. Also, respondent points out that the regulation was not issued under the 1977 Act, but under the Mining Enforcement and Safety Administration.

Petitioner's Jurisdictional Arguments

Petitioner concedes that the regulations found in Part 50, Title 30, Code of Federal Regulations, became effective January 1, 1978, and that they are not mandatory health and safety standards as defined in section 3(1) of the 1977 Act. Petitioner argues that section 3(1), retained from the Coal Act of 1969, defines a mandatory health and safety standard to mean either the interim standards of Title II and III or standards promulgated pursuant to Title I. Part 50 was promulgated pursuant to section 508 of Title V of the Coal Act, 30 U.S.C. § 957, authorizing the Secretary to issue regulations to carry out any provision of the Coal Act, and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, formerly 30 U.S.C. § 723, 732, 42 F.R. 65536. Section 508 is the general rule-making authority to promulgate regulations. Sections 4 and 13 of the Metal Act contained implied authority to promulgate necessary implementing regulations. By contrast, mandatory standards were required to be promulgated under section 101 of Title 1 of the Coal Act and section VI of the Metal Act. Since the Federal Mine Safety and Health Act of 1977 has the same definition of "mandatory health or safety standard" (section 3(1)), and the same rule-making authorities as the Coal Act,

and since under the 1977 Act all existing regulations issued under the Coal and Metal Acts are valid, the Part 50 regulations are valid regulations and not mandatory standards. Further, petitioner points out that historically, Part 50 replaced old parts 58 (Metal Act) and 80 (Coal Act) of Title 30, Code of Federal Regulations (supplemental information, 42 F.R. 65534), and that Parts 58 and 80 were promulgated under the same rule-making authorities as Part 50 and were, accordingly, promulgated as regulations and not mandatory standards (see 37 F.R. 24151; 35 F.R. 19999).

Petitioner argues that respondent's reliance on the transfer provisions of section 301(b)(1) is misplaced. In support of this argument, it is argued that 30 U.S.C. § 961(b)(1) deals with standards, even though the word "regulations" is used at one point. Even there, however, petitioner points out that the context clearly implies safety and health standards and that this section of the Act was designed to refer to the transfer of standards. Petitioner believes that the controlling provision dealing with the transfer of regulations is section 301(c)(2), which provides in pertinent part "All orders, decisions, determinations, rules, regulations * * * (A) which have been issued, made, granted or allowed to become effective in the exercise of functions which are transferred under this section * * * and (B) which are in effect at the time this section takes effect [March 9, 1978] shall continue in effect according to their terms until modified, terminated, set aside * * * by the Secretary of Labor, the Federal Mine Safety and Health Review Commission, or other authorized officials * * * "[Emphasis in original.] Thus, while petitioner views section 301(c)(2) as a broad "catch all" provision, it maintains that it specifically enumerates regulations among the transferred matters which remain in effect and applicable as of March 9, 1978. And, since Part 50 are regulations and not standards as defined by section 3(1) of the 1977 Act and its predecessor, section 301(c)(2) and not (b)(1) is applicable, and by its very wording the regulation in question continued in effect and did not have to be repromulgated by the Secretary of Labor.

With respect to the imposition of a civil penalty for violation of a regulation rather than a mandatory standard, petitioner argues that section 104(a) provides for penalty assessments for violations of a provision of the Act and its implementing regulation which is not a standard. Citing the language of section 110(a) which provides for assessment of civil penalties for violations of "any other provision of this Act," petitioner maintains that it is clear that civil penalties may be assessed for violations of any regulation, rule, or order as well as any mandatory health or safety standard. The implementation of a provision of the Act by a regulation involves an inextricable relationship, so that if a regulation is violated the implemented provision of the Act is also violated. Thus, the violation can be cited and the civil penalty assessed on that basis.

Further, since section 110(b) refers to violations cited under section 104(a), an uncorrected cited violation of a regulation and a provision of the Act which are not mandatory standards is subject to section 110(b).

Finally, petitioner points out that Part 50 implements sections 103(a), (j), (d) and (h) of the 1977 Act (formerly sections 103(a), 103(e), 111(a), and 111(b), respectively, of the Coal Act). Section 50.10 implements section 103(j) of the 1977 Act (formerly section 103(e) of the Coal Act), requiring an operator to notify MSHA in case of an accident. A violation of 30 CFR 50.10 therefore constitutes a violation of section 103(j) of the Act.

Respondent's Reply Brief

In its reply brief, respondent submits that a close reading of sections 301(b)(1) and (c)(2) shows that what Congress intended was that all "mandatory" standards or regulations had to be in effect as of November 9, 1977, to remain effective under the Federal Mine Safety and Health Act of 1977 (1977 Act). Congress, in enacting 30 U.S.C. § 961(b)(1), recognized that under the 1977 Act penalties could only be assessed for violations of mandatory health or safety standards, or a violation of the Act itself. Recognizing this, it was declared that all "mandatory standards" and "standards and regulations under this chapter" in effect on November 9, 1977, would remain in effect as mandatory safety and health standards. Respondent asserts that had Congress intended the effect urged by petitioner, then it would have been unnecessary to use the language contained in 30 U.S.C. § 961(b)(1), and to achieve the result petitioner desires, Congress would merely have stated that all mandatory health or safety standards in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards. From respondent's point of view, the effect of 30 U.S.C. § 961(c)(2) is that all non-mandatory regulations which became effective in the exercise of functions which were transferred by the section remain in effect. There is no mention of "mandatory" standards as exists under 30 U.S.C. § 961(b)(1). Also, 30 U.S.C. § 961(c)(2) has no reference to regulations "under this chapter."

Respondent agrees with petitioner that 30 U.S.C. § 961(c)(2) is a "catch-all" provision. However, in looking at the context in which the word "regulations" is used in § 961(c)(2), respondent believes that it is referring to matters which were pending in individual cases before MESA during the interim period, and that the use of the words "orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges" does not indicate it is referring to substantive matters or mandatory standards or regulations for which penalties may be assessed. On the other hand, § 961(b)(1) clearly indicates it is referring to mandatory standards and regulations for which penalties may be assessed under the 1977 Act. Respondent asserts

that petitioner's argument that section 50.10 is mandatory and also transferred to MSHA under 30 U.S.C. § 961(c)(2) is inconsistent because if it is mandatory, then 30 U.S.C. § 961(b)(1) applies. If it is not mandatory, then 30 U.S.C. § 961(c)(2) may apply, but there is no requirement of compliance with a regulation which is not mandatory.

With regard to any penalty assessment pursuant to section 104(a), respondent emphasizes the fact that the citation in this case was issued for an alleged violation of regulation 30 CFR 50.10, and not statutory section 103(j), 30 U.S.C. § 813(j), and asserts that there could have been no citation issued for a violation of 30 U.S.C. § 813(j), which merely requires notification of an accident with no time for such notification specified. The citation is for failure to notify immediately, which is only a requirement of the regulation and not a requirement of the Act. Moreover, 30 CFR 50.10 was not enacted pursuant to the Federal Mine Safety and Health Act of 1977, but was enacted to implement the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act. Thus, it cannot be construed to be an implementation of specific provisions of the 1977 Act. Respondent argues further that the language found in section 109(a) of the 1969 Act with respect to the requirement that a civil penalty be assessed for a violation of a mandatory health or safety standard is virtually identical to the language contained in section 110(a) of the 1977 Act, the section under which petitioner is proceeding in this case. Here the injury to the miner was reported, which is all that is required by 30 U.S.C. § 813(j). Petitioner seeks to assess a penalty for failure to report "immediately," which is not a requirement of the statute. Since the language of the 1977 Act is so identical to that of the 1969 Act, respondent maintains that a similar result must attach, that is, an operator may only be penalized for a violation of a mandatory health or safety standard. As stated earlier, the regulation in question here, is not a mandatory health or safety standard.

With regard to petitioner's reliance on section 110(b), 30 U.S.C. § 820(a), respondent argues that it merely underscores respondent's point with regard to section 110(a). Respondent emphasizes that it has been cited under section 110(a) and not 110(b), and the two sections contain different language in that section 110(b) states that an operator who fails to correct a violation for which a citation "has been issued under Section 104(a)" is subject to penalties for each day the violation continues, while section 110(a) does not state that a penalty may be assessed for a 104(a) violation, but that a penalty may be imposed only for a violation of a mandatory health or safety standard or a violation of the Act itself.

Findings and Conclusions Concerning the Jurisdictional Question

The 1977 Act was enacted on November 9, 1977. Since section 50.10 was not promulgated as a regulation and did not become effective January 1, 1978, it is clear that on the date of enactment

of the 1977 Act it was not a viable regulation promulgated pursuant to this statute. Under the transfer provisions of section 301(b)(1), all mandatory standards and regulations issued under the Metal and Nonmetallic Metal Act and the 1969 Coal Act, which were in effect on November 9, 1977, were to remain in effect until such time as the Secretary of Labor issues new or revised standards. The transfer provisions of section 301(c)(2), which has been characterized as a "catch-all" provision by the parties, is in fact a savings provision which I believe was intended to cover all of the matters described therein during the interim period between enactment of the statute on November 9, 1977, and the effective date of the transfer of functions on March 9, 1978. While it is true that the statutory language in section 301(c) (2), which simply states "regulations," is not as specific as the language relating to mandatory standards and regulations, as used in section 301(b)(1), and gives rise to some statutory confusion as detailed in the skillful presentations and arguments made by counsel on both sides of the controversy, after careful consideration and analysis, I believe that petitioner has the better part of the jurisdictional argument and that its position is correct, and my reasons in this regard follow.

Section 301(c)(2) provides, inter alia, that

> "All regulations which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, etc., etc., by the Secretary of Labor * * *." [Emphsis added.]

I construe the use of the term regulation to include Part 50, Title 30, Code of Federal Regulations, and I conclude that they were validly promulgated by the Secretary of Interior in the exercise of his functions which were transferred to the Secretary of Labor as of March 9, 1978. The statutory accident reporting requirements which appeared in section 103(e) of the 1969 Coal Act, and section 13 of the Metal and Nonmetal Act, were the statutory requirements promulgated as mandatory regulations in Part 50, and I conclude that they were in effect and applicable at the time the citation in question here was issued. Accordingly, I accept and adopt petitioner's jurisdictional arguments with respect to the applicability of section 50.10 as my findings and conclusions on this issue and reject those advanced by the respondent, including its motion to dismiss this case on jurisdictional grounds.

Petitioner's Arguments on the Merits

Petitioner asserts that there is no dispute that respondent's employee was injured at the mine on June 22, 1978, and that respondent failed to make the immediate notification required by

section 50.10. Petitioner seeks a finding that there was a reportable "accident" within the meaning of section 50.10, and in support of its case relies on counsel's arguments made during the course of the hearing, where the issue was framed as follows (Tr. 50):

> THE COURT: The question in issue here is whether the Respondent Hecla Mining Company had knowledge of the extent of the injuries that Mr. Miller had, knowledge to the extent to conclude there was or was not a reasonable potential to cause death, imposing a duty on them to file a report?
>
> MR. SALZMAN: Yes.

I believe the essence of petitioner's arguments and the theory of its case regarding the reporting requirements of section 50.10 are set forth as follows during the colloquy appearing at pages 54-57 of the transcript:

> THE COURT: Section 50.10, subpart (b) requires immediate notification to MSHA in the event--if I can translate accident to event--of an injury to an individual that has a reasonable potential to cause death. Once the incident occurs, the operator is required under this section to immediately, meaning pick up the phone--
>
> MR. SALZMAN: That's correct. That was the purpose of my recalling Mr. Langstaff to the witness stand.
>
> There are two separate reporting requirements; one, for any kind of an injury as 50.20, you fill out this form and send it to them, and they get it sooner or later. The second one we are dealing with today is the "immediate" pick up the phone so they can go out and investigate.
>
> THE COURT: Okay now, you have an incident at a mine. So, you have the immediate notification. But that same incident again has to subsequently be reported in writing within ten days.
>
> Now, do you want to make some argument or any further observations?
>
> MR. SALZMAN: Just some brief observations.
>
> I think it's unfortunate that they have put definitions on words which are contrary to the normal usage of the term, but they have, and that's what we are dealing with.

But in that context I think given the restrictions and given the aims of the Act, I believe it should be interpreted in the broadest effect what obviously the purpose of these reporting requirements is.

I believe when you have an incident and people--no matter what the doctor may say, break a couple vertebrae, that is of some degree of seriousness.

When you learn after that the person has been moved from one hospital to another a distance of 80 miles and that person the next day goes into an intensive care unit, I think at that time you have the obligation to, that is immediately, contact MSHA.

THE COURT: What if the fellow had a total recovery the next morning? Does that make a difference?

MR. SALZMAN: After or before it was reported--to a reasonable potential to cause death, I believe that if someone--when this occurs, they have to go to the hospital, they are in an intensive care unit, I think that the operator should reasonably be required to assume--I think assumption of reporting given the goal of the statute--

THE COURT: Now, the goal of the statute is immediate notification so MSHA can go and investigate to determine what?

MR. SALZMAN: To determine the cause of the accident, the condition which may or may not have been corrected.

THE COURT: Preservation of evidence?

MR. SALZMAN: Yes, and the prevention of another accident.

THE COURT: A guy breaks a leg, and a month after something happens that makes it reportable; he takes a turn for the worse.

For a whole month there is no requirement for notification to MSHA; so there is nothing MSHA could do in terms of investigating the cause to determine preventative measures, et cetera, until 30 days after the event, in which event the guy turns for the worse, and then MSHA conducts an investigation?

* * * * * * *

MR. SALZMAN: The answer to your question, second part of your question, even 30 days later, taking that hypothetical, they still have the opportunity to go back and investigate and look at the condition which may have caused this accident and do something to prevent--

THE COURT: In those 30 days all the evidence was destroyed, the mining keeps on going.

MR. SALZMAN: May or may not. Obviously the period of time-- But 30 days is better than never.

Respondent's Arguments on the Merits

Aside from its jurisdictional arguments, respondent asserts that it should also prevail on the merits of the alleged violation. In support of its argument, respondent argues that the petitioner submitted no evidence to establish that the miner's injuries had a reasonable potential to cause death, and that the inspector who issued the citation did not even testify. Respondent maintains that it does not have employees with medical backgrounds and believes it is entitled to rely on the opinions of attending physicians as to whether an injury has a reasonable potential to cause death. In the case at hand, respondent argues that the attending physician stated this was not the case, and the mere fact that the miner was transferred to a Spokane, Washington, hospital was not "constructive" notice of injuries with a reasonable potential to cause death. Respondent asserts that the evidence showed that such transfers are routinely made for injuries which are not serious. Finally, respondent argues that the petitioner has the burden of proving that the injuries had a reasonable potential to cause death. Since this is a medical determination, and the petitioner offered no medical testimony, respondent maintains that a violation has not been established.

Findings and Conclusions on the Merits

The statutory requirement for reporting accidents is found in section 103(j) of the 1977 Act, formerly section 103(e) of the 1969 Act, and it states in pertinent part as follows: "In the event of an accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof."

It is clear from the plain wording of the statutory language that mine accidents are required to be reported to MSHA. The statute on its face places no time limitations as to when those reports are to be made. In this case, while the citation as issued does not specifically charge the respondent with failing to immediately notify MSHA, the narrative description does state that respondent

failed to notify MSHA's district office or the 24-hour answering service in Washington, D.C., and it does cite a violation of 30 CFR 50.10. Thus, I believe it is clear that respondent in this case is charged with a violation of the regulatory provisions of 30 CFR 50.10 for failure to immediately report the accident to MSHA by contacting the district or subdistrict office having jurisdiction over the mine or by telephoning MSHA's headquarters in Washington, D.C., at the toll-free telephone number listed in the regulation. The term "accident" is defined by section 50.2(h) (2) as "an injury to an individual at a mine which has a reasonable potential to cause death".

The petitioner in this case has the burden of proof to establish that the accident which occurred on June 22, 1978, was a reportable accident under the cited regulation. The question of whether the accident in question was required to be reported pursuant to section 50.10 requires the petitioner to establish that the injuries sustained by the accident victim had a reasonable potential to cause death. Recognizing the "unfortunate" use of the definitional language found in section 50.2(h) (2), petitioner nevertheless argues that the reporting requirements of section 50.10 should be given the "broadest effect to meet the obvious purpose" of the reporting requirement (Tr. 55). Although the record establishes that the initial information given to the respondent with respect to the extent and seriousness of the injuries sustained by the accident victim at the time he was taken to a local hospital, the evening of June 22, by the attending physician only indicated that he suffered cuts and bruises about the arm and face and three fractured vertebrae but was "O.K.", petitioner maintains that when the victim was then moved to another hospital in Spokane, some 80 miles away, and placed in the intensive care unit, respondent was obligated at that time to immediately report the accident to MSHA on the theory that it was reasonable at that time to assume that the victim's injuries posed a reasonable potential for death, thereby meeting the regulatory definition of a reportable accident. In short, petitioner takes the position that anytime someone is placed in an intensive care unit it is reasonable to assume that he may die. On the facts presented here, while the victim apparently sustained serious injuries, they did not result in death and he recovered.

The evidence adduced in this case reflects that the respondent was continually monitoring and receiving information concerning the accident victim's condition from the time he was taken to the first hospital and after he was transferred to the second. These reports were periodically made by the respondent's safety director, who was also related to the accident victim, after visits to the hospital and conversations with the victim, doctors, and attending nurses. The initial conversations with the attending physician at the first hospital led the respondent to believe that the victim's injuries were not serious and that he was "fine." However, the victim took a turn for the worse, and after being transferred to

the second hospital, while the initial reports from the nurses indicated that he was "fine," the victim's condition had gotten progressively worse and there were "problems" with internal bleeding and internal damage. At no time during the victim's initial hospitalization did the doctor indicate that there was reason to believe that he would die, and Mr. Langstaff, the company official responsible for reporting accidents to MSHA, testified that during the week following the accident he had no medical basis for determining that the victim's injuries were such as to allow him to conclude that they could potentially lead to death. He indicated that he followed his usual practice of awaiting the receipt of official medical reports or doctor's opinions before deciding whether to report the accident. Since 5 days or so had elapsed from the date of the accident until he learned through conversations with his safety director that the victim's condition was actually worse than initially reported, the "immediacy" of the reporting requirement had long passed and he saw no reason to file a telephone accident report at the precise moment the victim was placed in intensive care because at that time he had no official medical reports which would indicate that there was a reasonable expectation of death as a result of the injuries. Since he has no medical training, Mr. Langstaff took the position that he had to rely on the information being supplied to him by his safety director who kept almost daily contact with the hospital in an effort to obtain information concerning the victim's condition. Mr. Langstaff finally reported the accident on June 29, by executing a standard MSHA accident reporting form used for that purpose, and he apparently did so in compliance with the requirements of section 50.20, which requires that such forms be submitted within 10 days of an accident.

Respondent's defense to the citation in this case rests on its belief that the petitioner presented no credible evidence to support the assertion that injuries sustained by the accident victim had a reasonable potential to cause death. Since respondent employs no one with medical backgrounds, the argument is made that it is entitled to rely on the opinions of the attending physicians, as passed on to its safety director who made inquiries concerning the condition of the accident victim as to whether the injuries posed a reasonable potential for death. Since all of the information then available to the respondent indicated that they did not, then respondent maintains that at that point in time, the accident was not required to be immediately reported to MSHA. Since the question of whether any injuries sustained in an accident had a reasonable potential to cause death is necessarily a medical determination, and since petitioner offered no medical testimony to support its assertion that the accident was in fact of the type required by the regulatory definition of an "accident" to be reported immediately to MSHA, respondent asserts that petitioner has failed to establish a violation of section 50.10. Further, respondent maintains that the mere fact that the injured miner was transferred to an intensive care unit of the second hospital was not "constructive" notice of injuries with a reasonable potential to cause death.

I believe that the language of section 50.10 requiring the immediate reporting of an accident makes it clear that such accidents are to be reported as they occur by either contacting MSHA's local district office or by telephone call to to the toll-free number listed therein. The types of reportable "accidents" required to be reported are enumerated by definition in sections 50.2(h)(1) through (12). The particular type of accident at issue here is covered by subsection (h)(2), and in my view the definitional language leaves much to the imagination since reasonable laymen may differ as to whether any injury sustained by a person in a mine accident was such as to require it to be reported. Petitioner's counsel candidly recognized the "unfortunate" definitional language, but I take the regulatory language as I find it, and the fact that MSHA finds the prospect of being forced to present medical evidence to support a case bottomed on this section of its reporting regulation to be cumbersome is irrelevant. MSHA has the burden of proof in this proceeding and it must establish that the accident in question was reportable within the framework of its own definitional standard. That is, MSHA must establish as a matter of fact by a preponderance of credible evidence that the injuries sustained by the accident victim in this case had a reasonable potential to cause death. Once that is established, it must then prove that the accident was not reported immediately thereafter.

On the evidence presented in this case, I reject MSHA's attempt to establish that the injuries sustained by the accident victim in this case were in fact such as to raise a reasonable potential for death either at the time of the accident when the victim was taken to a local hospital, or the next day when he was transferred to the second hospital, solely on the basis of the fact that he was placed in intensive care, and that on that day respondent was required to report the accident pursuant to section 50.10, by contacting the district office or making a telephone call to Washington, D.C. I find that respondent acted reasonably in the circumstances, and that once it was informed later in the week that the accident victim's condition had worsened when it learned that he had internal injuries, the accident was duly reported by Mr. Langstaff by means of the filing of an MSHA report form used for such purposes. Although it can be argued that the respondent failed to immediately use the telephone or contact MSHA's district office when it finally became apparent, 4 or 5 days after the accident, that the victim's condition was far more serious than initially believed, the thrust of the citation and petitioner's case is the assertion that no immediate notification was made either at the time of the accident or at the time the victim was placed in intensive care. In these circumstances, I find that MSHA has failed to establish that the accident in question was in fact a reportable accident within the meaning of section 50.10. Accordingly, the citation is VACATED and this case is DISMISSED.

George A. Koutras

George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

REPUBLIC STEEL CORPORATION, Applicant	:	Application for Review
v.	:	Docket No. PITT 78-459
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 236422 September 5, 1978 Banning Mine
UNITED MINE WORKERS OF AMERICA, Respondent	:	

DECISION

Appearances: Bronius K. Taoras, Esq., Republic Steel Corporation, Uniontown, Pennsylvania, for Applicant;
John H. O'Donnell, Esq., U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Forrest E. Stewart

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Republic Steel Corporation (Applicant) filed a timely application for review pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 801 et seq., requesting review of Order No. 236422, issued September 5, 1978. A hearing on the merits was conducted on April 19 and 20, 1979, in Pittsburgh, Pennsylvania. Applicant called two witnesses and introduced two exhibits. Respondent called three witnesses and introduced nine exhibits. The United Mine Workers of America failed to make an appearance. At the conclusion of the hearing, the parties elected not to submit posthearing briefs.

On August 18, 1978, inspector James Caffrey conducted a regular inspection of the Banning Mine, 6 North Working Section. At that time, he observed what he believed to be a violation of 30 CFR 75.1707. The inspector discussed the matter with his supervisor and thereafter, on August 22, 1978, he issued 104(a) Citation No. 236119. He described the condition or practice at issue as follows:

The escapeway ventilated with intake air was not separated from the belt and trolley haulage entries of the mine for the entire length of the entries developed since March 30, 1970 to the beginning of the 6 North (009) working section. The Secretary or his authorized representative has not permitted such separation to be extended for a greater or lesser distance in the 6 North working section. Coal mined at the face by the continuous miner, immediately dumps onto mine floor and loaded into #22 shuttle car by conventional loading machine was transported about 230 feet by #22 shuttle car, transferred (piggy-back) from #22 shuttle car into #17 shuttle car and transported about 240 feet by No. 17 shuttle car, transferred (discharged) from #17 shuttle car into #18 shuttle car, then transported about 430 feet by #18 shuttle car and transferred (discharged) onto belt conveyor tail piece (about 900 feet total travel distance with 2 intermediate loading (transfer) (discharge points). The escapeway entry ventilated with intake air, belt conveyor entry and trolley haulage entry were not separated by any ventilation control inby the belt tail piece or inby the end of energized trolley wire. An energized trolley feeder-wire (+1 MCM, 600 volts) was extended about 600 feet from end of bare trolley wire & terminated about 230 feet from pillar being mined. Insulation was stripped from the feeder wire at 14 or more locations to provide nipping stations for DC electrically operated gathering pumps, shuttle cars, loading machines, continuous miners and other equipment.

The inspector originally specified that the condition was to be abated by 9 a.m., on August 29, 1978, but thereafter extended the termination due date to 4 p.m., September 5, 1978. At that time, four of the five necessary stoppings had been constructed. Approximately 75 percent of the fifth stopping had been completed. Because of the operator's failure to correct the condition within the time set for abatement, the inspector issued 104(b) Order of Withdrawal No. 236422 on September 5, 1978. The inspector described the pertinent condition or practice as follows:

Insufficient efforts were made by operator to assure that escapeway required to be ventilated with intake air was separated from belt and trolley haulage entries of the mine for entire length of such entries developed since March 30, 1970 to the beginning of the 6 North (009) working section. About 40 concrete blocks are needed to be installed to complete permanent-type stoppings to provide separation to a point inby (ss 0+89.53), most inby surge (piggy-back) point where #17 shuttle car which hauled coal loaded by conventional loading machine dumped the cargo into #18 surge car which then hauled the coal to the belt tail.

The parties are in essential agreement as to the facts herein. The 6 North Section up to the 6 North belt tail was developed on a six-entry system. Entry No. 2 contained the trolley haulage. The conveyor belt was on entry No. 3. The intake escapeway was located in entry No. 4. This escapeway was separated from the belt and trolley haulage entries up to the belt tailpiece.

The operator was retreat mining on the 6 North Working Section. As noted by the inspector in Citation No. 236119, the coal was cut with a continuous miner, dumped onto the floor, and then transferred to a shuttle car. The coal was transferred to the belt by a "piggy-backing" procedure. The first shuttle car transported the coal a distance of 230 feet to a surge point where the coal was transferred to a second shuttle car. This car then transported the coal a distance of 240 feet to a second surge point and a third shuttle car. The third shuttle car then transported the coal 430 feet to the belt tailpiece. Applicant asserted that the working section began at the belt tailpiece. Respondent contended that the section began at the first surge point outby the face.

Inspector Caffrey testified that the belt air was separated as well as could be reasonably expected from the working section. The air movement within the entry could not be measured with an anemometer. The air which ventilated the face areas in the 6 North Working Section came predominantly from the trolley haulage entry. Approximately 25 percent of the air which ventilated the face came from the intake escapeway. The air from these two intake entries mixed and became common at the first crosscut to the left inby the belt tailpiece. The inspector issued Citation No. 236119 because of his concern that the intake escapeway did not extend in separated air up to the first surge point outby the working face. If a fire were to occur on the trolley haulageway, miners would be forced to travel a greater distance in air contaminated with the by-products of that fire.

Section 75.1707 1/ requires that the intake escapeway be separated from the belt and trolley haulage entries for the entire length of such entries to the beginning of the working section.

1/ 30 CFR 75.1707 reads as follows:

"In the case of all coal mines opened on or after March 30, 1970, and in the case of all new working sections opened on or after such date in mines opened prior to such date, the escapeway required by this section to be ventilated with intake air shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section, except that the Secretary or his authorized representative may permit such separation to be extended for a greater or lesser distance so long as such extension does not pose a hazard to the miners."

The term "working section" has been defined in 30 CFR 75.2(g)(3) to mean "all areas of the coal mine from the loading point of the section to and including the working faces." The regulations, however, do not contain a definition of the term "loading point." Alex O'Rourke, an MSHA supervisory engineer, testified that the loading point has traditionally been considered to be the point at which shuttle cars dump coal into a conveyor or mine cars. "Loading point" is similarly defined in A Dictionary of Mining, Mineral, and Related Terms 2/ as that point where coal is loaded into cars or conveyors. Inspector Caffrey testified that industry usage of the term "car" included mine cars or wagons, but that he did not recall ever having heard the term applied to a shuttle car. Both of Applicant's witnesses also testified that a shuttle car would not be considered a "car" within the meaning of this definition. On the 6 North Section, therefore, the belt tailpiece was the first point outby the face at which coal was loaded into cars or a conveyor. If this definition were to be applied, the 6 North Working Section would extend from the tailpiece inby.

Respondent asserted that the appropriate definition of "loading point" was "the place where coal is first dumped after being transported from the face area." Mr. O'Rourke testified that this had been accepted as policy at MSHA since 1972 or 1973. Both Mr. O'Rourke and Inspector Caffrey testified that MSHA had not placed this definition in writing--memo or otherwise--and that they did not know if it had been made available to operators.

Coal is transported out of the Banning Mine by dumping it in the belt conveyor. Since trolley or truck haulage is not used for the conveyance of coal, the pertinent question is whether the term "loading point" is defined as one of the places where coal is loaded on a shuttle car or the place where coal is loaded on the conveyor from the shuttle car. The first definition is a relatively new concept used by the inspector which has not been published or even promulgated in writing to the inspector. The second definition is both the dictionary definition and the traditional definition. It is accepted as the definition to be used in determining the location of the loading point. It corresponds with the term's common usage in the industry and is accorded more weight than the unwritten, uncommunicated "policy" which the inspector attempted to apply.

2/ The definition of "loading point" contained in the Bureau of Mine's A Dictionary of Mining, Mineral, and Related Terms, page 652, (1968), and introduced at the hearing as Applicant's Exhibit No. 2, is as follows:

"a. The point where coal or ore is loaded into cars or conveyors; where a conveyor discharges into mine cars; where a wagon or ferry is loaded. See also transfer point. Nelson b. N. of Eng. Where coal is transferred from a mother gate or trunk belt conveyor into tubs. Trise."

It is clear that the shuttle car is not the type of mine car or conveyor to which the definition refers in establishing the location of the loading point. A definition based on the place where a shuttle car might be loaded is too imprecise. The electrically permissible shuttle car might be used any place in the mine, including the face. In the instant case, shuttle cars were loaded at the face and at two other places outby the face. The inspector selected the most inby of those surge points and attempted to define it as the loading point. The locations of these surge points were temporary and subject to frequent change. The location of each surge point would ordinarily depend upon the length of the trailing cable, the number of shuttle cars used, the progress in mining at the face, and the location of the belt tailpiece. In addition, the size of the working sections would be appreciably reduced if it were limited to the area inby one of the surge points. This reduction could have a significant negative impact on the affect of other safety standards applicable within the working section and could possibly increase the overall hazard to the miners. Under the circumstances of the case, something more than unpublished "policy" should be required to change the traditional definition of cars or conveyors commonly used to determine the loading point.

An examination of the mine map graphically illustrates that the belt tailpiece should be designated as the loading point. The shuttle car roadway does not follow No. 3 entry, in which the belt conveyor is located, beyond the belt tailpiece. The shuttle cars use a roadway perpendicular to the belt and to No. 3 entry. For all practical purposes, the haulage system in No. 3 entry stops at the belt tailpiece and does not intend inby beyond that point. The trolly haulageway in No. 2 entry extends inby only a short distance beyond the belt tailpiece which is located in No. 3 entry. The intake escapeway ran parallel to the belt and trolley haulage entries only to a point one crosscut inby the belt tailpiece. There it changed direction and ran parallel to the shuttle car roadway, that is, perpendicular to the belt.

Section 75.1707 requires that the intake escapeway be separated from the belt and trolley haulage entries for the entire length of such entries to the beginning of the working section. It does not require that the intake escapeway be separated from an entirely different haulageway used by permissible shuttle cars. Both the belt entry and the trolley haulage entry were separated from the intake escapeway outby the belt tailpiece. Since the belt tailpiece was the beginning of the working section, the condition cited in Order No. 236422 did not constitute a violation of 30 CFR 75.1707 as alleged. Order No. 236422 was, therefore, improperly issued.

ORDER

The application for review is GRANTED and Order No. 236422, issued on September 5, 1978, is VACATED.

Forrest E. Stewart
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE LAW JUDGES
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ARLINGTON, VIRGINIA 22203

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. VINC 79-164-P
	:	A/O No. 33-00939-03010
v.	:	
	:	Docket No. VINC 79-165-P
NORTH AMERICAN COAL CORPORATION, Respondent	:	A/O No. 33-00939-03011
	:	
	:	Powhatan No. 3 Mine

DECISION

Appearances: William B. Moran, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner MSHA; Fred S. Souk, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110 of the Act by the Secretary of Labor, petitioner, against North American Coal Corporation, respondent.

These cases were duly noticed for hearing and were heard as scheduled on November 6, 1979. At the hearing, pursuant to agreement of the parties and in accordance with the regulations, the subject docket numbers were consolidated for hearing and decision.

Citation Nos. 285305, 285130, 285559, 280749, 280751, 280754, 281801, 281803, 280757, 281804, 281806, 284116, 284117, 280759, 284119, 281807, 280764, 284120, 284121, 280767, 281814, 281815, 281816

Prior to the hearing, the Solicitor filed a motion to approve settlements for the above-captioned 104(a) citations. All the recommended settlements were for the originally assessed amounts in the total amount of $3,827. At a prehearing conference held on November 2, 1979, I advised the Solicitor that his motion was inadequate and requested him to submit an amended motion at the hearing. The Solicitor subsequently presented an amended motion which set out a detailed explanation for each of the recommended settlements. After a careful

review of the Solicitor's motion, the recommended settlements for the originally assessed amounts for these citations were approved from the bench.

Citation Nos. 280752, 280755, 281802, 280756, 281805, 284115, 280758, 284118, 280760, 281808, 280763, 284112, 280766, 284123

Each of these 104(a) citations alleges a violation of 30 CFR 75.514. At the hearing, the Solicitor and the operator introduced documentary exhibits and testimony with respect to these citations (Tr. 1-292). Upon conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 292-312):

> This involves 14 citations for alleged violations of 30 CFR 75.514. The parties have agreed to a set of joint stipulations admitted as Court Exhibit No. 1 which in setting forth all the undisputed facts in detail, recites a multiplicity of locations along the main track haulage of the subject mine where bonds were missing or loose, or where fish plates were missing or loose.
>
> 30 CFR 75.514 requires, inter alia, that all electrical connections be electrically efficient. The Solicitor contends that this mandatory standard requires that every bond and fish plate be in perfect condition, i.e., that each and every one of them be bolted or joined where they are supposed to be. The operator's counsel argues on the other hand, that this mandatory standard does not apply to track haulage bonds and fish plates, and moreover, that even if it does, it applies to them not as individual components, but as part of a total system which must then be viewed in its entirety for electrical efficiency.
>
> After careful consideration of the parties' position I have concluded that the operator is correct. I do so because after listening to the testimony from MSHA's own experts, I am convinced that MSHA has not properly faced the difficulties presented, and that these difficulties cannot be met by attempting to apply 75.514 which when applied as MSHA now is doing, does not solve the problem, but rather creates confusion and unfairness not only among operators but among MSHA's own personnel.
>
> A literal reading of 75.514 could support an interpretation that each and every rail bond and fish plate is an electrical connection. However, as the operator

has pointed out, the legislative history refers to electrical connections "in wiring." There is no reference in the legislative history or mandatory standard to track haulage or to bonding although such references easily could have been made if this had been what Congress intended. Moreover, as the operator further points out, bonding and track haulage is dealt with separately in the metal and non-metal regulations. I recognize that the metal and non-metal regulations are not binding here, but by the same token I should not decide this case with blinders on. It is significant and not to be ignored that this matter is covered by a specific regulation in a companion situation.

That 75.514 does not apply to this case is further made clear by the testimony of MSHA's own witnesses. This testimony pointed out that in the 1953 Code, bonding of tracks had been specifically provided for, but that this provision had been inadvertently left out of subsequent enactments. To be sure, MSHA now has bonding requirements in its inspector's manual, but it is hornbook law at this late date that these manuals are not binding on anyone outside MSHA. The former Board of Mine Operations Appeals so held in North American Coal Corporation, 3 IBMA 93 at 103-106, and in Kaiser Steel Corporation, 3 IBMA 489 at 498. When confronted with a situation where track bonding and related matters no longer were specifically covered by the statute or regulations, MSHA should have undertaken appropriate rulemaking to bring the situation under control in coal mines just as it did with respect to metal and non-metal mines.

The solution does not lie in trying to apply 75.514. Quite the opposite is true. The impossibility and impracticability of applying 75.514 to this case is demonstrated by the subject citations. MSHA contends that 14 violations exist here. However, in no instance can MSHA determine the gravity or did it attempt to do so with respect to any of these violations. Nevertheless, the original assessed penalties for these violations ranged up to $170. In my view, $170 is a substantial penalty. Accordingly, this type of approach by MSHA simply does not make sense. On the contrary, it indicates to me that the mandatory standard was not intended to, does not, and cannot work under these circumstances.

A further problem exists with upholding these citations because 75.514 requires that electrical connections be "electrically efficient." Nowhere is the

term "electrically efficient" defined. The Solicitor contends that every time a bond or fish plate is loose or broken it is not electrically efficient. However, the Solicitor's first electrical expert, an electrical inspector, testified that where a bond at a joint is loose or missing, the fish plate could be electrically efficient, and that conversely, where the fish plate is loose, the bond can be electrically efficient. Moreover, this electrical inspector testified that the return feeder cable here was the most efficient electrical conductor of all because of the size of its diameter. There is no allegation that there was anything wrong with the return feeder cable in this case. I accept this testimony from the first MSHA electrical expert on these points although I recognize that, as in some other respects, it is in conflict with testimony from MSHA's second expert. Assuming 75.514 would otherwise be applicable, I believe that the electrical connection referred to therein means the entire configuration at the joint including the rails, bonds, fish plates and return cable and that electrical efficiency cannot be determined by looking at single elements of the joint such as one bond or one fish plate. As the evidence adduced by MSHA itself makes clear, it makes no sense to look at these individual places because one by one they give no idea of any hazard from heating or arcing. Here it has been stipulated that there was no heating or arcing. The testimony of MSHA's first expert is a sufficient basis in and of itself to decide that the individual joints consisting of bonds, rails, fish plates, and return cables were electrically efficient.

In addition, I decide that the system as a whole should be looked at to determine electrical efficiency once again assuming the applicability of 75.514. I believe Judge Moore's decision in Knisley Coal Company (PITT 73-210-P), dated October 22, 1974, was correct.

If as the Solicitor says, it is impossible for MSHA to test individual bonds and fish plates for electrical efficiency, then MSHA can adopt new regulations which like the metal and non-metal regulations require a certain type of bonding at given intervals. MSHA is not powerless to deal with this situation. It merely wants to handle this matter as painlessly as possible for itself.

One final point must be made. The testimony makes clear that MSHA itself does not enforce the interpretation of 75.514 it is asking me to accept in this case. MSHA's first expert, the electrical inspector, admitted that often he does not cite an individual broken bond as a violation. Obviously, he thinks the policy is unworkable. Plainly, from his testimony he is not alone among those in the field who think this way. Even more importantly, both MSHA's experts made clear that MSHA does not require that both rails be bonded on secondary track haulage roads. The reason for this is that the loads on secondary track haulage roads are lighter than those on main track haulage roads. I recognize that the subject 14 citations cover only the main track haulage roads. However, I cannot ignore the fact that if I adopted MSHA's position in this case, bonding on both rails on secondary track haulageways as well as main haulageways would be required although this is contrary to what MSHA actually does at the present time, and MSHA has never indicated that it will change its present policy regarding secondary track haulage roads. Once again, I should not and will not decide this case with blinders on. I can only conclude that MSHA itself does not really believe 75.514 applies to track haulage bonds and fish plates, but is selectively applying this mandatory standard only where it wants to. The Act simply cannot be administered in this fashion. It is obviously illegal, patently unfair and makes no sense.

To be sure, the problems regarding the electrical integrity and safety of track haulage systems must be faced. However, such problems are not met, and certainly are not solved by trying to persuade an administrative law judge to stretch a mandatory standard beyond its logical, sensible, historic and legal limits.

The operator did not present much evidence. It did not have to. The utter disarray in MSHA's present enforcement policy in this area was manifested most clearly through the confusion and discomfiture of its own witnesses whose candor and sincerity only served to heighten the unfortunate situation. Rule-making may be a long and arduous process, but I have neither the authority nor the inclination to substitute myself for it.

In light of the foregoing, the subject citations are vacated, and no penalty is assessed.

ORDER

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

In accordance with the foregoing determinations, the operator is ORDERED to pay $3,827 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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

Standard Distribution

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

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-404-PM
Petitioner	:	A/O No. 42-00176-05001
	:	
v.	:	Magna Concentrator
	:	
KENNECOTT COPPER CORPORATION,	:	Docket No. DENV 79-413-PM
Respondent	:	A/O No. 42-00712-05003
	:	
	:	Arthur Concentrator

DECISION

Appearances: James Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; F. Alan Fletcher, Esq., and James M. Elegante, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Stewart

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a). A hearing was held on these matters in Salt Lake City, Utah, on July 17, 1979. With regard to the violations alleged in Docket No. DENV 79-404-PM, Petitioner and Respondent each called two witnesses. At the conclusion of the hearing, a decision was rendered from the bench setting forth findings of fact and conclusions of law and assessing penalties:

> The Solicitor has indicated that there is no history of previous violations on the part of the operator, and I so find that there is no history of previous violations.
>
> The evidence has indicated that the operator is a large corporation and that the mining operation and the concentrator operation are large. There is no evidence that the penalty requested will affect the operator's ability to continue in business.

As to citation No. 338206, the inspector alleges that housekeeping was needed at the head pulley and the drive motor of the incline belt. The evidence has amply shown that there were pieces of conduit and pieces of wire in the area and that they could possibly constitute a tripping hazard.

Both the Solicitor's witnesses and the operator's witnesses have indicated that there was some tripping hazard. I find that the lighting was at least fair, and the conditions were visible. It was not likely that a person would trip but he would be more likely to trip in that area than other places. Therefore, a tripping hazard existed.

Another reason that the hazard was somewhat unlikely to cause injury was the fact that this area was seldom used, that is, it was used only on occasion.

I find that the condition, however, was obvious, that the operator knew or should have known of these conditions, and that it should have been corrected. The record establishes that the operator was negligent.

I find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. Even though the tripping hazard is slight, I note that the penalty requested was only $40. The nature of the hazard was evidently considered in proposing the penalty for this violation.

As to citation 338210, I find that a violation did occur. Petitioner's inspector, Frank E. Vario, described the violative conditions as follows: In the electrical portion of the carpenter shop, the floor was saturated with oil and solvent and the solvent tank was uncovered. A cutting torch is sometimes used within about six feet.

As to the gravity of this violation, I find that there was at least a slipping hazard, acknowledged by witnesses for both the Petitioner and the Respondent. It appears that the oil and the solvent did cause the rubber mat and the covering to be slippery. It is also possible that the uncovered solvent tank and the oil solvent on the floor could also be a fire hazard. However, I do not find sufficient evidence to show that a cutting torch was actually used within about six feet of the solvent tank. I understand the inspector to mean the six-foot distance to be from the solvent tank to the cutting torch. That is not clear, and even if it should be, as to the saturated oil and solvent on the floor,

I still find insufficient evidence to indicate that a cutting torch was actually used. If the torch was used in this area, the evidence indicates that perhaps there was a door which could be closed and that the area where the cutting occurred was outside the building. Nevertheless, there is a slight possibility of a fire hazard even though the use of a cutting torch has not definitely been established.

As to the operator's negligence, I find that the condition was obvious and it should have been known to the operator, and the condition should have been corrected by the operator. The record establishes that the operator was negligent.

I find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of a violation. There were no previous violations, the operator demonstrated good faith and the possibility of an injury as a result of these conditions was slight.

I find that those conditions have been considered in arriving at a proposed penalty of $44. I therefore find that this small penalty in the amount of $44 is appropriate for the violation.

The Respondent is therefore ordered to pay MSHA the sum of $84 within 30 days of the date of this citation.

The bench decision is hereby affirmed.

Counsel for Petitioner moved at the hearing to withdraw the petition for assessment of civil penalty with respect to Citation No. 338209 on the grounds that he lacked sufficient evidence of the alleged violation. The motion to withdraw Citation No. 338209 was granted by the administrative law judge and is affirmed at this time.

At the conclusion of the hearing, the parties agreed to a settlement of the second proceeding herein, Docket No. DENV 79-413-PM. Counsel for Petitioner asserted the following:

With respect to citations numbers 00336009 and 00336010, the Respondent wishes to withdraw his Notice of Contest, and the parties have agreed that the penalties which were proposed are appropriate, although we do want to put evidence in the record on that. The penalty proposed for citation No. 00336009 is $56 and for 00336010, the penalty is $106. The Secretary of Labor hereby moves to withdraw the Petition for Assessment of Penalty for citation No. 00336012 and the penalty for that.

With respect to the six statutory criteria underlying the proposed penalties for the two items remaining in question, the parties stipulate as follows: First of all, that the amount of penalties would not affect Respondent's

ability to continue in business; secondly, as to the testimony of Mr. Pinder with respect to size will stand as to these two citations; thirdly, with respect to history, by the time these two citations were assessed, the Respondent had had a total of 20 assessed violations within the preceding 24 months and those arose out of seven inspection days.

As to the negligence and the gravity involved in both of these citations, it was slight. Both of these citations were abated within the time set forth by the inspector, which would show the Respondent's good faith in complying.

Based on those proposed criteria, we would then propose to Your Honor and the Commission that a penalty of $56 be assessed for violation of 09 and a penalty of $106 be assessed for violation of 10; and, finally, that Your Honor grant the motion of the Secretary to withdraw the Petition and the underlying citation for assessment of penalty and vacate the citation for assessment of penalty and vacate the citation for the last item, the last two digits being 12.

Counsel for Petitioner asserted thereafter that Citation No. 336012 was withdrawn because of difficulties of proof.

This settlement was approved by the administrative law judge at the hearing. The Respondent was ordered to pay the agreed-upon sum of $162 within 30 days of the date of the decision approving settlement.

The decision approving settlement rendered at the hearing is hereby affirmed.

ORDER

It is ORDERED that the bench decision rendered in Docket No. DENV 79-404-PM is hereby AFFIRMED.

It is ORDERED that the granting of Petitioner's motion to withdraw Citation No. 338209 is hereby AFFIRMED.

It is further ORDERED that the decision approving settlement in Docket No. DENV 79-413-PM is hereby AFFIRMED.

If payment has not been made by Respondent as ordered at the hearing, it is hereby ORDERED that Respondent pay the sum of $246 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5205 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-114-PM
Petitioner	:	A.C. No. 02-01510-05001
v.	:	
	:	Crushed Granite Operation
MADISON GRANITE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Malcolm R. Trifon, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
W. T. Elsing, Esq., Phoenix, Arizona, for Respondent.

Before: Administrative Law Judge Michels

This proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petition for assessment of civil penalty was filed by MSHA on December 5, 1978, and a timely answer was filed thereafter by the Respondent. A hearing was held in Phoenix, Arizona, on September 11, 1979, at which both parties were represented by counsel.

The charges concern seven citations. Evidence was received as to each each citation and a decision thereon was rendered from the bench. These decisions as they appear in the record, with certain necessary corrections or changes, are set forth below, seriatem. The Petitioner filed a motion for reconsideration of the decision in one such citation. That matter will be taken up under the citation involved.

Citation No. 371248, April 12, 1978

The following is the bench decision on this citation found at pages 31-34 for the transcript:

> This decision relates to Citation Number 371248. [The] inspector issued a citation April 12, 1978, in which he charged as follows: "Guard tail pulley of stacker belt (reinstall guard removed for cleanup)." This condition or practice was charged to be a violation of 30 CFR 55.14-1.

This particular mandatory standard reads as follows: "Gears; sprockets; chains; drive, head tail, and takeup pulleys; flywheels; couplings; and shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded".

My first finding would be to the fact of the violation and based on the testimony I would have to find that there was a violation of the mandatory standard as charged. The inspector visited the site. He found that the guard was not on the particular belt pulley as required by law and, accordingly, there is a violation of 55.14-1 and I so find. I will add to that this observation: That even though this particular condition was caused by the negligence of an employee, it is still under the law chargeable to the operator. The law as written places the full responsibility on the operator and these other factors are taken into account only under the criteria that are considered in evaluating and deciding upon [an] appropriate penalty for the violation. So, while in some cases it may seem rather harsh and perhaps technical, that is as I understand [it] the way the law is written, and I would really have no choice but to find a violation. I should also add to this and I think it was clear from the testimony, that it was not disputed the guard was in fact removed and not replaced.

The criteria, some of these I will find for -- make the findings for this violation only and these findings will be applicable to the subsequent citations also, if any are found to be violations.

It was stipulated that there is no history of prior violations and I so find. It was stipulated that the operator has seven (7) employees who work thirteen thousand eight hundred and ninety-five (13,895) man hours per year. I have no other evidence on the size of the company and it seems to me that [this] represents a small operation and I so find. No evidence was presented as to the operator's ability to continue in business. Based on an assessment of an appropriate penalty for this citation, I find that the penalty to be assessed will not affect the operator's ability to continue in business.

The inspector testified that he had every reason to believe the violation was expeditiously corrected and I so find. I find that the gravity of this violation in the circumstances to be slight. The inspector testified that there is some possibility of an employee slipping into a

pinch point in this belt pulley and being injured. Approximately three (3) employees might be affected. However, it was brought out and I think by both witnesses, that this possibility in all of the circumstances was quite remote. So, therefore, my finding is slightly serious.

So far as negligence is concerned, just as a technical matter I would find some degree of negligence. It is, I think, a slight negligence because the operator has a very good record as indicated by the testimony of safety and it was also shown that this particular violation was caused wholly by an employee who was later discharged. Furthermore, since there was no foreman or other employee of the operator at the plant in this period to observe the lack of the guard, it does appear that the operator had no real opportunity to be aware of it except as a technical and legal concept of responsibility under the law. So therefore I would find only that slight degree of negligence as the law would require here.

The penalty assessed by the Office of Assessments in this case was sixty ($60.00) dollars and it seems to me that in light of all the circumstances revealed at this hearing that [this] would be excessive. As I indicated, the gravity is slight. There is little or no negligence and in light of the operator's good record of safety I look at it more as a -- in this instance and in these circumstances as a technical legal violation, but as I previously indicated, it is necessary to -- not only to find that the operator is in violation but I have no choice but to assess some penalty. Accordingly, I will assess the penalty of ten ($10.00) dollars for this citation.

The bench decision on this citation is affirmed.

Citation No. 371249, April 12, 1978

The bench decision on this citation, found at pages 105-108 of the transcript follows:

The inspector -- I'm now referring to Citation 371249 and the inspector charged the condition or practice [as follows:] "Establish a continuous ground. All motors, metal frames to be tied into it. Have electrician from registered contractor check your ground and write in log what its resistance is, and that you have an established ground". The mandatory standard applicable on November 30, 1977, and therefore at the time this violation was cited as follows: It is 30 CFR 55.12-28. "Continuity and resistance of grounding systems shall be tested immediately

after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative."

Now I agree with Mr. Elsing that this regulation requires only two (2) general things; that is, the testing at certain specified times and a recording of those tests and their availability to the inspector. Applying that regulation to the facts here, in my view, the requirement that it be tested immediately after installation is not applicable because the operator was not subject to the law at the time of the installation which, based on the evidence and the reasonable inferences to be drawn therefrom, was prior to March 9th, 1978. Also, there is no evidence that there is involved here either repair or modification, so therefore such times are not applicable here. The only phrase so far as I can see that's applicable is "and annually thereafter" and there is a question as to its meaning. Counsel for MSHA contends it means that testing should have followed immediately after the law became effective. Counsel for the operator, on the other hand, contends that it would mean one (1) year after the effective date of the law and its applicability to this operator, which would be one (1) year from November 30, 1977, or November 30, 1978.

I should interpose that there are other regulations which as I understand it would require proper grounding systems. We are here only talking about a requirement which specifically and explicity requires testing and at certain times. I can't read into that any requirement that this testing take place immediately after either the effective date of the law or the date that it becomes applicable to this operator. This operator as I read this is required to make -- to test annually and the question is, from what reference point, considering the fact that this standard was in effect at the time it became applicable to the operator. It seems to me that it would be logical to construe that as Mr. Elsing has argued, that it would be within one (1) year after its applicability or namely, by November 30th, 1978.

My ruling here which I think you're already anticipating is with regard [to what] I consider the extreme gravity of the failure to test. I am absolutely sure from prior circumstances that this is vital for safe practice involving these electrical systems, to test and perhaps keep a record of it, but I don't think that issue is before me.

The only issue before me is whether at the time charged the operator should have tested and recorded that test and my ruling is that since the law as made applicable to the operator did not require a testing at that particular time, that there has been no violation of that standard and that is my finding * * *.

Now I think this regulation does require testing immediately after installation where applicable and a year thereafter and if the date of installation is known, then the testing would have to be within one (1) year or approximately, I suppose, a year thereafter * * *. And the same applies for repair and modification in my view. If those were factors involved in the matter, as I would interpret it, the testing would have to be at that time and annually thereafter.

In this instance, the problem has been there was no evidence as to the time of installation, which was the only time that was involved. There is no evidence as to whether the operator knows or does not know. I think that it would be a part of the burden of the MSHA to show what timespread it is applying here and if it's based on the installation, to show that, and so therefore my decision is based on the failure of proof in that regard. Accordingly, the Citation Number 371249 is vacated and the petition will be dismissed as to that citation.

The above decision is affirmed.

Citation No. 378006, May 5, 1978

A decision was rendered from the bench as to this citation, which will be found at pages 81-83 of the transcript. MSHA charged a violation of 30 CFR 55.15-2 in that the crusher operator was observed not wearing a hard hat while walking around the crusher area. I found in the bench decision that there was no violation based on the precedents of the Board of Mine Operations Appeals and also OSHA which hold the employer not liable in some circumstances for an employee's failure to wear protective clothing or other devices.

On October 22, 1979, Petitioner filed a motion for reconsideration of the decision of this citation submitting that this case is distinguishable from the cases relied upon, decided by the Board of Mine Operation Appeals and OSHA. 1/ Respondent answered asserting that the decision was correct and should be affirmed.

1/ It does not appear that the rules of procedure prohibit reconsideration such as is sought here. While there is no specific provision on authority for reconsideration, the rules do provide that "the jurisdiction of the Judge terminates when his decision has been issued

Having reviewed the applicable cases and the Commission's recent interpretation thereof, it appears that my reliance on Board case precedent was misplaced. North American Coal Corporation, 3 IBMA 93 (1974), is the principal Board decision supporting dismissal, but it has been so qualified and limited that it no longer constitutes a valid precedent for the position taken in the decision above. Cf. Webster County Coal Corporation, 7 IBMA 264 (1977), and Rushton Mining Company, 8 IBMA 255 (1978).

Furthermore, the Commission held in United States Steel Corporation, Docket Nos. PITT 76-160-P and 76-162-P (September 17, 1979), that it is well established that under the Federal Coal Mine Health and Safety Act of 1969, an operator is liable for violations of mandatory health or safety standards without regard to fault (footnote omitted). In a footnote the Commission observed:

> 3/ U.S. Steel's argument relying on North American Coal Corp., 3 IBMA 93 (1974), is not persuasive. The rational of the Board's decision in North American has been limited to the language of the particular standard involved in that case, 30 CFR §75.1720. Webster County Coal Corp., supra. See also Ruston Mining Co., supra. The present case presents no occasion to determine whether we agree with the Board's interpretation of 30 CFR §75.1720.

Accordingly, I hereby amend my bench decision on this citation, by substituting therefor the following:

> The inspector listed the following condition or practice in his citation: "The crusher operator was observed not wearing his hard hat while walking around the crusher area." This was charged to be a violation of 30 CFR 55.15-2 which reads: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard."
>
> The employee without a hard hat was working in an area in which as a matter of policy the operator required the wearing of hard hats (Tr. 74). The regulation, however, is phrased not in terms of hard hat areas but areas "where

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fn. 1 (continued)
by the Executive Director" 29 CFR 2700.65(e). This has not yet happened. No problem arises here relating to review by the Commission, a matter which concerned the agency in Secretary of Labor v. Penn Allegh Coal Company, Inc., Docket No. PITT 78-97-P (January 3, 1979). This decision, as provided for in 2700.65(a), has not yet been reduced to writing or issued by the Executive Director. Furthermore, the parties have raised no issue on the authority of the Judge to reconsider his decision at this stage.

falling objects may create a hazard." The inspector observed the employee climbing down the shaker screen without a hard hat (Tr. 66-67). He testified that the employee had to check the belts underneath the shaker screen and that the employee was in a dangerous position part of the time. The inspector indicated his belief that the hazard was the material flowing through the conveyors and the belts (Tr. 69). There is no testimony from the inspector that he saw falling objects or even that the conditions indicated the possible presence of falling objects.

The inspector stated that "if" a rock fell down, the employee could have gotten hurt when getting off the shaker screen. Mr. Madison, the plant owner, testified, however, that the employee does not go under the conveyor belts and that when coming down the ladder, he is 6 to 7 feet away from the conveyor belt. Mr. Madison also testified that the speed of the conveyor belt would allow rocks to fall only on the screen and that in no way could rocks fall on a man (Tr. 73-74; R-3). This testimony was not disputed or challanged. Further, the inspector testified that the operator had operated for a long time with an excellent safety record (Tr. 18).

MSHA has the burden of proof to show by a preponderance of the evidence, not only that an employee was not wearing a suitable hard hat but that such employee was in or around a mine or plant where falling objects may create a hazard. MSHA has shown that no hard hat was worn, but it has not shown with a preponderance of the evidence that the employee was in an area where falling objects may create a hazard. I so find. 2/

I do not suggest that the operator's policy of requiring hard hats in the screening area should be abandoned. It is a valuable precaution and possibly even a necessity for the protection and safety of employees. This matter is decided only on the ground of failure of proof; it is not a decision on the actual need for hard hats in the area concerned.

I should also note that the circumstances in this instance were peculiar and will likely not be repeated. The operator has a policy to require everybody in the

2/ I recognize that the amended decision differs from my bench decision on the finding of whether the area was one "where falling objects may create a hazard." No specific finding was made on the point in the bench decision, and I accepted the showing that the area was a hard hat area as sufficient. A full review of the evidence now satisfies me that the finding on this question in the amended decision is the correct finding.

crushing and screening area to wear hard hats (Tr. 74). Hard hats were available and the employee in question had one in his car (Tr. 69). This policy was verbally enforced by the superintendent or the working foreman. The employee involved had been warned to wear his hard hat. He had had headaches and was off work quite a bit. He claimed that the hard hat contributed to his headaches (Tr. 75). This employee had been given a job apparently in spite of his problems because he had a large family and was on relief (Tr. 71). The employee was discharged for his failure to comply with the operator's instructions (Tr. 75).

I find no violation in Citation No. 378006 and it is hereby vacated and the petition dismissed as to this violation.

I affirm my decision from the bench as amended.

Citation Nos. 378007-378010, May 5, 1978

A decision was rendered from the bench on these citations which will be found at pages 128-131, of the transcript as follows:

> Judge Michels: That then completes the evidence on these four (4) citations. So the decisions on the Citation Numbers 378007 through 378010 are as follows: -- this will be a consolidated resolution. The inspector charged for each of four (4) different conveyors essentially the same; namely, that the conveyor did not have a stop cord or a guard along the walkway. Three (3) of the citations charge that there was no guard along the walkway on either side of the conveyor. This condition is charged to be a violation of 30 CFR 55.9-7. That regulation or mandatory standard requires as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length".
>
> The evidence on these citations which is essentially undisputed, is that the four (4) conveyors did not have a continuous stop cord; that is, a stop cord along the full length, nor were they guarded. The requirement clearly is that unguarded conveyors with the walkway shall be equipped with these emergency devices. Since the emergency devices were not in place I find that there was a violation in each of the four (4) instances. I find a violation, in other words, of 30 CFR 55.9-7 for each of the citations in 378007 through 378010.
>
> There are findings to be made on three (3) of the criteria, findings having already been made on the three (3) other criteria that are generally applicable. First, on the gravity or seriousness. There is a conflict to some

extent in the testimony as to whether the conveyors are as safe now as they were before the installation of the guards. The guards were installed for purposes of abatement or to correct the alleged condition. Based on the testimony of witness Herr and the picture [Respondent's Exhibit R 4], I suppose that one might conclude that with that rail an accident could be more serious if somebody should put his hand under the roller. However, it seems to me that the rail would be instrumental, at least in preventing accidental instances of limbs being inserted under the roller. But in any event, the question of abatement or the correct means of guarding is not really before me. The real issue is whether there was a cord or not, a continuous cord, cut-off cord on an unguarded conveyor. Now if the conveyor is guarded then you don't need the cord and the abatement purpose of the guard was to replace the need for the cords. The operator is of course free to install the kind of guard, I believe, that it believes will serve the purpose and prevent injury and if additional screening or additional guarding is necessary, that perhaps should be done. But as I understand it, the inspector was satisfied with the minimum type of railing that was installed and accepted that and I have no reason at this time to go behind his judgment on accepting that as being adequate abatement.

To get back to the hazard, I find from the evidence that there is a danger of miners working around the conveyors or perhaps walking, using the conveyors, of accidentally becoming entangled in them and becoming injured and, without the stop cord, having no means to stop the conveyor and reduce or eliminate the possible injury.

On the question of negligence the mandatory standards place on operators the requirement that they know what the standards are and to comply with them. The lack of either a stop cord or the guarding in these circumstances was certainly readily observable and so therefore should have been known and I find some degree of negligence for the failure to install either the guard or the stop cord. Abatement, based on the evidence, was done rapidly and in good faith and I so find.

The Assessment Officer has assessed a fine -- or proposed a fine of thirty-eight ($38.00) dollars for each of the four (4) violations. These proposals are not binding upon me, but I believe that in all the circumstances that would be an appropriate fine for the violation found. So in conclusion, therefore, a fine is assessed of thirty-eight ($38.00) dollars for each of the four (4) violations found in the Citations Numbers 378007 through 378010.

I hereby affirm the above-decision in Citation Nos. 378007-378010 except for the size of the assessments. After reading the transcript and reconsidering the matter, I believe that I assessed these citations too high since there was a low degree of negligence. It is true that for a clearly defined walkway, the absence of a guard or cord would be obvious and known or should be known. These, however, were not clearly defined walkways. They were merely the ground alongside the conveyors which miners used and walked along to service the equipment (Tr. 110-111, 115, 118). I agree that these are walkways within the meaning of that term as used in 30 CFR 55.9-7, but that fact may not be so clearly evident to an operator. Thus, it seems that a small degree of negligence is involved. Accordingly, I will reduce the assessments by one-half and reassess for each of these citations a penalty of $19.

A summary of the dispositions in this case follows:

Citation No.	Action taken or Assessment
371248	$10
371249	vacated
378006	vacated
378007	19
378008	19
378009	19
378010	19
	$86

IT IS ORDERED that Respondent pay the penalties totaling $86 within thirty (30) days of the date of this decision.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 28 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PIKE 79-44-P
	:	Assessment Control No. 15-02097-02020V
v.	:	
	:	Feds Creek No. 1 Mine
KENTLAND-ELKHORN COAL CORPORATION Respondent	:	

DECISION

Appearances: John H. O'Donnell, Esq., U.S. Department of Labor, for Petitioner;
Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

A hearing was held in the above-entitled proceeding on May 15, 1979, in Pikeville, Kentucky, under Section 105(d) of the Federal Mine Safety and Health Act of 1977 pursuant to a written notice of hearing dated April 12, 1979.

The proceeding involves a Petition for Assessment of Civil Penalty filed by MSHA on November 21, 1978, as amended on May 8, 1979, seeking assessment of civil penalties for alleged violations of 30 CFR 75.200 and 30 CFR 77.506. When the hearing was convened on May 15, 1979, counsel for the parties stated that they had entered into a settlement agreement with respect to the alleged violation of Section 75.200, but that each party would present evidence with respect to the alleged violation of Section 77.506 (Tr. 3).

The Settlement Agreement

Under the settlement reached with respect to the alleged violation of Section 75.200, respondent would pay a civil penalty of $8,000 instead of the penalty of $10,000 proposed by the Assessment Office (Tr. 4).

It was stipulated that respondent is a subsidiary of The Pittston Company Coal Group, that the Feds Creek No. 1 Mine produces about 600 tons of coal daily and, at the time the order here under consideration was written, employed 10 miners on the surface and 145 underground. The Feds Creek Mine extracts coal from the Pond Creek seam which averages 60 inches in thickness (Tr. 4-5). Those facts support a finding that respondent is a large operator, is subject to the provisions of the Act, and that civil penalties in an upper range of magnitude are appropriate under the criterion of the size of respondent's business. In the absence of any financial evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business.

The settlement agreement specifically concerns a violation of Section 75.200 alleged in Order No. 2 CC dated March 17, 1977, which stated that unsupported shale roof was present on the runaround on the Jackson Rowe Section beginning at the overcast and extending inby for a distance of 43 feet. Two posts were the sole means of roof support (Exh. 2).

The background circumstances leading up to the occurrence of the violation were that the track entry being used at the time Order No. 2 CC was written ran parallel to an old track entry which had been cut about 20 years prior to 1977. Respondent had made a crosscut to connect the old and new track entries, but the crosscut had never been bolted. The inspector who wrote the order observed the mine foreman walking through the unsupported crosscut. The inspector also walked through the crosscut to take measurements, knowing that the crosscut was unsupported. The inspector explained that he had walked through the crosscut because its roof consisted of blue slate and that he felt the roof was perfectly safe even through it had never been bolted. The inspector believed that the operator's failure to support the roof, despite the inspector's having walked under it, was a serious and a very negligent violation because respondent's roof-control plan requires all roof to be supported and the inspector claims that respondent had had ample time within which to install supports (Tr. 5).

Counsel for respondent defended the operator's failure to have installed supports by explaining that there was a drop in elevation between the two tracks and that the delay in supporting the roof was caused by the necessity of respondent's having to construct a ramp for the purpose of moving a roof-bolting machine into the crosscut (Tr. 5-6).

Respondent corrected the alleged violation by 11:00 a.m. of the day following issuance of Order No. 2 CC (Exh. 4). Therefore, I find that respondent demonstrated a normal good faith effort to achieve rapid compliance.

The facts set forth above indicate that the violation was not serious enough to warrant imposition of a maximum penalty of $10,000. A large penalty is warranted on the basis of negligence because respondent succeeded in supporting the roof within a 24-hour period once the order was issued. Additionally, Exhibit 1 shows that respondent has violated Section 75.200 on 48 prior occasions. That is an unfavorable history of previous violations and requires that a relatively large penalty be imposed for the instant violation of Section 75.200. For the foregoing reasons, I find that a penalty of $8,000 is reasonable and that the parties' settlement agreement with respect to the violation alleged in Order No. 2 CC dated March 17, 1977, should be approved as hereinafter ordered.

The Contested Violation

Order No. 1 VEH (7-79) 4/27/77 § 77.506 (Exhibit 5)

Findings. Section 77.506 requires that automatic circuit breakers or fuses of the correct type be used to protect all electric equipment and circuits against short circuit and overloads. Respondent violated Section 77.506 because a piece of heavy copper wire had been substituted for a fuse in

the nip which was used to obtain power from the trolley wire for the car-repair shop located on the surface of the mine. The violation was serious because the use in the nip of a piece of wire, instead of a proper fuse, destroyed short circuit and overload protection on the power circuit which supplied electricity to the lights, electric heater, and electric welder in the shop where track haulage equipment was repaired (Tr. 11-12; 48). If a short circuit had occurred in the equipment used in the shop, the two men working there could have been exposed to shock or electrocution (Tr. 25). Heat generated by a short circuit could also have caused electrical insulation to ignite and produce a fire (Tr. 31). Since the shop was on the surface, a fire would have been less hazardous to the men working in the shop than exposure to electrical shock (Tr. 49). The gravity of the shock hazard was reduced by the fact that the resistors used for space heating were frame grounded and the frame ground would have had to have been burned in two by overheating before the resistors would have become a shock hazard (Tr. 47). The substitution of a wire for a fuse was an act of gross negligence in view of the fact that one of the men working in the shop had repeatedly tried to obtain fuses from the chief electrician and the supply shop without success. He had advised the supply personnel that he was substituting a wire for a fuse because of his inability to obtain a fuse at the shop (Tr. 89-91; Exh. 8).

Discussion and Conclusions. Respondent's chief electrician testified that he was present when the inspector found the wire in the nip during an inspection of the repair shop on Wednesday, April 27, 1977 (Tr. 62; 70). Consequently, respondent does not dispute that a violation of Section 77.506 occurred. Respondent's defense was that the negligence associated with the violation was not great enough to warrant the inspector's issuance of an order of withdrawal under the unwarrantable failure provisions of Section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. As the Commission held in MSHA v. Wolf Creek Collieries Co., Docket No. PIKE 78-70-P, issued March 26, 1979, 79-3-11, and in Pontiki Coal Corp. v. MSHA, Docket No. PIKE 78-402-P, issued October 25, 1978, 79-10-13, the validity of the order citing respondent for a violation of Section 77.506 is not an issue in a civil penalty proceeding arising under the 1969 Act, but it is necessary to evaluate respondent's defense in order to determine the degree of negligence which was associated with the violation of Section 77.506.

Respondent's defense to MSHA's claim of gross negligence was exclusively based on the testimony of respondent's chief electrician who testified that he had held the position of respondent's chief electrician for only about 1 month before the violation occurred. He stated that he had examined the circuit in the repair shop shortly after his being hired by respondent and that he had determined on the basis of his initial examination that the No. 1 cable being used to supply power in the shop was undersized for its intended purpose. Therefore, on Saturday, April 23, he had replaced the No. 1 cable in the shop with No. 4 cable. He said that he had found on Saturday that a wire was being used in the nip instead of a fuse and that he had removed the wire but had not inserted a fuse because no work was being done on Saturday and therefore no power was needed in the repair shop (Tr. 58; 64-65).

The chief electrician said that he did not get to the repair shop until 10:00 or 11:00 a.m. on the following Monday, April 25, 1977. By that time the two men who normally worked in the shop, Alson Thornbury and Fonso Hatfield, were already working. When the chief electrician examined the nip, he found that a wire had again been installed in the nip instead of a fuse. The chief electrician, at that time, replaced the wire with a fuse. The chief electrician said that he was, therefore, surprised when the inspector found a wire in the nip on the following Wednesday which was just 2 days after he had inserted a fuse in the nip (Tr. 70; 77-79).

The inspector who wrote the order stated that if the electrician had explained the above-described steps which he had taken to insure that the power circuit in the shop was protected with adequate overload and short circuit protection, he would have issued a notice under Section 104(b) of the 1969 Act. Such a notice would have been considered to involve a lower degree of negligence than is usually associated with an unwarrantable failure order (Tr. 37-40).

If no evidence controverting the testimony of the chief electrician had been introduced, the record would have supported a finding of a low degree of negligence. The inspector, however, expected that his order might become the subject of a hearing and therefore he took the unusual precaution of asking one of the shop workers, Mr. Thornbury, for a written statement of the facts surrounding the issuance by the inspector of the order here involved (Tr. 32; 93). That written statement was introduced as Exhibit 8 in this proceeding and it indicates that Mr. Thornbury admitted having substituted the piece of trolley wire for a fuse, but Mr. Thornbury said that he had used a wire because the fuses frequently blew and neither the chief electrician nor the supply house would provide him with an adequate number of fuses for the nip.

Additionally, Mr. Thornbury was called as a witness and testified as follows: (1) He had been able to obtain only a couple of fuses from the chief electrician. They soon blew out because the use of the electric welder in the shop overloaded the circuit and blew out the 200-amp fuses which were the largest ones he could get (Tr. 90; 96). (2) Mr. Thornbury tried repeatedly to obtain fuses from the supply shop, but the supply shop personnel claimed they did not have any. In such circumstances, Mr. Thornbury said he was forced to substitute a wire for a fuse because he had a lot of repair work to do and had no other way to obtain electricity (Tr. 90-91). (3) Mr. Thornbury worked in the shop for about 1½ years and he said that they used "the same old wire" to supply power all the time he was there and that it was not replaced a short time before the inspector's order was written (Tr. 95-96). (4) Mr. Thornbury said a wire or a fuse was always in the nip when they started to work on Monday after each weekend and that he had never come to the shop on any Monday and found the nip inoperative because of a lack of either a wire or a fuse in the nip (Tr. 96). (5) Mr. Thornbury said that he had never been told by the chief electrician to refrain from using a piece of trolley wire in the nip, but he said he had told the chief electrician and supply house that he was using a wire in the nip and that using a wire might cause trouble if it were to be discovered by an inspector (Tr. 90-91).

It is obvious from the foregoing review of the conflicting testimony that a determination must be made as to whether Mr. Thornbury's testimony should be considered as more or less credible than that of the chief electrician. I believe that the circumstances surrounding the two witnesses' conflicting testimony support a finding that Mr. Thornbury's testimony is more credible than that of the inspector. Mr. Thornbury submitted a written statement of the events associated with the inspector's issuance of the order here involved. Subsequently, Mr. Thornbury retired because of ill health and appeared at the hearing in response to a subpoena. His testimony at the hearing was entirely consistent with the written statement given to the inspector prior to the hearing. Mr. Thornbury had not been present in the hearing room when the chief electrician testified and had no reason to believe that the facts he was giving were different from those stated by the chief electrician. Moreover, the chief electrician stated that no reprimand or other disciplinary action was taken against Mr. Thornbury even though Mr. Thornbury had readily admitted that he had substituted the wire for a fuse in the nip. In such circumstances, there is no reason to believe that Mr. Thornbury would have testified adversely to respondent's position out of personal animosity toward respondent's management.

For the reasons given above, I find that respondent's management was aware of the fact that the wire had been substituted for a fuse and had failed to do anything about it.

Assessment of Penalty. It has already been found above that respondent is a large operator, that payment of penalties will not cause respondent to discontinue in business, and that respondent demonstrated a normal good faith effort to achieve rapid compliance. The violation was serious because it was accompanied by a potential shock hazard and a fire. The fire would have been on the surface where no one would have been exposed to a lethal amount of carbon monoxide or other noxious fumes. The inspector stated that he observed no defects in the wire supplying power to the resistors and welder. Additionally, the equipment in the shop was frame grounded so that the use of the wire in the fuse nip would have had to have been accompanied by a breakdown of the frame ground before anyone would have been shocked by coming in contact with the resistors or welder.

The violation was the result of gross negligence because respondent had declined to obtain fuses as often as they were needed even though one of the shop repairmen had advised the chief electrician and the supply department that he was using a wire instead of a fuse because of their indifference to the fact that he needed fuses. No reason was given for respondent's failure to provide adequate circuits to carry the power required to operate both the resistors and the welder. In such circumstances, I find that respondent was grossly negligent in allowing the violation to occur. Consequently, a penalty of $4,000 will be assessed for this violation of Section 77.506.

Exhibit 1 shows that respondent has violated Section 77.506 on three prior occasions in three different years. While that is not a significant previous history, it should not be ignored. Consequently, the penalty of $4,000 will be increased by $50 to $4,050 in view of respondent's history of previous violations.

WHEREFORE, it is ordered:

(A) The motion for settlement made at the hearing is granted and the settlement agreement under which respondent has agreed to pay a penalty of $8,000 for the violation of Section 75.200 alleged in Order No. 2 CC (7-36) dated March 17, 1977, is approved.

(B) Respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $14,050 of which $8,000 will be attributed to the settlement agreement described in paragraph (A) above and the remaining sum of $4,050 will be allocated to the violation of Section 77.506 alleged in Order No. 1 VEH (7-79) dated April 27, 1977.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VINC 79-138-PM
Petitioner	:	A.O. No. 11-01603-05002
v.	:	
	:	MM #6 Mine
OZARK MAHONING COMPANY,	:	
Respondent	:	Docket No. VINC 79-173-PM
	:	A.O. No. 11-01599-05001
	:	
	:	Barnett Mine

DECISION

Appearances: Miguel J. Carmona, Esq., and William Posternack, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
M. L. Hahn and Victor Evans, Ozark Mahoning Company, Rosiclare, Illinois, for Respondent.

Before: Judge Stewart

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a) (1978). The hearing in these matters was held on August 21, 1979, in Evansville, Indiana. Petitioner called two witnesses and introduced five exhibits. Respondent introduced nine exhibits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties offered the following stipulations:

> The size of the operating company was 454,636 man-hours per year.
>
> The size of the MM #6 Mine was 44,000 man-hours per year.
>
> The size of the Barnett Mine was 36,373 man-hours per year.

Both mines are considered small.

Respondent has a low number of past violations at both the MM #6 and the Barnett Mines.

There is no indication on the record that the ability of the Respondent to remain in business would be adversely affected by any civil penalty ordered herein.

Docket No. VINC 79-138-PM

A single violation was alleged under this docket number. Citation No. 366255 was issued at the operator's MM #6 Mine by inspector Jack Lester on July 11, 1978. The inspector cited a violation of 30 CFR 57.9-71 1/ and described the condition or practice at issue as follows: "Traffic rules including speed, signals and warning signs were not standardized and posted at the mine." The operator demonstrated a normal degree of good faith by correcting the condition within the time set by the inspector for abatement.

Section 57.9-71 requires that traffic rules be posted. Petitioner established that the operator had not posted a traffic sign at a point where vehicles exited mine property onto a country road. The failure to post either a yield or stop sign was in violation of section 57.9-71.

The operator was negligent in its failure to post a traffic sign. The absence of such a sign was visually obvious and should have been known to Respondent.

It was probable that an accident would occur because of this violation. The inspector testified that the visibility of drivers exiting the mine and that of drivers on the country road was partially restricted by a pile of rock. As the inspector turned onto mine property, he met a coal haulage truck and a hazardous condition developed as it entered onto the country road. At least one haulage truck used the road each hour in exiting the mine property.

Docket No. VINC 79-173-PM

The four violations included under this docket number were alleged by inspector Jack Lester to have occurred at Respondent's Barnett Mine. In each instance, the inspector issued a section 104(a) citation.

1/ On the face of the citation, the inspector referred to 30 CFR 57.9-72 as the mandatory standard violated. He testified that he had done so inadvertently. The Office of Assessment's proposed assessment and the petition for assessment of civil penalty correctly noted that 30 CFR 57.9-71 was the standard allegedly violated.

Citation No. 00366218 was issued on April 20, 1978. The inspector cited a violation of 30 CFR 57.12-82 and described the pertinent condition or practice as follows: "Electrical power lines were noted in contact with water lines at the pump station on 800 level of the mine." The operator demonstrated a normal degree of good faith by correcting the condition within the time set by the inspector for abatement.

Section 57.12-82 requires that power lines shall be well separated or insulated from waterlines. The inspector observed an energized 480-volt power cable crossing over, and in contact with, a 4-inch aluminum water pipe. The outer jacket of the cable was comprised of neoprene and rubber insulation. This cable insulation did not fulfill the requirement that the power line be well separated or insulated from the waterline. The cable was in contact with the waterline and this condition was in violation of section 57.12-82. Any physical damage done to the insulation of the power cable could have caused energization of the waterline. Such physical damage could have been caused by a rock fall, the vibration of the pipelines, or a blow-out of the cable itself.

The operator was not negligent in its failure to comply with section 57.12-82. The cable was in good condition. The inspector did not observe splices in it or breaks in the insulation and the line was equipped with a ground fault indicator system. The operator may have reasonably believed that the cable was sufficiently insulated to meet the requirements of the mandatory standard. The inspector concluded that the operator was negligent because this type of violation had occurred at the mine on prior occasions. The evidence of record, however, did not establish that the operator knew or should have known of this particular condition.

It was probable that an accident would occur because of this condition. Any damage done to the cable could have energized the entire length of the waterline. If a person were to contact the energized pipeline, that person might suffer electrocution, severe burning, or shock.

Citation No. 00366228 was issued on May 19, 1978. The inspector cited a violation of 30 CFR 57.12-82 and described the relevant condition or practice as follows: "Powerlines were in contact with air and water lines by 8-S-85 chute and 9-S-369 raise." The operator demonstrated a normal degree of good faith by correcting the condition within the time specified for abatement.

This condition was in violation of section 57.12-82 as alleged. It was noted above that this standard requires powerlines to be well separated or insulated from waterlines and airlines. In this instance, an energized 110-volt powerline had been suspended from aluminum air and waterlines with uninsulated tie wire. The powerline was 12- or 14-gauge wire and was protected only by factory

insulation. Because uninsulated tie wire had been used to suspend the powerline, it was not sufficiently separated or insulated from the lines to which it was attached.

It was not established on the record that negligence existed on the part of the operator. The cable was in good condition. There were no splices or breaks in the insulation. The operator may have believed that the powerline was adequately insulated. The inspector had concluded that Respondent was negligent because violations of this sort had occurred at this mine on prior occasions. The evidence of record, however, did not establish that the operator knew or should have known of this particular condition.

It was probable that this condition would result in an accident. Falling rock or a blow-out of the powerline could have caused energization of the air and waterlines. The cable was located in an active working area. The possibility also existed that the powerline might be damaged by heavy equipment or by rock thrown during blasting. Moreover, the section on which the cable was located was wet. If an accident were to occur, the injury expected to result would be electrocution, serious burns, or shock.

Citation No. 00366229 was issued on May 19, 1978. The inspector cited a violation of 57.11-51(a) and described the relevant condition or practice as follows: "A safe means of access was not provided in the secondary escape route between 900 level and 800 level because of loose rock in the ladders and on the landings." The operator demonstrated a normal degree of good faith by correcting the condition within the time set by the inspector for abatement.

The condition was in violation of section 57.11-51(a) as alleged. This mandatory standard requires that escape routes shall be inspected at regular intervals and maintained in a safe, travelable condition. The ladder in question was situated in the secondary escapeway. The inspector found that rock had accumulated on some of the rungs of the escape ladder so as to make a safe handhold or foothold difficult to obtain. The accumulations of rock on the landings also presented a slipping or tripping hazard. Although he was unsure whether the rock had fallen from above or was forced through boards on the sides of the escapeway, the inspector noted that no provision had been made to prevent rock from falling from above.

The operator was negligent in that it should have known of the condition and taken steps to abate it. The escapeway was not being inspected at regular intervals by supervisory personnel. If such inspections had taken place, the condition would have been observed.

The inspector testified that the occurrence of the event against which section 57.11-51(a)is directed was probable. At the time the violation was noted by the inspector, four men were working on the

900 level. Because the mine had a history of release of hydrogen sulfide gas, the inspector thought that there might be a need to evacuate the miners through the secondary escapeway. If miners were forced to use the secondary escapeway, it was probable that an accident would occur. A fall could reasonably be expected to result in injury ranging from bruises to fatalities.

Citation No. 00366230 was also issued on May 19, 1978. The inspector cited a violation of 30 CFR 57.6-92 and described the relevant condition or practice as follows: "Explosives becoming deteriorated were in the day box on the 900 level." The operator demonstrated a normal degree of good faith by destroying the explosives on the following day, within the time set by the inspector for abatement.

The condition was in violation of section 57.6-92 as alleged. The standard requires that damaged or deteriorated explosives shall be destroyed in a safe manner. The inspector observed approximately 12 sticks of explosives in a day box on a regularly-used haulageway. The sticks of explosives were becoming "very mushy" and beads of oil had formed on the outer surfaces. These explosives had become "damaged or deteriorated" within the meaning of the mandatory standard.

The operator was negligent in that it should have known of the condition and taken steps to abate it. The condition of the explosives was visually obvious and they were situated in the day box. The day box is intended to hold only a single day's usage of explosives. It was the responsibility of supervisory presonnel to inspect the explosives contained in this box and make certain that they were used on a rotating basis.

The explosives were a type with which the inspector was not familiar. Despite the deterioration, they posed little danger. The inspector believed that the substance which appeared to be leaking from the explosives was nitroglycerine. In fact, this substance was a nonexplosive, liquid salt solution. It was improbable that this condition would lead to accident or injury.

ASSESSMENTS

In consideration of the findings of fact and conclusions of law in this decision, based on the stipulations and evidence of record, the following assessments are appropriate under the criteria of section 110(i) of the Act:

Citation No.	Penalty
00366255	$ 60
00366218	50
00366228	70
00366229	80
00366230	100

ORDER

The Respondent is ORDERED to pay the amount of $360 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., and William C. Posternack, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Chicago, ILL 60604 (Certified Mail)

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

NOV 29 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 78-613-P
Petitioner	:	A.C. No. 15-05120-02014V
v.	:	
	:	Ken No. 4 North Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Gregory E. Conrad, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Thomas F. Linn, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Cook

I. Procedural Background

On August 9, 1978, a petition for assessment of civil penalty was filed by the Mine Safety and Health Administration (MSHA) against Peabody Coal Company (Peabody) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act). The petition, as amended herein, alleged a violation of 30 CFR 75.1722(c). An answer was filed on September 7, 1978.

Subsequent thereto, various notices of hearing were issued. The hearing was held on January 11, 1979, in Evansville, Indiana. Representatives of both parties were present and participated.

A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing, but difficulties experienced by counsel forced a revision thereof.

MSHA and Peabody submitted their posthearing briefs on April 12, 1979, and April 13, 1979, respectively. Neither party submitted a reply brief.

II. Violation Charged

Notice No. 7-0057 (1 TML), October 17, 1977, 30 CFR 75.1722(c).

III. Evidence Contained in the Record

A) Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B) Witnesses

MSHA called as its witness MSHA inspector Thomas M. Lyle.

Peabody called as its witness William C. Ford, a unit foreman at the Ken No. 4 North Mine.

C) Exhibits

1) MSHA introduced the following exhibits into evidence 1/:

a) M-1 is a copy of Notice No. 7-0057 (1 TML), October 17, 1977, 30 CFR 75.1722(c).

b) M-2 is a computer printout compiled by the Office of Assessments listing violations at the Ken No. 4 North Mine for which Peabody had paid assessments between July 1, 1977, and October 17, 1977.

c) M-3 is a termination of M-1.

d) M-4 is a computer printout compiled by the Office of Assessments of the history of violations for which penalties have been paid beginning January 1, 1970, and ending June 30, 1977. 2/

e) M-5 is a page from the Inspector's Manual.

f) M-6 is a diagram of the subject area of the Ken No. 4 North Mine.

2) Peabody introduced the following exhibits into evidence:

a) O-1 is a piece of wire.

b) O-2 is a piece of expanded metal mesh.

1/ Exhibit M-8 is a copy of an alert flier. It was offered, but not received, into evidence at the hearing, and is to be found in a separate envelope filed with the record.

2/ Exhibit M-4 is filed, and has the same exhibit number, in the official file of the consolidated proceedings in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P; which cases also involve the Petitioner and Respondent herein. By agreement of the parties reference can be made to those three cases as relates to the content of such exhibit (Tr. 7-8).

c) O-3 contains copies of preshift and onshift examiners' reports for the No. 1 Unit at the Ken No. 4 North Mine.

d) O-4 is a "J" bolt.

e) O-5 is a photocopy of O-7.

f) O-6 is a photocopy of O-8.

g) O-7 is an uncorrected carbon copy of Notice No. 7-0057 (1 TML).

h) O-8 is an uncorrected carbon copy of the termination of O-7.

3) MSHA and Peabody jointly introduced the following exhibits into evidence:

a) Joint Exhibit No. 1 is a diagram of a tailpiece.

b) Joint Exhibit No. 2 is a diagram of a head drive.

4) The following exhibit is contained in the official file of the consolidated proceedings in Peabody Coal Company, Docket No. BARB 78-6, BARB 78-688-P and BARB 78-690-P:

M-1, as marked in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P, is a controller information report compiled by the Office of Assessments containing information as to the size of both Peabody Coal Company and the Ken No. 4 North Mine. 3/

D) Order Receiving Exhibit in Evidence

During the consolidated proceedings in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P, MSHA moved for the receipt in evidence of Exhibit M-4. Peabody objected (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 17-28). It was agreed that a ruling would be withheld until after the parties had been afforded the opportunity to argue their respective positions in their posthearing briefs (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 17-28, 761).

3/ The official exhibit is contained in the official file of the consolidated proceedings in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P. It was agreed by the parties that official notice could be taken of Exhibit M-1, as marked in those consolidated proceedings (Tr. 197-180). For convenient reference, a copy of such exhibit has been placed in a separate envelope and filed with the official file in the instant case.

During the hearing in the instant case, it was provided that reference could be made to the three above-noted proceedings for any reference that either party wished to make to Exhibit M-4 (Tr. 7-9). 4/

Thereafter, MSHA moved for approval of a settlement in Docket No. BARB 78-690-P, and for leave to withdraw the petition in Docket No. BARB 78-688-P. Peabody moved to withdraw its application for review in Docket No. BARB 78-6. These motions were granted in a decision dated July 26, 1979. Consequently, a ruling was not made as relates to Exhibit M-4's receipt in evidence. Accordingly, this ruling will be made herein.

Effective July 1, 1977, Peabody Holding Company became the controller of Peabody Coal Company, replacing Kennecott Copper Corporation. Peabody objects to the Administrative Law Judge's consideration of a history of the violations of Peabody Coal Company while it was under the ownership of Kennecott Copper Corporation for purposes of assessing a civil penalty (Respondent's Posthearing Brief, p. 9). Peabody presented the testimony of Mr. Richard Romero, an operations administrative supervisor for Peabody Coal Company, to establish that significant and substantial management changes occurred subsequent to Kennecott Copper Corporation's divestiture of Peabody Coal Company (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 27, 738-761).

The testimony of Mr. Romero reveals that since the divestiture Peabody's management operations, with the exception of data processing, have been decentralized (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 739, 748-746). The purpose of this decentralization is to localize all decision-making, policy-making and financial authority, thus placing accountability within the corporation at the local level (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 746-750). However, responsibility for safety matters had not been completely decentralized as of the date of the hearing (Docket No. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 755), although the individual in charge of safety at the Ken No. 4 North Mine had been changed (Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P at Tr. 759).

The above-noted testimony is insufficient to establish that substantive changes in company mine safety and health policy, as relates to the Ken No. 4 North Mine, have followed the divestiture. In effect, Peabody argues that the mere change of the controlling company is sufficient to bar consideration of the history of violations prior to July 1, 1977 (Docket Nos. BARB 78-6, BARB 78-688-P and

4/ A copy of those portions of the transcript in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P material to the instant case has been placed in an envelope filed with the official file in the instant case.

BARB 78-690-P at Tr. 26-27). I disagree. In spite of the divestiture, the fact remains that the entity known as Peabody Coal Company has been the operator of the Ken No. 4 North Mine at all times relevant to this proceeding, and the history of previous violations at that mine is material to the assessment of a civil penalty for the subject violation. Peabody's position, when carried to its logical extreme, would permit a controlling company with an onerous history of previous violations to escape the consequences of its conduct through a paper reorganization having no effect on substantive safety policies at its various mines. Accordingly, the enforcement scheme envisioned by the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act) and the 1977 Mine Act is best promoted by evaluating history of previous violations on an operator by-operator, mine-by-mine basis.

Accordingly, Peabody's objection is OVERRULED, and Exhibit No. M-4, contained in Docket Nos. BARB 78-6, BARB 78-688-P and BARB 78-690-P and incorporated herein, is hereby RECEIVED in evidence.

IV. Issues

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

V. Opinion and Findings of Fact

A). Stipulations

The parties filed the following stipulations on January 9, 1979, applicable to the above-captioned proceeding:

1) Administrative Law Judge Cook has jurisdiction over the subject matter in this proceeding.

2) Peabody Coal Company and the Ken No. 4 North Mine are subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Federal Mine Safety and Health Act of 1977.

3) The subject notice of violation was duly served on the operator.

4) The assessment of any penalty in this proceeding will not affect the ability of the Respondent to continue in business.

5) Peabody Coal Company is considered to be a large-sized operator for purposes of assessing any penalties in this proceeding.

6) Inspector Thomas M. Lyle was a duly authorized representative of the Secretary at all times relevant to this proceeding.

B). Motions

After the last witness had testified, MSHA moved to amend its petition to conform with the proof. Peabody objected to the amendment and moved for dismissal of the proceeding. These motions were made after the undersigned Administrative Law Judge observed apparent discrepencies regarding the violation charged. Specifically, the Judge noted that Inspector Lyle had testified that the notice charged a violation of 30 CFR 75.1722(c), and that some of the documents attached to the petition made reference to 30 CFR 75.1722(b) (Tr. 180-81).

The notice of violation attached to the petition alleged a violation of 30 CFR 75.1722(c).

The motions were taken under advisement (Tr. 183, 205-208).

Peabody bases its motion to dismiss on the grounds that it was not demonstrated that the operator had been duly served with a notice alleging a violation of 30 CFR 1722(c) (Tr. 207). In a civil penalty proceeding, a notice is adequate, even though it does not specify a particular section of the Act or mandatory standard violated, if the alleged violation is described with sufficient specificity to permit abatement. At the stage where the operator is charged with a violation of law in a civil penalty proceeding it is entitled to adequate and timely notice of the section of the Act or mandatory standard involved so as to permit preparation of a timely and adequate defense. Old Ben Coal Company, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975); Eastern Associated Coal Corporation, 1 IBMA 233, 79 I.D. 723, 1971-1973 OSHD par. 15,388 (1972).

The description of the condition or practice in the notice (Exh. M-1) can only be construed as alleging a violation of 30 CFR 75.1722(c). The testimony with respect to Peabody's abatement efforts establishes that the notice described the alleged violation with sufficient specificity to permit abatement (Tr. 123, 131-132). The petition was clearly sufficient to permit preparation of a timely and adequate defense since the evidence adduced by Peabody related solely to 30 CFR 75.1722(c) (Tr. 119-178). Furthermore, Peabody states in its posthearing brief that it will not assert that it was unaware of the section allegedly violated (Respondent's Posthearing Brief at page 6).

The Commission's Interim Procedural Rules, 29 CFR 2700.1 et seq., in effect on the date of the hearing, do not specifically address the

amendment of petitions to conform with the proof. Rule 15(b) of the Federal Rules of Civil Procedure, although not specifically applicable to this proceeding, reflects the collective experience of the courts in addressing such motions, and, as such, provides some guidance in the instant case.

Rule 15(b) states that issues not raised in the pleadings shall be treated in all respects as if they had been raised in the pleadings when such issues are tried by the express or implied consent of the parties. Under such circumstances, a party may move at any time, even after judgment, to amend the pleadings to conform with the proof. If an objection is raised to evidence at the trial on the ground that it is not within the scope of the pleadings, the court is empowered to permit amendment of the pleadings when such action will subserve the presentation of the merits and "the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." The court is empowered to grant a continuance to enable the objecting party to meet such evidence.

The fact that the evidence adduced by both parties relates solely to 30 CFR 1722(c) indicates that the issues raised in a civil penalty proceeding addressing that regulation were tried with the implied consent of both parties. Although Peabody did not object to the introduction of such evidence during the presentation of MSHA's case-in-chief within the meaning of Rule 15(b), it is significant to note that Peabody has not demonstrated that it would be prejudiced by the proposed amendment. In fact, it is highly doubtful that Peabody could do so in light of the above-noted statement that it will not assert that it was unaware of the section allegedly violated.

Accordingly, Peabody's motion to dismiss is DENIED, and MSHA's motion to amend the petition to conform with the proof is GRANTED. IT IS THEREFORE ORDERED that the petition be, and hereby is, AMENDED to allege a violation of 30 CFR 75.1722(c) wherever 30 CFR 75.1722(b) is cited.

C) Occurrence of Violation

On October 17, 1977, MSHA inspector Thomas M. Lyle visited Peabody's Ken No. 4 North Mine to conduct a hazard analysis and accident prevention inspection (Tr. 16-17). He was accompanied on his inspection underground by Mr. William C. Ford, the foreman on the No. 1 Unit (Tr. 18). At approximately 5:30 p.m., Inspector Lyle issued a notice pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, citing Peabody for a violation of the

mandatory safety standard embodied in 30 CFR 75.1722(c) 5/ (Exh M-1). The notice described the "condition or practice" as follows:

> Guards that had been installed on the main line belt tailpiece and the No. 1 Unit conveyor drive had not [sic] fastened or secured adequately to prevent persons from coming in contact with the moving belt and rollers. The guards were tied along side of the tailpiece and conveyor drive with small amounts of shooting wire or placed against bolt studs that were not fastened with screw type nuts. The operator or his agent knew or should of [sic] known this violation existed. Responsibility of Alton Fulton mine manager.

(Exh M-1).

At the time that the inspector observed the machinery, the belts were both in operation (Tr. 65).

There were guards along both sides of the tailpiece (Tr. 32, 45-46). There were two guards on one side, measuring approximately 5 or 6 feet and 4 feet in length, respectively (Tr. 32, 34). These guards were approximately 2 feet in width (Tr. 35). There were guards along both sides of the conveyor drive. Three guards were present on one side of the conveyor drive. One measured 6 feet by 4 feet. The remaining two were each approximately 6 feet in length, but their widths were not given (Tr. 43-46).

The inspector testified that the guards, made of expanded metal mesh (Tr. 31, 43), were substantial and adequate (Tr. 30, 32, 35, 46). According to the inspector, bolt studs had been welded to the machinery for the purpose of hanging and securing the guards (Tr.47). In the inspector's opinion, compliance with 30 CFR 75.1722(c) required the use of nuts and bolts or "J" hooks as securing devices (Tr. 47). Since neither of these methods had been employed, the inspector concluded that Peabody was not in compliance with the regulation.

It is unnecessary to determine whether the use of nuts and bolts or "J" hooks are the sole permissible means of complying with 30 CFR 75.1722(c). The scope of inquiry in the present case is considerably more limited. The question presented is whether the method employed

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5/ 30 CFR 75.1722 provides:

"Mechanical equipment guards. (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

"(b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from

by Peabody was adequate to secure the expanded metal mesh guards to the subject tailpiece and conveyor drive. The controlling inquiries in this regard are what type of wire was used and how was the wire used to secure the guards?

The inspector testified that he picked up a piece of the wire and examined it while the men were securing the guards (Tr. 37). He was adamant in his opinion that shooting wire, and not the type of wire represented by Exhibit O-1, had been used to secure them. Exhibit O-1 is a sample of the general utility wire used for such purposes as securing guards and tying up water hoses (Tr. 79, 126). It is thicker than shooting wire (Tr. 37-38). Although Mr. Ford never testified affirmatively that general utility wire had been used to secure the guards in question, 6/ his testimony is of that general tenor. He stated that shooting wire would never be used to secure the guards because "we are only issued two rolls a week." Using it to secure the guards would require such a sizable portion of this wire that "you wouldn't have enough to use to shoot at the face" (Tr. 148). By way of illustration, it would require 60 to 70 feet of general utility wire to secure a tailpiece (Tr. 148).

Several factors are present indicating that the inspector properly identified the type of wire used. First, his experience in shooting coal (Tr. 12-16, 37-38) indicates a familiarity with the type of materials used in such operations. This knowledge, coupled with the fact that he examined a piece of the wire while the men were securing the guards (Tr. 37), points to a correct identification.

Secondly, the inspector testified that Mr. Ford had stated that he had observed the guards being wired on October 15, 1977, and that he had brought it to the attention of Mr. Alton Fulton, the mine manager. Mr. Fulton told Mr. Ford not to worry, and that he, Mr. Fulton, "would take the credit for setting it up or he'd take the blame if anything was wrong" (Tr. 63-64). This statement must be juxtaposed with the testimony of Mr. Ford, who indicated that the use of general utility wire for securing guards was a common practice at the mine dating back to 1972 or 1973 (Tr. 142-143, 161). He also testified that this method was adequate to hold the guards securely in place (Tr. 139). In light of these considerations, it would appear that the only logical reason for mentioning the subject to Mr. Fulton was to inform him of a deviation from the customary practice, e.g., to inform him that shooting wire was being used to secure the guards.

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fn. 5 (continued)
reaching behind the guard and becoming caught between the belt and the pulley.

"(c) Except when testing the machinery, guards shall be securely in place while machinery is being operated."

6/ Apparently, Inspector Lyle and Mr. Ford employed the term "shooting wire" to refer to two separate things. The inspector defined it as the blue and red, plastic-coated leg wire from a blasting cap

Accordingly, the inspector's identification, bolstered by the inferences drawn from Mr. Ford's conversation with Mr. Fulton, results in a finding that the thinner shooting wire and not the thicker general utility wire, was used to secure the guards.

As relates to the placement of the wires, Mr. Ford indicated that the guards on the tailpiece were wired at 12 separate locations (Tr. 135-136). The guards were wired to the frame or the belt rope at 10 separate places, and at the two remaining locations the guards were wired to each other (Tr. 135-136; brown "X's" on Joint Exhibit No. 1). A belt rope is a one-half or five-eighths-inch steel cable on a tailpiece, and is located approximately 16 to 18 inches above the mine floor (Tr. 172-173). The top of the guard is approximately 12 inches above the rope (Tr. 173). A turntable keeps the belt rope pulled tight so that it has very little flexibility (Tr. 173-175). The guards on the conveyor drive were wired at six locations (Tr. 137-138; red lines on Joint Exh. No. 2). At four of these locations, the guards were wired to the frame. At the remaining two locations, they were wired to each other (Tr. 137-138). Only a small amount of wire was used, three wraps at the most (Tr. 114-115).

According to the inspector, a guard is "securely in place" within the meaning of 30 CFR 75.1722(c) when the method of attachment will prevent an individual from becoming entangled in the machinery. This would occur if the method of attachment is insufficient to prevent the guards from coming off when a person strikes them with his body (Tr. 39, 101, 115). The inspector testified as an expert that shooting wire would be inadequate to perform this function (Tr. 39).

The testimony reveals that the inspector correctly identified the type of accidents that 30 CFR 75.1722(c) was designed to prevent. A guard that is not secured so as to prevent such injuries cannot be deemed "securely in place." It is unnecessary to decide whether general utility wire (Exh O-1) meets these standards because the credible evidence in the record reveals that such wire was not used to secure the guards in question. The inquiry is limited to the conditions that existed on October 17, 1977. I am inclined to accept the inspector's expert opinion that the guards were not securely in place based upon his characterization of the physical properties of shooting wire and the number of wraps used, in conjunction with Mr. Ford's

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fn. 6 (continued)
(Tr. 37-38), and indicated that they are often found lying on the mine floor after blasts have been set off. Miners often use these discarded wires for various purposes (Tr. 38). This definition coincides with Mr. Ford's definition of a "cap wire" (Tr. 130-131). Mr. Ford used the term "shooting wire" to refer to a yellow-plastic coated wire that comes on rolls (Tr. 130-131, 148), which apparently indicates that he was referring to a much longer wire.

description of the placement of the wires. Of particular significance, is the following: The tailpiece guards were secured at seven of the 12 separate locations by wiring the guards to the belt rope, a steel cable which, altough under tension, still retained a measure of flexibility. As relates to the conveyor drive, four of the six wire attachments were located at the top along the length of the guard, with none on either side along the width of the guard. It is highly conceivable that an individual falling against the guards would cause the cable to vibrate or the guard to bend (Tr. 69), breaking one or more of the wire attachments and threatening the integrity of the system.

Accordingly, in light of the foregoing, it is found that a violation of 30 CFR 75.1722(c) has been established by a preponderance of the evidence.

D) Gravity of the Violation

The inspector classified the violation as very serious (Tr.71). The area was wet and slippery due to the dust-suppressing water sprays at the conveyor drive. Some of this water would reach the tailpiece area (Tr. 68). An individual could slip and dislodge the guards, and thereby become exposed to the moving parts of the machines (Tr. 29, 42, 68-71). The anticipated injuries were described as severe, ranging from the loss of an arm to death (Tr. 70-115). The miners directly exposed to the hazard included belt cleaners, belt examiners and maintenance men working in the area (Tr. 115-116).

Mr. Ford disagreed, stating that the conveyor drive and the tailpiece were sufficiently guarded to prevent entry (Tr. 140).

In view of the fact that the guards were present and attached, although not as securely as the regulations require, it is found that the violation was moderately serious.

E) Negligence

The inspector opined that the condition had existed since at least October 15, 1977, based on his conversation with Mr. Ford (Tr. 65), wherein Mr. Ford stated that he had noticed the guards being wired on October 15, 1977 (Tr. 63). The inspector classified the violation as readily visible, and that it would be noticeable to a preshift or onshift examiner (Tr. 64). The area was subject to onshift belt examinations during production shifts (Tr. 64-65). The belts were running on the day in question (Tr. 65).

Determining whether a method of attachment is adequate to secure guards in place is essentially an exercise in sound judgment. The regulation does not designate any identifiable methods as either acceptable or unacceptable. The record clearly reveals that Peabody demonstrated a good faith effort to secure its guards in place, even though the methods employed have been found inadequate in the instant

proceeding. The fact that other inspectors could have determined that the use of wire was an appropriate method of securing the guards (Tr. 139), although not controlling in the instant case because the inferences drawn from the conversation between Mr. Ford and Mr. Fulton indicate that the use of shooting wire was a deviation from past practices, is not wholly without significance. While it is true that Inspector Lyle told Peabody on previous occasions that nuts and bolts or hooks must be used (Tr. 60-63), the fact that other inspectors could have permitted the use of wire indicates that Peabody's judgment could have been affected by a reasonable belief that MSHA would consider wire adequate under some circumstances.

Accordingly, it is found that Peabody demonstrated a slight degree of ordinary negligence.

F) Good Faith in Attempting Rapid Abatement

The violation was abated by fastening the guards to the bolt studs with nuts (Tr. 67, 131). No additional studs were installed (Tr. 134). It required 15 to 20 minutes to abate the condition (Tr. 139-140). The notice was terminated 1 hour after its issuance (Exhs. M-1, M-3).

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

G) History of Previous Violations

30 CFR Standard	Year-1 10/18/75 - 10/17/76	Year-2 10/18/76 - 10/17/77	Totals
All sections	69	85	154
75.1722(c)	0	0	0

(Note: All figures are approximations).

As relates to the Ken No. 4 North Mine, Peabody had paid assessments for approximately 154 violations of regulations in the 24 months preceding October 17, 1977. Approximately 69 of these paid assessments were for violations cited between October 18, 1975, and October 17, 1976. Approximately 85 of these paid assessments were for violations cited between October 18, 1976, and October 17, 1977.

There were no paid assessmsents for violations of 30 CFR 75.1722(c) during the 24 months preceding October 17, 1977.

H) Appropriateness to Penalty to Operator's Size

Peabody produced approximately 47,650,569 tons of coal in 1978 (Exh. M-1 filed in Docket Nos. BARB 78-6, BARB 78-688-P, BARB 78-690-P). The Ken No. 4 North Mine produced approximately 168,792 tons of coal

in 1978 (Exh. M-1 filed in Docket Nos. BARB 78-6, BARB 78-688-P, BARB 78-690-P). Furthermore, the parties stipulated that Peabody Coal Company is considered to be a large-sized operator for purposes of penalty assessment.

I) Effect on Operator's Ability to Continue in Business

The parties stipulated that the assessment of any penalty in this proceeding will not affect the Respondent's ability to continue in business. Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Peabody Coal Company and its Ken No. 4 North Mine have been subject to the provisions of the 1969 Coal Act and 1977 Mine Act at all times relevant to this proceeding.

2. Under the Acts, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspector Thomas M. Lyle was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the notice which is the subject matter of this proceeding.

4. The violation charged in Notice No. 7-0057 (1 TML), October 17, 1977, 30 CFR 75.1722(c), is found to have occurred as alleged.

5. As set forth in Part V(B), supra, Respondent's motion to dismiss is DENIED, and MSHA's motion to amend the petition to conform with the proof is GRANTED.

6. All of the conclusions of law set forth in previous parts of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

MSHA and Peabody submitted posthearing briefs. No reply briefs were submitted. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are

rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of a penalty is warranted as follows:

Notice No.	Date	30 CFR Standard	Penalty
7-0057 (1 TML)	10/17/77	75.1722(c)	$275

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of $275 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 30 1979

MABEN ENERGY CORPORATION, Applicant	:	Contest of Citation
v.	:	Docket No. WEVA 79-123-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 637722 April 23, 1979 Maben No. 4 Mine

DECISION

Appearances: James M. Brown, Esq., File, Payne, Scherer & Brown, Beckley, West Virginia, for Applicant;
Edward H. Fitch, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent, Mine Safety and Health Administration (MSHA).

Before: Judge Melick

This case is before me upon the application of the Maben Energy Corporation (Maben) under section 105(d) of the Federal Mine Safety and Health Act of 1977 1/ to contest a citation issued by the Mine Safety and Health Administration (MSHA) under section 104(a) of the Act. A hearing was held on October 23, 1979, in Beckley, West Virginia, at which both parties, represented by counsel, presented evidence.

The issue in this case is whether Maben is responsible for a violation of the Act by failing to conduct the inspections required by 30 CFR 77.216-3(a) at an impoundment structure known as the Wyco Freshwater Dam located in Wyoming County, West Virginia. 30 CFR 77.216-3(a) provides as follows:

> All water, sediment, or slurry impoundments which meet the requirements of section 77.216(a) [2/] shall be examined

1/ 30 U.S.C. § 801 et seq. (1978), hereinafter referred to as "the Act."
2/ 30 CFR 77.216(a) provides that certain plans be filed for impounding structures that can:
"* * * (1) Impound water, sediment, or slurry to an elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or (2) Impound water, sediment, or slurry to an elevation of 20 feet or more above the upstream toe of the structure; or (3) As determined by the District Manager, present a hazard to coal miners."

by a qualified person designated by the person owning, operating or controlling the impounding structure at intervals not exceeding 7 days for appearances of structural weakness and other hazardous conditions. All instruments shall be monitored at intervals not exceeding 7 days by a qualified person designated by the person owning, operating, or controlling the impounding structure.

The parties have stipulated that the impounding structure at issue in this case, the Wyco Freshwater Dam, meets the criteria in 30 CFR 77.216(a) and therefore comes within the inspection requirements set forth in 30 CFR 77.216-3(a). Maben admits that it has not been making the inspections but contends that it does not own, operate or control the impounding structure and that therefore, it is not the person responsible for such inspections. MSHA concedes that Maben does not own the impounding structure but contends that it both operates and controls that structure and is thus nevertheless responsible for such inspections. In determining whether Maben was in violation of 30 CFR 77.216-3(a), I must, therefore, first determine whether Maben is a person "operating or controlling" the structure within the meaning of the cited regulation.

The Wyco Freshwater Dam, constructed in the early 1970's by the Whitesville A & S Coal Company in connection with a strip-mining operation, consists of a cross-valley earth and rockfill structure approximately 400 feet long, 20 feet high, 300 feet wide at the base and 40 feet wide at the crest. There is a 60-foot wide spillway discharge cut through rock at one end of the structure and a 24-inch diameter decant pipe extending through the structure. The impoundment upstream of the dam covers an area of about 2 acres and the drainage area upstream includes more than 2,000 acres. Engineering tests have shown the dam to be stable and not to be a safety hazard.

The dam and the pond it created were used by the Westmoreland Coal Company in its Maben No. 4 Mine--the mine now operated by Applicant--beginning in the early 1970's as a source of water for its mining equipment, for firefighting and for its bathhouse. The Maben No. 4 Mine is a drift mine located on a nearby hill above and to the southwest of the dam. According to the evidence, Westmoreland has had and continues to have a leasehold interest over the entire property under discussion, including the actual coal seam being mined, the access roads, and the Wyco Dam and its impoundment pond. Westmoreland had previously accepted responsibility for the dam and in this regard a notice was issued to Westmoreland on October 22, 1974, by the Mining Enforcement and Safety Administration (MESA), MSHA's predecessor, for a violation of 30 CFR 77.216, alleging that the Wyco Dam was not of substantial construction. The notice was terminated on April 20, 1977, after Westmoreland enlarged the spillway around the dam. Apparently, revised design and maintenance plans submitted by Westmoreland under the provisions of 30 CFR 77.216-2(a) have never been approved by MESA (nor by its successor (MSHA), and Westmoreland's request in May 1976 to abandon the dam has apparently never been acted upon by either MESA or MSHA.

On October 3, 1977, Westmoreland, contracted with Maben for Maben to "mine, remove, transport and deliver" coal from a tract of land (including Westmoreland's Maben No. 4 Mine) near, but not including, the area of the Wyco Dam. In that contract, Westmoreland designated itself as owner of the mine property. Soon thereafter, Maben began its mining operations under the contract. On April 23, 1979, MSHA issued the citation at bar for Maben's failure to inspect the nearby Wyco Dam at 7-day intervals.

As I have already noted, whether Maben is responsible for the inspections required by 30 CFR 77.216-3(a) depends on whether it is found to be a person "operating or controlling" the dam. The words "operating" and "controlling" as used in the context of the cited regulation are not defined in the regulations. In this context, however, the word "operate" is defined in the American Heritage Dictionary of the English Language (1976), as "to run or control the functioning of." The word "control" in this context is defined therein as "the exercise of authority or dominating influence over; direct; regulate." I find that these definitionss appropriately reflect the meaning of the terms "operating" and "controlling" as used in the cited regulation.

MSHA alleges primarily four reasons to support its contention that Maben was "controlling" and "operating" the impoundment: (1) Maben used an access road to its mine that lies partly over the impoundment structure, (2) Maben used water from the impoundment pond for an employee bathhouse, (3) Maben modified the spillway outlet by construction work on its access road; and (4) Maben maintains a gate at the entrance to the mine access road and to the main road to the impoundment area.

There is no dispute that Maben has continued to travel the access road and both the MSHA inspector, Harold Owens, and an engineer testifying on behalf of Maben, Andrew Fox, located a portion of that road upon the impoundment structure. I cannot find from the evidence however that Maben was in fact dumping mine products on the structure as alleged by MSHA. Estimates by the MSHA inspector as to the approximate location of a coal stockpile appearing in a Government photograph, in the face of direct contradictions by Maben, were too uncertain to enable me to establish its precise location as alleged. The evidence is uncontradicted, however, that Maben did in fact raise the access road about 2-1/2 to 3 feet above the spillway floor at its outlet thereby modifying the spillway and potentially affecting the level of water behind the impoundment structure. Evidence that Maben maintains a gate at the entrance to the mine access road and to the main road to the impoundment area is also unchallenged.

While these facts clearly show that Maben has used the impoundment structure and its pond in connection with its mining operations and that such use could very well affect the impoundment structure, I cannot equate that use with the degree of dominating influence required to constitute an "operating" or "controlling" of the structure. In support of its contention that Maben has been operating and controlling the Wyco Dam, MSHA cites Kessler Coal, Incorporated v. MESA, Docket No. HOPE 76-235

(March 18, 1976), in which Judge Stewart found that Kessler owned and controlled a refuse pile created by a previous mine operator. In that case, however, a lease existed under which Kessler was specifically granted leasehold rights over mine property, including the property on which the refuse pile was located, thereby placing Kessler in a position of special ownership with controlling and operating rights over that refuse pile. In the instant case on the other hand, no such lease exists and in its contract with Westmoreland, Maben was given essentially only the right to extract coal in a defined area not including the Wyco Dam or its pond and was not granted any ownership interest in the land. Thus, Maben has been given no specific legal authority to operate or control the impoundment structure and as a factual matter has not exercised operating or controlling influence over the structure.

MSHA also appears to argue that since Maben has used other property outside of the contract area such as roads, office buildings and for the drilling of a well, that it actually has the right to control all property within the vicinity of the mine complex, including the impoundment structure at issue. The mere use of such property does not, however, give rise to a right to control it since the use may very well be trespassory. Moreover, even assuming that Maben had a right to control certain other property unconnected with the impoundment structure, it does not, of course, follow that such a right would, for that reason, attach also to that structure. While MSHA also suggests that the definition in the 1977 Act of the term "operator" should govern the definition of the term "operating" as used in the cited regulation, I find no basis for such a conclusion. The terms are separate and distinct and used in entirely different contexts.

Under the circumstances, I conclude that Maben is not the person owning, operating or controlling the Wyco Dam and is not therefore responsible for the inspections required by 30 CFR 77.216-3(a). The citation that is the subject of this proceeding is therefore vacated.

Gary Melick
Administrative Law Judge

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