November Index 1980

Commission Decisions:

Administrative Law Judge Decisions:

Commission Decisions

NOVEMBER

The following case was Directed for Review during the month of November:

Penn Allegh Coal Company, Inc., v. Secretary of Labor, MSHA, PENN 81-6-R (Judge Stewart, October 21, 1980)

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

Ranger Fuel Corporation v. Secretary of Labor, MSHA, WEVA 79-217-R (Judge Laurenson, September 23, 1980)

Consolidation Coal Company v. Secretary of Labor, MSHA, WEVA 80-116-R, etc. (Judge Laurenson, October 7, 1980)

Secretary of Labor, MSHA v. Mulzer Crushed Stone Co., LAKE 80-201-M (Judge Koutras, October 6, 1980, decision on remand)

Review was Dismissed in the following case during the month of November:

Council of the Southern Mountains v. Martin County Coal Corporation, KENT 80-222-D (Judge Steffey, October 3, 1980)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 12, 1980

Council of Southern Mountains, Inc.	:	
	:	
	:	Docket No. KENT 80-222-D
v.	:	
	:	
Martin County Coal Corporation	:	

ORDER

This proceeding was initiated by a complaint filed by the Council of Southern Mountains alleging that the mine operator violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978) ["The Act"] by refusing to permit non-employee representatives of miners to enter mine property for the purpose of monitoring miner training classes. On October 3, 1980, the judge issued a document entitled "Decision" in which he found that Martin County Coal's refusal to permit representatives of the Council to enter mine property to attend the training classes constituted discrimination and interference with the Council in violation of section 105(c)(1) of the Act. The judge ordered Martin County to cease and desist from interfering with the Council's attendance at training classes and to notify the Council when and where such classes would be held.

The judge also ordered Martin County "to reimburse the Council for all attorneys' fees and other expenses incurred in connection with the filing and prosecution of the complaint in Docket No. KENT 80-222-D or to otherwise incurred as a direct result of Martin County Coal Corporation's refusal to allow the Council's representative to monitor training classes". The judge's decision did not, however, specify the dollar amount of this award.

On October 22, 1980, the Council filed a motion with the judge asking that the judge clarify whether his decision constituted his "final disposition" of the proceeding and whether the judge reserved jurisdiction for the purpose of implementing his order of relief. The Council said it was seeking this clarification in order to protect its interests regarding the award of costs and expenses. In a letter in response to that motion, the judge said he did not believe that he any longer had jurisdiction to enter an order in the proceeding.

Martin County Coal has filed a petition for review raising issues relating to the merits of the judge's rulings. The Council of Southern Mountains has filed a petition to protect its interest in the implementation of the order awarding costs and expenses.

Section 113(d)(1) of the Act and Commission Rule 65(a) require that the decision of the judge contain an order that finally disposes of the proceedings. Jackie Ray Hammonds v. National Mines Corporation, KENT 79-345-D, October 24, 1980. Secretary of Labor on behalf of Larry D. Long v. Island Creek Coal Co. and Langley & Morgan Corp., 2 FMSHRC 1698 (July 25, 1980). The issuance of the document on October 3rd entitled "Decision", did not include orders which finally disposed of the proceedings before the judge because the amount of attorneys' fees and costs is not resolved. Thus, the issuance of this document did not initiate the running of the statutory review periods. The judge retains jurisdiction.

Accordingly, the petitions for review are dismissed as premature. The parties may refile petitions once an order awarding costs and expenses is entered. The Executive Director shall return the record to the judge.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Distribution

Jack W. Burtch, Jr., Esq.
James F. Stutts, Esq.
McSweeney, Stutts & Burtch
121 Shockoe Slip
Richmond, Virginia 23219

L. Thomas Galloway, Esq.
Richard L. Webb, Esq.
Center for Law & Social Policy
1751 N Street, N.W.
Washington, D.C. 20036

Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge Richard Steffey
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6230

NOV 3 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PITT 78-430-P
	:	A.C. No. 36-03425-02015 V
v.	:	
	:	Maple Creek No. 2 Mine
UNITED STATES STEEL CORPORATION, Respondent	:	

DECISION

Appearances: Stephen Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Louise Symons, Esq., for Respondent.

Before: Judge William Fauver

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

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

FINDINGS OF FACT

1. At all pertinent times, Respondent United States Steel Corporation operated a coal mine known as the Maple Creek No. 2 Mine in Washington County, Pennsylvania, which produced coal for sales in or substantially affecting interstate commerce.

2. Respondent used a continuous-mining method in the Maple Creek No. 2 Mine. The continuous miner was powered electrically from a power source that was located about seven blocks from the section. Each block was driven on an 85-foot center. Power to the machine could be cut off at the power source or by using the breaker switch, which was located on the side of the machine.

3. On August 30, 1977, at about 8:30 a.m., federal mine inspector David E. McCusker arrived at the 2 main, 7 flat, 35 room section of the mine. The day-shift crew was mining and loading coal with the continuous miner. The inspector observed the miner in operation for a short while before the operator was forced to stop the machine because of a rupture in the hydraulic system. Paul Gaydos, the assistant mine foreman, and the mechanic, William Huddock, were immediately notified of the problem.

4. The mechanic activated the pump motor to force hydraulic fluid through the system so that he could locate the rupture. The inspector could hear the sound of dripping oil immediately in front of the operator's compartment but he was unable to see the leaking hose.

5. Directly in front of the operator's compartment was a valve chest, which housed numerous hoses that fed hydraulic fluid to various parts of the machine. The valve chest was protected by a side guard, which was secured by four bolts, and a top guard or lid. Two bolts were on top of the machine and secured the top and side guards together. The side guard was about 30 inches by 40 inches.

6. When the foreman arrived, the operator was backing the miner out from the working face to provide more room to locate and repair the leak. The mechanic had just left the area to get his tools. To find the leak, the foreman had the pump motor turned off and removed the tram cover or cat motor cover, which protected the cat motor hoses near the bottom of the machine. However, he was unable to find the leak under the tram cover.

7. The mechanic returned with his tools and spare parts and the inspector observed him holding a crescent wrench and reaching through a small opening behind the valve chest guard. The inspector believed he was trying to uncouple the oil line, but he could not actually see the mechanic's hand behind the guard. Also, the mechanic's back was towards the inspector and blocked visibility of the mechanic's hands. At this time, power to the miner had not been deenergized and locked out at the power source.

8. The inspector stopped the mechanic because the machine had not been deenergized and locked out at the power source. The inspector believed that the mechanic was in danger of injuring himself, possibly on metal braids of a ruptured hose and possibly from hot oil if the pump motor were turned on while he was working on the machine. He did not consider it safe to cut off the machine power only by using the breaker switch, because he believed there was a danger that someone might activate the power before the repairs were completed.

9. The inspector then issued Notice of Violation No. 1-DEM, which read in part: "Repairs were observed being made on the Lee Norse continuous miner (Serial No. 4057) in 2 main, 7 flat, 35 room section while the power was on the machine, and the section foreman was at the machine watching the mechanic make repairs."

10. The cited condition was abated immediately by deenergizing and locking out the power source to the continuous miner. The mechanic and foreman removed the guards, located the leak, and replaced the hose.

11. After the ruptured hose was replaced, power was returned and the motor was turned on to make sure there were no other leaks. The motor was then turned off at the breaker switch, to replace the guards. The inspector did not require that the machine circuit be deenergized at the power source in order to replace the guards. He remained in the section until the machine was put back in service.

12. Under normal practice, to locate the source of a leak the pump motor was activated so that pressure would force fluid through the rupture. The sound and sight of dripping oil would often be enough to lead the mechanic to the rupture. However, if the source of the leak could still not be located, the top guard and side guard over the valve chest would be removed so that the mechanic could look for the rupture. The pump motor would often need to be reactivated because the build-up of oil and grease on the hoses was so great that a visual search of the rupture was difficult. The normal sequence of repairing oil leaks on the continuous miner was to locate the leak, deenergize the machine by locking out the power source, make the repairs, and reenergize the machine.

13. Respondent had a practice of removing the guard before the machine was deenergized at the power source if the source of the leak could not be found after the motor was turned on. Once the leak was located, the power source would be deenergized at the power source before repairs were begun. Only when the exact source of the leak was known would Respondent first lock out the power source. Sometimes, power would be returned to the machine before the guard was replaced so that the repairs could be tested. It was standard practice for Respondent to use the breaker switch while performing these tests.

14. It was contrary to company policy and considered unsafe to reach behind the guard to search for a ruptured hose. Even with the pump motor off, there would be a danger of injury from protruding metal braids of a ruptured hose. However, there was no real danger from metal braids in reaching behind the upper part of the guard with a wrench to remove the guard bolts.

15. To remove the guard over the valve chest, the mechanic would reach behind the guard with a wrench or pliers and secure the nut while loosening the bolt on the outside with a wrench in his other hand. Finger pressure on the nut was not sufficient. It was possible to reach behind the guard to feel some of the hoses; however, both guards had to be removed to reach most of the hoses and to repair a ruptured hose, depending on where the leak was located. Only two hoses were visible without removing the top guard.

DISCUSSION WITH FURTHER FINDINGS

On August 30, 1977, Inspector McCusker charged Respondent with a violation of 30 C.F.R. § 75.509, which provides: "All power circuits and electric

equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for troubleshooting or testing."

Inspector McCusker initially charged Respondent with a violation of 30 C.F.R. § 75.1725(c), which provides: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." However, the notice of violation was modified to charge Respondent with a violation of section 75.509, which is a statutory provision. In Consolidation Coal Company, WEVA 79-440-R, 2 FMSHRC 965 (April 28, 1980), which involved an allegation that the mechanic was changing an oil hose without deenergizing power, Judge Lasher held that section 75.1725(c) was an implementing regulation of a statutory provision (section 75.509) and that "electric equipment," as used in the statutory provision, had the same meaning as "machinery" in the implementing regulation.

I find that section 75.1725(c) is an implementing regulation for section 75.509 and that the same basic rationale governs the two standards.

The basic issue as to the notice of violation is whether Respondent's mechanic was "troubleshooting or testing" or whether he was "working on" the machine when the citation was issued.

The Secretary contends that at the time the notice of violation was issued, the mechanic was working on the continuous miner without first locking out the power source. The Secretary argues that it was reasonable for the inspector to assume that the mechanic had already located the leak, because he turned the pump motor off after checking for a leak, and to assume that when the mechanic reached behind the valve chest he did so to "work on" the miner by uncoupling the hose fitting.

The inspector testified that the mechanic turned on the pump motor to locate the source of the leak. He stated that when the motor was turned on, dripping oil could be observed and heard in front of the operator's compartment so that when the motor was turned off, he assumed that the leak had been found. The inspector also testified that he observed the mechanic take a crescent wrench and reach through a small opening behind the valve chest, and that the wrench that the mechanic used would not fit the bolts that held the guards in place.

Respondent argues that the mechanic reached behind the guard to loosen the top bolt near the operator's compartment and that the inspector's conclusion that he was removing a hose coupling is unfounded because the inspector could not see whether the mechanic was loosening a bolt or making a repair. The inspector testified that he could not see the mechanic's hand behind the guard and that the mechanic's back was towards him. He testified that he assumed the mechanic was uncoupling a hose fitting. Respondent argues that the mechanic's action in reaching behind the guard to remove a bolt constituted "troubleshooting" because he was removing the guard to search for the source of the leak.

I find that the Secretary failed to prove by a preponderance of the evidence that the mechanic was uncoupling, or in the process of uncoupling, an oil hose fitting. The evidence showed that the proper procedure for repairing a ruptured hose on the continuous miner was to locate the source of the leak, deenergize the power by locking out the power source, make the necessary repairs and restore power to the machine. However, the activity of locating a leak often involved activating the pump motor so that pressure would force fluid through the hoses. If the leak could still not be located, the motor was turned off and the guards over the valve chest were removed so that the mechanic could visually observe the hoses. If the build-up of oil and grease still prevented the mechanic from locating the rupture, the pump motor would have to be reactivated.

The inspector was unable to see precisely what the mechanic was doing with his hand behind the valve chest guard. I credit the testimony of the assistant mine foreman, who helped the mechanic repair the rupture, that the leak had not been located before the mechanic reached behind the guard and that the mechanic was loosening a bolt that secured the guard over the valve chest to locate the rupture. I find that under these circumstances, it was reasonable to use the breaker switch to turn off the power rather than locking out power at the power source. I find that the mechanic was "troubleshooting" when the Notice of Violation was issued.

CONCLUSIONS OF LAW

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

2. Petitioner did not meet its burden of proving a violation as alleged in Notice of Violation No. 1-DEM.

ORDER

WHEREFORE IT IS ORDERED that the subject proceeding is DISMISSED.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

Stephen Kramer, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Louise Symons, Esq., Counsel for United States Steel Corporation, 600 Grant Street, Pittsburgh, PA 15219 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

5 NOV 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-519 A.O. No. 46-04633-03021
v.	:	Mine No. 1
SIGLER MINING, Respondent	:	

ORDER ASSESSING DEFAULT PENALTY

The operator having received the captioned proposal for assessment of civil penalties and having failed to file its answer within 30 days as required by Rule 28 of the Commission's rules of procedure, an order to show cause why it should not be declared in default issued on October 6, 1980. The order directed respondent to explain its delinquency and to comply with the requirements of Rule 28 that it provide a statement of the reasons why each of the violations are contested, including a statement as to whether each violation occurred and whether a hearing is requested. The operator's response filed October 27, 1980, fails to comply with these requirements.

Accordingly, it is ORDERED that the operator be, and hereby is, declared in DEFAULT.

It is FURTHER ORDERED that pursuant to Rule 63 of the Commission's rules the proposed penalty of $1174 be, and hereby is, ASSESSED as a FINAL ORDER of the Commission. Finally, it is ORDERED that respondent pay the amount finally assessed, $1174, on or before Monday, November 24, 1980.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Sidney Salkin, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Leonard L. Sigler, President, Sigler Mining, Inc., General Deliver, Jodie, WV 26674 (Certified Mail)

Harrison B. Combs, Esq., UMWA, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

5 NOV 1980

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Orders
v.	:	Docket No. PENN 80-287-R
	:	Citation No. 840695; 6/2/80
RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Respondent	:	Docket No. PENN 80-288-R
	:	Order No. 840699; 6/11/80
UNITED MINE WORKERS OF AMERICA, Respondent	:	Renton Mine

DECISION

Duing the course of the inspector's testimony in Penn 80-287-R the parties requested a recess. After the recess the Solicitor advised that MSHA would modify the subject section 104(d)(1) citation to a section 104(a) citation. The operator then moved to withdraw its notice of contest. The motion to withdraw was granted from the bench.

Thereupon Docket No. PENN 80-288-R was consolidated for hearing and decision with PENN 80-287-R. The Solicitor advised that MSHA also would modify the subject section 104(d)(1) order in PENN 80-288-R to a section 104(a) citation. The operator then moved to withdraw its notice of contest with respect to that matter. The motion was granted from the bench.

In light of the foregoing the above-captioned cases are hereby DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

William H. Dickey, Jr., Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, 14480-Gateway Bldg., 3535 Market St., Philadelphia, Pa 19104 (Certified Mail)

Harrison Combs, Esq., UMWA, 900 Fifteenth St., NW, Washington, DC 20005 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

5 NOV 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ISLAND COUNTY HIGHWAY DEPARTMENT, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-372-M ASSESSMENT CONTROL NO. 45-01299-05001 MINE: CAMANO ISLAND PIT & MILL

DECISION

APPEARANCES:

Faye Sutton, Esq., Office of Robert A. Friel, Associate Regional Solicitor, U. S. Department of Labor, 8003 Federal Office Building, Seattle, Washington 98174
for Petitioner,

Alan R. Hancock, Esq., Office of David F. Thiele, Prosecuting Attorney of Island County, State of Washington, Courthouse, Coupeville, Washington 98239
for Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

Petitioner has charged Island County, a political subdivision of the State of Washington, with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter referred to as the Act). Island County denies the violations.

Pursuant to notice, a hearing on the merits was held in Seattle, Washington on February 20, 1980.

The parties filed post trial briefs.

ISSUES

The following issues were raised by the parties:

I. Whether a sand and gravel pit is a mine subject to the Act.

II. Whether the Secretary has promulgated safety regulations governing sand and gravel pits.

III. Whether Island County's sand and gravel pit affects interstate commerce.

IV. Whether a state or its political subdivision which is the proprietor of a mine is a "mine operator" as that term is used in the Act.

V. Whether the Commission has the authority to decide the constitutionality of the application of the Act to Island County.

VI. Whether the application of the Act to Island County violates the Tenth Amendment of the United States Constitution.

VII. Whether Island County violated the Act.

VIII. Whether the proposed penalties for any affirmed violations are appropriate.

DISCUSSION

I.

The initial issue is whether a sand and gravel pit is a mine subject to the 1977 Mine Safety Act. Island County provided several definitions of "mineral" to buttress its position that sand and gravel are not minerals and therefore, Island County does not operate a "mine".

The words "mine" and "mineral" are to be construed in a manner consistent with the intent of Congress in adopting the Act. Marshall v. Stoudt's Ferry Preparation Co. 602 F. 2d 589 (3rd Cir. 1979), Cert. denied, ____U.S.____ (1980). The objective of Congress was to provide all miners a safe working place. They were not concerned with the value of the material extracted from the earth. Respondent's supporting authorities which define "mineral" based on value are therefore, not appropriate.

It is evident that sand and gravel pits were intended to be within the coverage of the Act. In reviewing the safety record for metal and nonmetal mining, the House included data on the number of fatalities occurring in open pit, sand and gravel mines, stone quarries, and mills. House Report No. 95-312, 95th Cong. 1st Sess. 6 (1977). Congress also directed that any doubts over the extent of MSHA's jurisdiction are to be resolved in favor of inclusion within the Act. Senate Report No. 95-181 95th Cong. 1st Sess. 14 (1977).

The determination that sand and gravel pits are under the jurisdiction of the Act has been upheld in recent decisions. Stoudt's Ferry, supra.; Marshall v. Cedar Lake Sand and Gravel Co. 480 F. Supp.171 (E. D. Wisc. 1979). Marshall v. Wallach Concrete Products, Inc., et al, Docket No. 79-422 ____F. Supp.____(D.C. N.M. 1980).

II.

Another contention raised by Island County is whether the Secretary has promulgated safety and health standards for the operation of sand and gravel pits pursuant to the Act. Island County is correct in its assertion that the present mandatory safety and health standards for sand, gravel, and crushed stone operations were initially promulgated pursuant to the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 725. However, such standards were incorporated into the 1977 Act.

> The mandatory standards relating to mines, issued by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act ... which are in effect on the date of enactment of this Act shall remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines ... under the Federal Mine Safety and Health Act of 1977 until such time as the Secretary of Labor shall issue new or revised mandatory health or safety standards applicable to metal and nonmetallic mines .... 30 U.S.C. 961(b)(1).

III.

The third issue is whether Island County's sand and gravel operations "affect interstate commerce", and, thereby, bring Island County within the jurisdiction of the Act. The mines subject to the Act are those whose products enter commerce or those whose operations or products affect commerce. 30 U.S.C. § 803. This provision is to be given a very broad interpretation. Marshall v. Kraynack 604 F. 2d 231 (3rd Cir. 1979). Congress has found that health and safety accidents in all mines disrupt production and cause loss of income to operators which in turn impedes and burdens commerce. 30 U.S.C. § 801(f). Accordingly, even if a mine's products remain solely within a state, any disruption in its operations due to safety hazards affects interstate commerce. Marshall v. Kilgore 478 Supp. 4 (E.D. Tenn 1979); Marshall v. Bosack 463 F. Supp. 800 (E.D. Pa 1978).

Island County argues that since it is a small operation which does not sell its products to the public, it cannot be held to affect interstate commerce. The size of the operation is not determinative of whether it

affects interstate commerce. In the Kraynak case, the mine employed only the four individuals who owned it. The case of Martin v. Bloom 373 F.Supp. 797 (D.C. Pa 1973), cited by Island County, presents a unique situation of a mine operated by one man. The court's ruling that the local nature of the mine did not affect commerce has not been followed by other decisions. Martin appears to have a very narrow application not applicable here.

Island County may be the sole recipient of the sand and gravel mined from the pit but it still affects commerce. It is admitted that if it didn't operate the mine, it would obtain the materials from some commercial source (Tr. 26). Under the principles espoused in Wickard v. Filburn 317 U.S. 111(1942) and more recently in Bosack, supra, and Sec. of Interior v. Shingara 418 F. Supp. 693 (M.D. Pa, 1976), safety problems at the mine in combination with safety-related accidents at other mines throughout the country affect directly the stability of interstate commerce. Congress, therefore, has the power to regulate Island County's operations under the interstate commerce clause.

IV

The fourth issue focuses on the definition of "mine operator" and whether such definition includes a state in its capacity as the proprietor of a mine. Mine operator is defined by the Act as "any owner, lessee, or other person who operates, controls or supervises a ... mine ...." A person is designated as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. 802(d) and (f). Island County contends that a state or its political subdivision is not a "person" and thus, cannot be a mine operator subject to the Act.

The United States Supreme Court has held numerous times that Congressional acts regulating the conduct of certain businesses are to be enforced against states which have become proprietors of such enterprises. The sovereign immunity claim made by the state in these cases was not upheld even though they had argued that the acts in question were specifically directed to persons defined as corporations, partnerships etc., and were not made expressly applicable to states.

The principle enunciated by the Court has been that a state is not immune from federal regulations when it chooses to engage in a business of a private nature. Ohio v. Helvering 292 U.S. 360 (1934); Plumbers, Etc., 298 v. County of Door 359 U.S. 354 (1959).

Island County states that Congress by its definition of mine operator intended to specifically exclude states from the jurisdiction of the Federal Mine Act. Island County cites National League of Cities v. Usery 426 U.S. 833 (1976) in support of this proposition. I disagree. A state operated business is not a part of integral government functions. Ohio v. Helvering, supra. The restriction on federal regulation of states, enunciated in Nat'l League of Cities, applies only to integral functions of state government. This principle and its application to Island County is discussed more fully below. Island County is a mine operator subject to the Act.

V.

Island County contends that the application of the Act to itself violates the Tenth Amendment of the United States Constitution. The threshold issue to be addressed before this argument can be discussed is the authority of the Federal Mine Safety and Health Review Commission to decide questions of constitutional import which relate to the application of the Act to a particular party.

The Supreme Court has held that an administrative agency lacks the authority to determine the constitutionality of a particular provision of its enabling act. Weinberger v. Salfi 422 U.S. 749 (1974). P.U.C. of California v. U.S. 355 U.S. 534 (1958). This principle, however, does not preclude a resolution by the Review Commission of the question of whether the 1977 Mine Act is applicable to Island County.

The Review Commission is an independent tribunal empowered by Congress to review the enforcement actions of the Secretary and determine the liability of the parties. It is the sole arbiter of the factual issues and has been given broad authority to hear and decide all matters contested before it. 30 U.S.C. 823(d)(1).

The constitutional question raised by Island County concerns the extent of the Act's jurisdiction. Congress did not expressly provide for enforcement of the Act against states nor did it specifically exclude them. The Commission must then define the jurisdiction in a way that comports with the general purposes of the Act as enunciated by Congress.

The Commission has the authority to resolve a jurisdictional question of this kind.

> [I]t has long been established that the question of the inclusion of a particular entity within the coverage of a regulatory statute is generally for initial determination by an agency, subject to review on direct appeal, ... Securities & Exch. Com'n v. Wall Street Transcript Corp. 422 F.2d 1371, 1375 (2nd Cir. 1970) Cert. denied, 398 (1970) citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

Although the above cases dealt with the determination of jurisdiction as part of the investigative function of the enforcement agencies involved, the precept is applicable here. Congress designated that the Review Commission as the initial tribunal to adjudicate under the Act. As stated above, a necessary corollary to this duty is the authority to determine whether a particular party is within the coverage of the statute. Review by the United States Courts of Appeals is provided to assure due process.

It is a basic rule of statutory construction that legislation is to be construed in a manner that upholds its constitutionality. U.S. v. Vuritch 402 U.S. 62 (1971). Inherent then in the Commission's duty to resolve the jurisdictional question is the obligation to analyze any possible constitutional ramifications.

Constitutional issues in general have never been taken out of the purview of agencies. Courts have frequently required that fourth amendment claims be litigated before a Commission prior to granting judicial review. Marshall v. Babcock & Wilcox Co. 610 F.2d 1128 (3rd Cir. 1979). The resolution of questions of constitutional import has also been held to be within the scope of the agencies' authority to decide jurisdictional issues. "There is no reason to believe that the Commission will not be fully aware of the importance of first amendment considerations when it interprets and applies the Act's exclusion." Wall Street Transcript Corp., supra at 1380.

Although it may still hold true that an agency cannot determine the constitutional strength of its enabling act, that is not the issue here. The Commission is faced with a question of statutory construction. The resolution of this matter requires that it analyze the legislative history and constitutional principles. The Commission is not ruling on the constitutionality of an act of Congress but is determining what Congress intended and then enforcing it. The issue on appeal then would not be whether to uphold an act of Congress as would be the question if there was an attack on the statute itself. Rather, the appellate court would have to decide whether to affirm or reverse an interpretation of the Act by the Commission. This distinction was recognized by Davis in his treatise on administrative law.

> A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of legislation. When a tribunal passes upon constitutional applicability it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon constitutionality of the legislation the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. 3 K. Davis Administrative Law Treatise, § 20.04 at 74 (1958).

VI.

The merits of the constitutional question raised by Island County will now be addressed. Island County contends that the enforcement of the Act against a state or its political subdivision would violate the Tenth Amendment. Island County alleges that the constitutional principles enunciated in Nat'l League of Cities support its position. In that case, the application of the Federal Labor Standards Act to states was held to be unconstitutional because the impact of its enforcement would threaten the separate and independent existence of the states.

In applying this precept to the present case, Island County argues that the operation of a sand and gravel pit for the purpose of supplying materials for road maintenance is an integral government function. Accordingly, the County concludes that the interference from the enforcement of the Act would violate its separate and independent existence and, thus, would be unconstitutional.

Island County argues that Congress, having in mind the principles espoused in Nat'l League of Cities, intended to exclude states from the jurisdiction of the Act. Congress was no doubt aware of this landmark decision, but I find that it supports rather that negates the application of the Act to Island County.

In Nat'l League of Cities, the Court expressly refrained from overruling the ultimate holding in U.S. v. California 297 U.S. 175 (1936) which affirmed the propriety of federal regulation of a railroad owned and operated by a state. The Court distinguished the case before it from this earlier decision on the basis that the operation of a railroad engaged in interstate commerce was not "an area that the states have regarded as integral parts of their governmental activities." Nat'l League of Cities, supra at 854.

In U.S. v. California the State contended that because the revenue from the operation of the railroad was used for harbor improvements, it was performing a purely public function in its sovereign capacity. It concluded that it should, therefore, be excluded from the jurisdiction of the Safety Appliance Act. The Court agreed that the State of California was acting within its powers, but this did not exempt it from regulation by the federal government. In making this determination the Court analyzed the purpose of the Act and found that its effectiveness would be impaired if it were not applied to state-owned railroads.

> The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances (cites omitted), and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce even though their individual use is wholly intrastate (cites omitted). The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a private-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection. U.S. v. California, supra at 185.

U.S. v. California is analogous to the present case. The Federal Mine Safety and Health Act is also remedial. Congress was keenly aware of the grave dangers involved in every kind of mining activity and, further, recognized the need for a uniform regulatory scheme. Equal protection for all miners is at the heart of the 1977 Act. House Report No. 95-312, supra at 8-9. The danger to be apprehended and the potential impediment to interstate commerce is as great in state-owned mines as in those operated by private companies.

Island County argues that the State of Washington Industrial Safety and Health Act sufficiently monitors the safety practices of its mines as evidenced by their excellent safety record. Island County is to be commended for its excellent safety record. However, the safety record is not relevant to the issue of whether the Act applies to the County. Congress did not provide for the review of a mine operator's safety record before the issuance of a citation.

The Washington Industrial Safety and Health Act is still a viable means of protection for miners. Congress did not intend to fully displace any State plans on mine safety. They envisioned a "dual system which encourages State participation while at the same time not relinquishing Federal enforcement." House Report No. 95-312, supra at 25. Only state laws that conflict with the Act are superseded by it. 30 U.S.C. 955

Federal regulation of state-owned enterprises that have counterparts in the private sector is supported by the principles espoused in Nat'l League of Cities. Several decisions of the appellate courts have construed the precepts enunciated by the Court to prohibit federal intervention only when it would significantly hinder or interfere with a traditional function of a state.

> In determining whether an otherwise valid exercise of the federal commerce power would impermissibly impair state sovereignty we are therefore required to balance the reason for the exercise against the extent of usurpation of state policy making or invasion of integral state functions that would result, giving "appropriate recognition to the legitimate concerns of each government."(cite omitted). Friends of the Earth v. Carey 552 F.2d 25, 37 (2nd Cir., 1977).
>
> Where the legitimate exercise of a power delegated to Congress outweighs the interference with the state's self-determination in providing its essential public services, the tenth amendment is no bar to congressional action. Peel v. Florida Dept. of Transp. 600 F. 2d 1070, 1083 (5th Cir. 1979).

The maintenance of county roads is an essential and traditional service of local governments. The operation of a mine is not. It is a convenient method of providing materials needed for road construction, just as the running of the railroad was a convenient and economical means of maintaining California's harbors.

Island County fails to satisfy the criteria developed by the courts in their analyses of integral government functions. The County is not perceived by the community as the principal provider of sand and gravel, nor is it particularly suited for the operation of a mine. Amersbach v. City of Cleveland 598 F.2d 1033 (6th Cir. 1979). The operation of a sand and gravel pit is not an activity that is necessary to the separate and independent existence of a state.

Compliance with the Act may have an indirect effect on road maintenance. Island County may be expected to suffer some budgetary repercussions. The County Engineer testified that its funds were presently insufficient to meet all its needs, and compliance with the Act would cause further reductions. However, the impact would not be so substantial as to displace the County's policies of road maintenance. Island County concedes that there are other sources of sand and gravel.

In weighing any impact on road maintenance projects against the paramount objective of Congress to ensure a safe working place for all miners, the scales tip heavily in favor of mine safety. The application of the Act to states comports with the intentions of Congress, and is not violative of the Tenth Amendment. The Act must be construed to include within its jurisdiction a mine operator which is a state or political subdivision thereof.

For the foregoing reasons I rule against all the contentions raised by Island County.

VII.

The validity of the following citations is contested by Island County:

Citation No. 351642

Petitioner alleges that Island County violated 30 CFR 56.11-2[1] by failing to install a handrail on an elevated walkway. The facts are uncontroverted.

1. A walk platform constructed around the motor for the jaw crusher lacked a handrail (Tr. 114, 115, P-1).

2. A workman was observed by the inspector near the motor (Tr. 114).

3. A worker would be on the platform when doing maintenance work on the motor or when changing belts (Tr. 141).

4. The walkway is 5 to 6 feet in width (Tr. 135).

5. The distance from the platform to the surface below is 5 feet (Tr. 115).

6. There is a danger of someone falling off the platform which could result in a broken arm or leg (Tr. 115).

The standard involved requires that handrails be provided on all walkways. It was used by miners and a danger of falling and subsequent injury did exist. Accordingly, the citation should be affirmed.

Citation No. 351644

Petitioner charges that Respondent violated 30 CFR § 56.14-1[2]

1/ Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good conditions. Where necessary, toeboards shall be provided.

2/ Mandatory. 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.

by failing to install a guard at the head pulley where the pinch points were exposed. The facts are uncontroverted.

1. A guard was not installed at the head pulley of the No. 2 conveyor belt where the pinch points were exposed (Tr. 117, P-2).

2. There is a walkway along the side of the conveyor belt near the pinch points (Tr. 118).

3. The walkway is approximately 2 feet wide (Tr. 119).

4. The walkway is used frequently by miners (Tr. 142).

5. A miner's clothing could be caught in the pinch points and the miner pulled into the roller (Tr. 117, 118).

6. The walkway was approximately 2-1/2 feet from the rollers on the belt (Tr. 120, 142).

7. The pinch points are near the rollers (P-2).

The pinch points are moving machine parts which because of the close proximity to the walkway could cause injury to a miner. This is a constant danger since the walkway is used frequently by the miners. Accordingly, I find that the standard was violated and the citation should be affirmed.

Citation No. 351651

Petitioner charges that 30 CFR 56.9-7 [3] was violated because there was no emergency stop cord on the No. 2 conveyor belt nor was there a guard rail between the conveyor belt and the walkway. The facts are uncontroverted.

1. A walkway used frequently by the miners was located 2-1/2 feet from the rollers on the No. 2 conveyor belt (Tr. 120, 142).

2. There was no guard between the walkway and the conveyor belt. (Tr. 119).

3. There was no emergency stop devise along the belt line to shut off the power to the belt (Tr. 119).

4. The hazard was that someone could be pulled into the rollers and not be able to turn off the conveyor. (Tr. 119).

Island County failed to comply with 30 CFR 56.9-7. The citation should be affirmed.

3/ Mandatory. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

Citation No. 351653

The Secretary alleges that Island County violated 30 CFR 56.12-18[4]

The facts are uncontroverted.

1. The electrical panels located along the crusher platform which control the operation of the plant were not labeled as to what equipment they regulated (Tr. 121, P-3).

2. There are 12 electrical devices in each panel (Tr. 143).

3. There are at least 10 panels in the area (P-3).

4. Other power switches are at the main electrical shed which is 50 - 60 feet away from the panels in question (Tr. 122).

5. There was a danger that if someone were injured while the equipment was in operation, a co-worker would not be able to turn off the equipment immediately because of the lack of labels. This could increase the risk of severe injury.(Tr. 122).

The location of the power switches did not identify the units they controlled. There were several panels in one central area, and they regulated the operation of the entire plant. Accordingly, the citation should be affirmed.

Citation No. 351654

The Secretary alleges that an opening at the edge of a travelway should have had a safety chain or barrier around it to prevent someone from falling off the platform. It is alleged there was a violation of 30 CFR 56.11-12.[5]

4/ Mandatory. Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

5/ Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The evidence is uncontroverted.

1. Between the edge of a travelway platform and another structure there was an opening which did not have any guard or barrier around it to prevent someone from falling through it. (Tr. 122, P-4).

2. The walkway is six feet above the ground (Tr. 123).

3. The opening is near the area where the electrical panels are located which is visited frequently by those attending to the power switches. (Tr. 123, 143).

4. At times the dust in the area hinders visibility which adds to the risk of falling (Tr. 123).

There was a danger that someone could fall through the opening, particularly during periods of low visibility. The citation should be affirmed.

Citation No. 351647

The Secretary charges that the tail pulley under the jaw crusher was not guarded as required by 30 CFR 56.14-1.[6]

The facts are uncontroverted.

1. The self-cleaning tail pulley under the jaw crusher lacked a guard (Tr. 124, P-5).

2. Workers are in the area near the pulley when cleaning around the belt (Tr. 125, 146).

3. Normally, a worker would be 18 inches to 36 inches from the pulley while cleaning the area with a shovel (Tr. 147).

4. The pulley protrudes about 6 inches into the walkway area (Tr. 145).

5. The hazard is that while cleaning the area, a miner's clothing could be caught in the pulley, and the worker could be pulled into the equipment and sustain injuries (Tr. 124, 125).

Miners can come in contact with the unguarded tail pulley while cleaning the belt. There is a risk of injury if a miner's clothing should get caught in the pulley. The standard was violated. The citation and penalty should be affirmed.

6/ Mandatory. 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.

Citation No. 351648

Petitioner alleges that a broken ladder leading to the screening plant constituted a violation of 30 CFR 56.11-1.[7]

The evidence is uncontroverted:

1. A ladder leading to a work platform of the screening plant was broken at the top of the hand rail (Tr. 124,125, P-6).

2. The ladder was not secured to the platform (Tr. 126).

3. Workers were on the platform (Tr. 126).

4. There was a danger that a miner could fall off the ladder to the ground 8 to 10 feet below (Tr. 126).

5. There was an alternative safe means of access to the platform (Tr. 136).

Although the condition of the ladder cited by the inspector posed a danger to the miners, there was another safe means of access to the platform. The standard requires only that a safe means of access be provided. Respondent complied with the standard. Accordingly, the citation should be vacated.

Citation No. 351652

Petitioner cited Island County for an alleged violation of 30 CFR 56.14-1. The standard is set forth in footnote 2. The evidence is uncontroverted.

1. A self-cleaning tail pulley in the plant area was not guarded (Tr. 127, P-7).

2. The pulley protruded approximately 2-1/2 feet into the walkway area (Tr. 145).

3. A miner could be pulled into the machine and severely injured (Tr. 127, 128).

The standard requires that pulleys be guarded if they are in an area where they could be contacted by workers and cause injury. The facts establish a violation of this provision. The citation should be affirmed.

Citation 351646

The Secretary contends that Island County violated 30 CFR 56.11-5.[8]

7/ Mandatory. Safe means of access shall be provided and maintained to all working places.

8/ Mandatory. Fixed ladders shall be anchored securely and installed to provide at least 3 inches of toe clearance.

This standard requires that fixed ladders be anchored securely. The facts are uncontroverted.

1. Two ladders providing access to the work platform in the rolls crusher area and to a work area around the electric motor were not secured (Tr. 128, 129, P-8).

2. The ladder to the crusher was 7 to 8 feet high. The other one was 8 to 10 feet high (Tr. 130, 131, 135).

3. A miner was observed using the ladder to the crusher (Tr. 130, 131).

4. The platform around the rolls crusher is used for maintenance work (Tr. 145).

The ladders were used by the miners and were unsecured. The citation should be affirmed.

Citation No. 351650

Petitioner charges Island County violated 30 CFR 56.12-32[9].

The evidence is uncontroverted.

1. A junction box to the electric motor of the jaw crusher lacked a cover plate. (Tr. 131).

2. The inspector did not observe any testing or repair work being done on the motor at the time of the inspection (Tr. 136).

3. The wires of the motor were exposed to dust and moisture which could generate an electric shock (Tr. 132).

The standard requires that cover plates remain on electrical equipment at all times unless maintenance work is being performed. Island County did not refute Petitioner's statement that at the time of the inspection testing or repairs on the motor were not in progress. The citation should be affirmed.

Citation No. 351649

Secretary cited Island County for an alleged violation of 30 CFR 56.12-18. The standard is set forth in footnote 4. The facts are uncontroverted.

1. Ten of the 12 electrical panels in the electrical shed were not labeled (Tr. 132, 133).

9/ Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

2. The inspector could not tell by the panels' location which units they controlled (Tr. 137).

3. The danger to be apprehended is that the power to a particular machine could not be turned off quickly if someone were caught in the equipment (Tr. 133).

Unless their location clearly indicates which units they control, power switches are to be labeled. Island County had not complied with the standard. The citation should be affirmed.

Citation No. 351655

The Secretary alleges that Island County did not have a stretcher in the area as required by 30 CFR 56.15-1.[10] The transcript is incomplete on the proof of this citation. (Tr. 133). However, Island County concedes that the prerequisite evidence was erroneously deleted from the transcript (Brief, page 16).

Accordingly, the Citation should be affirmed.

VII

Island County disputes the appropriateness of the Secretary's proposed penalties. The penalty initially assessed by the Secretary for each citation is reduced as set forth in the ORDER. This reduction reflects the extraordinary good faith effort of Island County to abate the violative conditions. The mine was shut down immediately after the citations were issued, and the necessary repairs were made before it re-opened a day and a half later. (Tr. 157-159). This was done even though a withdrawal order had not been issued, and the inspector had given Island County up to 5 days to effect some of the repairs.

CONCLUSIONS OF LAW

Island County in its capacity as a mine operator of the Camano Island Pit and Mill is subject to the 1977 Mine Safety Act. All of the citations at issue except No. 351648 should be affirmed.

10/ Mandatory. Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

ORDER

Based on the foregoing findings of fact and conclusions of law, I enter the following order.

1. The citations listed below are affirmed and the corresponding penalty is assessed.

351642	-	$ 14
351644	-	$ 30
351646	-	$ 14
351647	-	$ 30
351649	-	$ 22
351650	-	$ 8
351651	-	$ 16
351652	-	$ 30
351653	-	$ 22
351654	-	$ 14
351655	-	$ 8

2. Citation No. 351648 and the proposed penalty therefor are VACATED.

John J. Morris
Administrative Law Judge

Distribution:

Faye Sutton, Esq., Office of Robert A. Friel, Associate Regional Solicitor,United States Department of Labor, 8003 Federal Office Building, Seattle, Washington 98174

Alan R. Hancock, Esq., Office of David F. Thiele, Prosecuting Attorney of Island County, State of Washington, Courthouse, Coupeville, Washington 98239

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6230

5 NOV 1980

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Order
v.	:	Docket No. WEVA 80-110-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Shoemaker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-361
	:	A.C. No. 46-01436-03086V
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Shoemaker Mine

DECISION

Appearances: Michel Nardi, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Co.;
David Street, Esq., Philadelphia, Pennsylvania, for Secretary of Labor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This action was commenced on November 23, 1979, when Consolidation Coal Company (hereinafter Consol) filed a notice of contest of an order of withdrawal issued on November 1, 1979, under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1) (hereinafter the Act). On June 16, 1980, the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) filed a proposal for assessment of a civil penalty against Consol for violation of 30 C.F.R. § 75.400. On July 11, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission (hereinafter Commission) 29 C.F.R. § 2700.12.

A hearing was held in Pittsburgh, Pennsylvania, on June 17, 1980. Charles Coffield, Michael Blevins, and Frank Cicholski testified on behalf of MSHA. Charles Adams, Lloyd Behrens, Jerry Pack, Jerry Ernest, and Randy Nolte testified on behalf of Consol. Both parties submitted post-hearing briefs.

MSHA alleged that Consol is chargeable with unwarrantable failure to comply with the regulation concerning accumulation of combustible materials and that a civil penalty should be assessed. Consol denies the allegations.

ISSUES

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

APPLICABLE LAW

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

> If, upon inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 C.F.R. § 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

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

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

STIPULATIONS

The parties stipulated the following:

1. Shoemaker Mine is owned and operated by Consol.

2. Consol and the Shoemaker Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.

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

5. A true and correct copy of the subject order was properly served upon the operator in accordance with Section 104(a) of the 1977 Act.

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

7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

FINDINGS OF FACT

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

1. Shoemaker Mine is owned and operated by Consol.

2. Inspector Charles Coffield, who issued the order in controversy, was a duly authorized representative of the Secretary of Labor at all times pertinent herein.

3. On November 1, 1979, Inspector Coffield performed a regular inspection of the Shoemaker Mine and, at 10:55 a.m., issued Order No. 0808600 pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. § 75.400 in that there were accumulations of float coal dust in numerous locations along and under the coal conveyor mother belt, the 2-D5 north section belt, and the structures and machinery in the vicinity of those belts.

4. The evidence of record established the existence of piles of combustible materials as follows:

a. Numerous areas of float coal dust and coal dust along the conveyor belts which extended up to 4 feet in width, hundreds of feet in length, 10 inches in depth and which were black in color.

b. Float coal dust up to 12 inches in depth on the overcasts containing the mother belt.

5. Immediately before the order in question was issued, the 2-D5 north section belt was out of alignment and was smoking and the belt was de-energized by Consol prior to the issuance of the order.

6. The preshift examiner's report for this section prior to the issuance of the order in question noted that the mother belt needed to be dusted and drug but no action had been taken by Consol prior to the issuance of the order.

7. Prior to the issuance of the order, Inspector Coffield observed two miners cleaning under the intersection of the mother belt and the longwall belt (not cited in the order) but those miners stated that they were only there to shovel a large pile of coal and then were to return to their section.

8. MSHA established that the coal dust and float coal dust accumulated along the conveyor belts as set forth above.

9. The accumulation of coal dust and float coal dust in the active workings of the Shoemaker Mine did not constitute an imminent danger because there was no immediate source of ignition at the time the order was issued.

10. The accumulation of coal dust and float coal dust in the active workings of the Shoemaker Mine had been present for more than one working shift at the time the order was issued.

11. The accumulation of coal dust and float coal dust in the active workings of the Shoemaker Mine created a safety hazard because, in the event of a fire or explosion, it would propagate such fire or explosion.

12. Consol is a large operator and the assessment of a civil penalty herein will not affect its ability to continue in operation.

13. The condition cited in the order was abated in a timely fashion and Consol demonstrated good faith in attaining abatement.

DISCUSSION

Contest of Order

After the instant action was commenced, the Commission issued two decisions construing the applicable regulation in controversy. On December 12, 1979, the Commission adopted a new standard for determining when a violation of 30 C.F.R. § 75.400 occurs. In Old Ben Coal Company, 1 BNA MSHR 2241, Docket No. VINC 74-111 (December 12, 1979), the Commission disagreed with the former standard announced by the Interior Board of Mine Operations Appeals that a violation of the mandatory standard did not occur even though an accumulation of combustible materials was present where the operator commenced abatement within a reasonable time after it had notice of the existence of the accumulation. The Commission held that the existence of an accumulation was a violation of the mandatory standard and that the action of the operator thereafter to abate this condition was irrelevant to the issue of whether a violation occurred.

On October 24, 1980, the Commission in Old Ben Coal Company, Docket No. VINC 75-180-P, etc. (October 24, 1980), stated as follows:

> We have recognized that some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.

Id. at 3.

The issue of whether the standard was violated in this case was vigorously contested at the hearing. Consol called five witnesses in its case. Charles Adams, who conducted the preshift examination of the mother belt, testified that it was in good condition but required one area of rock dusting and another area of dragging. He reported this condition in the preshift book. He did not travel the overcasts during his examination. Lloyd Behrens, Consol's escort during this inspection, testified that he saw one pile of coal dust near a scraper board and some other areas that needed rock dusting and dragging. He testified that this condition would have been corrected during the shift if no order were issued. Jerry Pack, the section foreman, stated that although the order in question was issued approximately 3 hours after the shift began, he had not had an opportunity to make an on shift examination of the area because "I had my hands full up at the face." He saw an area along the belt which was approximately 150 feet long and covered with float coal dust which looked dark. He conceded that in the event of a fire that float coal dust would speed the ignition of the fire. Jerry Ernest, the mine foreman, testified that he saw approximately 60 feet of float coal dust but that it was

"nothing to worry about" because it was only a thin film of float coal dust on top of 4 inches of rock dust. He stated that there were four men assigned to work on the belt at the time the order was issued. As its last witness, Consol called Randy Nolte, a UMWA member, who was assigned to clean the belt. He admitted that there was more float coal dust in the area around the belt than usual, but he could not estimate the depth or extent of this coal dust.

MSHA inspector Charles Coffield testified that he observed and measured accumulations of float coal dust up to 30 inches deep on overcasts and up to 12 inches deep on the floor of the mine. He described areas 200, 250, and 1500 feet long and 4 to 15 feet wide which were black in color. The float coal dust completely covered the bottom, cribbing, pumps, pipeline, and belt structures. There were electric motors and power wires in the area which were ignition sources. He smelled smoke coming from the 2-D5 north belt in an area where there was 12 inches of float coal dust on the bottom. He stated that he saw more than 50 locations along the belts where there were accumulations 8 to 18 inches deep, 3 to 4 feet wide, and 2 to 5 feet long. He decided to issue an unwarrantable failure order pursuant to section 104(d)(1) after Consol deenergized the 2-D5 north belt and no imminent danger existed. In his opinion the unwarrantable failure order was properly issued because of the following factors: (1) the extent of the area of violation and the depth of float coal dust; (2) the accumulations he observed would have taken at least 1-1/2 to 2 days to accumulate and could have been present for up to 1 month; (3) the preshift examiners should have seen and reported this condition; and (4) in the event of an ignition in the area, the accumulation of float coal dust would have caused a mine explosion. Inspector Coffield talked to two miners who were shoveling a pile of loose coal by the belt. They told him that they were only assigned to shovel that pile of coal and then were to return to their section.

Michael Blevins, the UMWA walkaround on this inspection, also testified on behalf of MSHA. He stated that he accompanied Inspector Coffield throughout the inspection in question. The deepest accumulation of float coal dust he observed was approximately 12 inches deep at an overcast. He specifically denied seeing any accumulation 30 inches deep. The overall condition of the belts was that rock dusting was needed on certain portions and the majority of the belts needed to be shoveled. He stated, "I thought the belt line was a mess." However, Mr. Blevins disagreed with Inspector Coffield concerning the depth of the accumulations. While the inspector testified that the average depth was 8 to 12 inches, Mr. Blevins estimated only 4 to 5 inches. Specifically he denied any accumulations up to 12 inches on the bottom, belt structures, and pumps. MSHA called Frank Cicholski, a UMWA safety committeeman, as a rebuttal witness. He testified that he observed the belts approximately 5 hours after the order of withdrawal was issued. He observed 10 to 15 locations of coal dust which were approximately 10 inches deep. He denied seeing any accumulations deeper than that. He estimated that there were another 15 to 20 locations where there was a moderate amount of accumulation of coal dust up to 2 inches in depth.

In the instant case, I find that the testimony of the witnesses called by MSHA concerning the amount and extent of float coal dust and coal dust was more credible than the testimony of the witnesses called by Consol. While

it appears that some of the testimony of Inspector Coffield was exaggerated, e.g., finding 30 inches of float coal dust on an overcast and an 8- to 12-inch average depth of the numerous accumulations on the floor, the preponderance of the evidence establishes that there were numerous areas along the conveyor belts in question where float coal dust and coal dust accumulated for hundreds of feet, several inches deep, and were black in color. The amount and extent of the combustible float coal dust and coal dust established that this was an accumulation in violation of 30 C.F.R. § 75.400 rather than a mere spillage which would not constitute a violation. Therefore, I find that Consol violated 30 C.F.R. § 75.400 as alleged by MSHA.

The order in question also alleged that the violation was due to the "unwarrantable failure" of Consol to comply with the mandatory standard. The term "unwarrantable failure" was defined by the Interior Board of Mine Operation Appeals as follows:

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

Zeigler Coal Company, 7 IBMA 280 (1977). This definition was approved in the Legislative History of the 1977 Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977). In the Old Ben Coal Company decision issued in December, 1979, the Commission upheld an order of withdrawal based upon the operator's unwarrantable failure to comply with 30 C.F.R. § 75.400. The Commission found that the violation was an unwarrantable failure even though the evidence established that the spillage occurred during the previous shift.

In the instant case, the preponderance of the evidence establishes that the accumulation of float coal dust and coal dust had been present for more than one working shift. Although the need to rock dust and drag the mother belt was reported on the preshift examination, Consol failed to conduct an on shift examination of this condition or establish that it had taken the necessary action to correct this condition. Even if Consol is correct in its assertion that this entire condition would have been corrected in the normal course of operations during the shift on which the order was written, this fact does not negate a finding of a violation of the mandatory standard or the fact that such a violation was unwarrantable. The extent and depth of the accumulation in question, as established by the evidence of record, shows that Consol knew or should have known of the accumulation and failed to exercise reasonable care to abate the condition. Therefore, the violation was caused by Consol's unwarrantable failure to comply with the mandatory standard.

Assessment of Civil Penalty

MSHA proposed that a civil penalty in the amount of $3,500 be assessed for this violation. Consol's history of assessed violations at this mine in the 2 years prior to this order shows 937 violations of the Act or mandatory standards. Seventy-one of these violations were of the same standard, 30 C.F.R. § 75.400, cited in this case. This history is significant in that there was almost one violation per week of the regulation proscribing the accumulation of combustible materials.

I have previously found that Consol was negligent in that it knew or should have known of the accumulation in question. MSHA has failed to establish its claim of gross negligence since there was no evidence of a reckless disregard of the mandatory standard or reckless or deliberate failure to correct an unsafe condition which was known to exist. Although Consol was working on the general area of the conveyor belts prior to the issuance of the order in question, it failed to take necessary action to correct this condition. Thus, Consol is chargeable with ordinary negligence.

The witnesses for both sides agreed that an accumulation of combustible materials could propagate a mine fire or explosion. Thus, a serious safety hazard was present.

However, I find that the description of the extent of the accumulation was exaggerated by Inspector Coffield. Since the proposed assessment of a civil penalty was based upon the inspector's description of the extent of the accumulation - which description, according to all of the other witnesses in the case, was substantially exaggerated - it follows that the proposed assessment was based upon a more extensive accumulation than was established by the evidence of record.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of $1,750 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

1. The administrative law judge has jurisdiction of this proceeding pursuant to section 105 of the Act.

2. Consol negligently permitted coal dust and float coal dust to accumulate in the Shoemaker Mine on November 1, 1979, in violation of 30 C.F.R. § 75.400.

3. The violation of the above mandatory standard was caused by the unwarrantable failure of Consol to comply with the mandatory standard.

4. At the time Order No. 0808600 was issued, there was in existence a valid citation pursuant to section 104(d)(1) of the Act on October 30, 1979, and, hence, Order No. 0808600 was properly issued.

5. Consol's contest of Order No. 0808600 is denied.

6. Under the criteria set forth in section 110(i) of the Act, a civil penalty in the amount of $1,750 shall be imposed for a violation of 30 C.F.R. § 75.400.

ORDER

WHEREFORE IT IS ORDERED that the contest of Order No. 0808600 is DENIED and the subject order is AFFIRMED.

IT IS FURTHER ORDERED that Consol pay the sum of $1,750 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.400.

James A. Laurenson, Judge

Distribution by Certified Mail:

Michel Nardi, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 6 1980

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citations
v.	:	Docket No. PENN 80-224-R
	:	Citation No. 838781; 4/10/80
RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Respondent	:	Docket No. PENN 80-225-R
	:	Citation No. 838782; 4/10/80
UNITED MINE WORKERS OF AMERICA, Respondent	:	Docket No. PENN 80-226-R
	:	Citation No. 838783; 4/10/80
	:	Docket No. PENN 80-233-R
	:	Citation No. 838747; 4/9/80
	:	Renton Mine

DECISION

Appearances: William Dickey, Jr., Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant, Consolidation Coal Company;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent, MSHA.

Before: Judge Merlin

These cases are Contests of Citations filed by Consolidation Coal Company. A hearing was held on October 28, 1980.

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

(1) The applicant is the owner and operator of the subject mine.

(2) The subject mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) I have jurisdiction of this case pursuant to section 105 of the Act.

(4) The inspectors who issued these subject citations were duly authorized representatives of the Secretary.

(5) True and correct copies of the subject citations were properly served upon the operator in accordance with the 1977 Act.

(6) Copies of the subject citations are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevance of any of the statements asserted therein.

(7) Docket No. PENN 80-224-R will be tried, and the decision with respect thereto will govern Docket No. PENN 80-225-R. Similarly, Docket No. PENN 80-226-R will be tried, and the decision reached therein will govern Docket No. PENN 80-233-R.

At the hearing, documentary exhibits were received and witnesses testified on behalf of the operator and MSHA (Tr. 5-121). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 121-122). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 134-139).

BENCH DECISION

The bench decision is as follows:

The docket numbers in these cases are Penn 80-224-R, 80-225-R, 80-226-R and 80-233-R.

These cases are notices of contest challenging section 104(a) citations for alleged violations of 30 CFR 75.1404-1. Counsel for both parties agreed to try 80-224-R and that the decision in that case would govern 80-225-R. Counsel further agreed to try 80-226-R and that the decision there would govern 80-233-R.

The same inspector issued these citations in 80-224-R and 80-226-R. At issue in all these cases is the meaning of section 75.1404-1 of the mandatory standards. This section provides as follows:

> A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of section 75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design

capabilities and at speeds consistent with the condition of the haulage road. A trailing locomotive or equivalent device should be used on trains that are operated on ascending grades.

The specific question presented is whether the word "should" in the last sentence of section 75.1404-1 is mandatory or whether it is merely a recommendation or suggestion which the operator can follow or not as it wishes.

After due consideration I conclude the language in question imposes a mandatory obligation upon the operator. I recognize that in the statutory sections contained in the mandatory standards the word "shall" appears and that in those sections of the mandatory standards which expand upon the original statutory provisions and which are only regulations, the words "shall" and "should" both are used. I have reviewed all the mandatory standards. I have found that the word "should" appears in many other standards besides section 75.1404-1, including roof control and ventilation sections. To hold that "should" is merely discretionary would, therefore, create a great gap in enforcement, which I do not believe was the intent of the drafters of the regulations. Where discretion is intended and allowed, the word "may" is used in the regulations. Accordingly, I hold that the word "should" in this section is mandatory.

In addition, it must be noted that section 75.1404-1 is, itself, an exception to the requirements of section 75.1404 regarding automatic brakes in that it allows an alternative method of satisfying the primary statutory mandate for automatic brakes. For this reason, also, the allowance of dual braking systems on locomotives operated within their design capabilities and at appropriate speeds, together with trailing locomotives or equivalent devices, must be held a requirement of the operator.

Admittedly, the language in question may not be as clear as it might be, but it is sufficiently clear for the operator to have understood that a trailing locomotive or equivalent device was required of it. Indeed, the operator's continued experimentation in this area demonstrates that this was so.

The inspector's testimony that the dragging devices in both citations were not in operable condition is uncontradicted, and I accept it. I further conclude that both citations were based upon conditions which occurred on ascending grades. The inspector's testimony on this point is supported by the numerical grade specifications on the operator's own mine map. Moreover, the operator's assistant mine foreman

specifically testified that the grade involved in the citation in PENN 80-226-R was ascending. Section 75.1404-1 requires equivalent devices on ascending grades. It does not require any particular degree of ascent. These cases fall squarely within the express terms of the standard. Moreover, the inspector testified about the dangers presented by full mine cars ascending even a one percent grade. I find this testimony persuasive. Here the trips contained 30 cars each, which according to the operator's mine foreman, held 8 tons apiece. I further find, based upon both the inspector's testimony and that of the mine foreman, that with respect to both citations the inspector could see far enough to determine that trips were approaching on ascending grades.

I recognize that the operator was experimenting with equivalent devices. However, this does not create an exception to the mandatory standard. It does, however, indicate that the operator's negligence, if any, was minimal. This, of course, is a factor which should be taken into account in the penalty aspects of these cases when they arise between the parties. So too, the length of time the drags had not been in operable condition goes to negligence, not to the existence of a violation.

I further recognize that the Secretary has no published criteria with respect to equivalent devices. However, according to the mine foreman, after some experimentation the operator has now come up with an effective drag or equivalent device. The subject citations were issued because the drags then being used were not in an operable position, and the inspector made clear that if they had been in an operable position, he would not have issued these citations. I believe it preferable for operators to devise equivalent devices they can work with rather than have the Secretary get further into the business of telling operators exactly how they must meet the requirements of the law.

In light of the foregoing, the citations in these docket numbers are upheld, and the notices of contest are dismissed.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The four Notices of Contest contained in these cases are hereby DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

William H. Dickey, Jr., Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Harrison Combs, Esq., UMWA, 900 Fifteenth St., NW., Washington, DC 20005 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 10 1980

WILLIAM A. ROBISON,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. WEVA 80-246-D
SOUTH UNION COAL COMPANY,	:	
Respondent	:	Jamison No. 12 Mine

DECISION

Appearances: David P. Born, Esq., and Richard Bunner, Esq., Fairmont, West Virginia, for Complainant;
William H. Higinbotham, Esq., Morgantown, West Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued July 29, 1980, a hearing in the above-entitled proceeding was held on September 30, 1980, in Clarksburg, West Virginia, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 209-211):

> This proceeding involves a discrimination complaint filed in Docket No. WEVA 80-246-D on February 25, 1980, as supplemented on April 10, 1980, alleging that complainant was employed by South Union Coal Company as a section foreman at its Jamison No. 12 Mine. On or about May 5, 1979, complainant alleges that he was unlawfully discharged by South Union's general mine foreman for his failure to perform acts which would have caused complainant to violate a mandatory health and safety standard. Complainant seeks the relief available under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 for the alleged violation of section 105(c)(1) of the Act. 1/
>
> Complainant first filed a complaint with the Mine Safety and Health Administration (MSHA) on May 8, 1979. On February 4, 1980, MSHA notified complainant that its investigation had revealed that no violation of section

1/ Section 105(c)(1) provides in pertinent part that no person shall discharge a miner because he has "* * * filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * of an alleged danger or safety or health violation in a coal or other mine * * *."

105(c)(1) had occurred. Since that finding meant that MSHA would not file a complaint with the Commission on complainant's behalf under section 105(c)(2) of the Act, complainant filed his own complaint with the Commission under section 105(c)(3) of the Act and the hearing has been held under section 105(c)(3) of the Act.

The issue in this case, of course, is whether a violation of section 105(c)(1) did occur, when the general mine foreman discharged Mr. Robison on May 5, 1979. I shall make some findings of fact on which my decision will be based. I shall make the findings in numbered paragraphs.

(1) William A. Robison began working for South Union Coal Company on November 10, 1978, as a section foreman. Prior to that time, Mr. Robison had worked for about 19 years in various capacities for Consolidation Coal Company.

(2) South Union Coal Company has stipulated that it is subject to the Commission's jurisdiction and to the provisions of the Federal Mine Safety and Health Act of 1977. The company did not produce coal continuously during the month of September 1980 because of the poor coal market existing at that time, but its normal production is from 5,500 to 6,000 tons per month. The company normally employs about 50 coal miners and has seven salaried employees.

(3) On May 3, 1979, Mr. Robison went to work on his normal evening shift which ran from 4 p.m. to midnight. He made a check of the working faces, without including an air reading at that time, and indicated to the operator of the continuous-mining machine, Mr. Frank Shorter, that he could commence mining in the No. 6 entry.

(4) Mr. Shorter began mining, but found that there was an unusual amount of dust coming back over the continuous-mining machine. Therefore, Mr. Shorter and his assistant, Mr. Randy Martin, determined that they would not run the continuous-mining machine in the midst of an excessive amount of dust. They stopped running the machine and told Mr. Robison that they would not operate the machine until ventilation conditions were improved.

(5) Mr. Robison had them cut another shuttle car or so of coal, so that he could try to determine why there was so much dust. After he had seen the amount of dust that existed, he agreed something needed to be done to improve ventilation.

(6) Mr. Robison began checking the stoppings and he also called outside and reported that ventilation problems existed. At the same time, or very shortly after that, Mr. Charles Gorbey called outside and asked that the safety committee, which worked the day shift, should come to the mine to examine ventilation conditions.

(7) Before much longer, the mine superintendent, Mr. Beres, and the mine foreman, Mr. Kincell, came into the mine. The safety committee also came into the mine. All are in agreement that there was an insufficient amount of air at the beginning of the shift.

(8) After several stoppings had been tightened and other work had been done on the ventilation system, the proper amount of air was obtained and the mine foreman, Mr. Kincell, was able to get an air reading with his anemometer showing that a volume of 3,100 cubic feet of air per minute existed behind the brattice curtain coming into the No. 6 entry. When Mr. Robison left the mine at the end of his shift, he was able to report that about 12,000 cubic feet of air existed at the last open crosscut.

(9) After Mr. Kincell, the mine foreman, had determined that an adequate amount of air existed at the working face, he asked Mr. Robison to get Mr. Martin and Mr. Shorter to work in the actual production of coal, while the other men continued to work on the ventilation system.

(10) Mr. Shorter and Mr. Martin declined to work in response to Mr. Robison's request, but when Mr. Robison reported to Mr. Kincell that the two men were unresponsive to his request, it was agreed that Mr. Kincell personally should ask them to work. Mr. Kincell did ask the two men to work, and they agreed to resume production of coal for the remainder of that shift. The result was that Mr. Robison was able to report about 21 shuttle cars of coal having been produced on May 3, which was about an average amount because production ranged from 21 to 46 cars of coal on an average working shift.

(11) When Mr. Robison reported for work on the next day, which was May 4, 1979, Mr. Kincell, the mine foreman, asked him to make certain before he began producing coal that the ventilation was up to the required amount before he began producing coal. Mr. Robison again found that there was not an adequate amount of ventilation at the beginning of the shift. It was again necessary to do some tightening of curtains and stoppings in order to get the proper amount of air before production was begun.

(12) On May 4, Mr. Robison encountered other difficulties in that a shuttle car had a defective cable which required a splice. That put the shuttle car out of commission from about 7:30 to 8 p.m. A roof-bolting machine also had a problem and was out of service from about 10 to 10:45 p.m. Additionally, the roof-bolting machine was mired in mud from time to time, which kept the miners from being able to bolt as rapidly and in the places they would like to have bolted. Finally, about 11 p.m. the tramming chain on the continuous-mining machine broke, so that toward the end of the shift on May 4 Mr. Robison found that he had a number of problems to deal with.

(13) On May 5, which was a Saturday, Mr. Robison received a call from Mr. Kincell, the mine foreman, who advised Mr. Robison that he was going to have to discharge Mr. Robison. Mr. Robison asked that he be permitted to come to the mine and discuss the matter in person with Mr. Kincell.

(14) Mr. Robison did go to the mine and they did have a discussion. What was said by both men during that discussion is largely uncontroverted by either man. Mr. Kincell gave as his primary reason for discharging Mr. Robison the fact that a lot of backstabbing was going on, which Mr. Kincell did not think he could continue to tolerate. During the course of the conversation, Mr. Kincell did tell Mr. Robison that he believed Mr. Robison could have persuaded Mr. Shorter and Mr. Martin to work on Thursday, May 3, if he had really wanted to do so.

(15) In his testimony, Mr. Kincell explained that by "backstabbing" he meant the fact that he had received, over a period of time, comments from the men on Mr. Robison's shift statements to the effect that Mr. Robison was ambitious and would like to see Mr. Kincell terminated from his job as mine foreman so that Mr. Robison could achieve that position.

(16) At first Mr. Kincell discounted such statements, but eventually became convinced that his authority in the mine was being eroded by Mr. Robison's comments. Mr. Kincell believed that he should have been able to receive more loyalty on the part of his section foreman than Mr. Robison had been demonstrating.

(17) Another reason that Mr. Kincell gave for Mr. Robison's discharge was that he had found Mr. Robison's work to be unsatisfactory in several respects. The primary aspect that he found unsatisfactory was that Mr. Robison had failed to cut head coal with the continuous-mining machine,

so as to increase the height of one of the entries for the purpose of converting it into a haulageway. Both the day-shift section foreman and the evening-shift section foreman are supposed to do some of the cutting of the head coal. Cutting head coal is not as productive as normal cutting with the continuous-mining machine. The result is that the section foreman who cuts head coal loses a certain amount of production. When the day-shift section foreman complained to Mr. Kincell that the evening shift--that is, Mr. Robison's shift--was not cutting the proper amount, or fair amount of head coal, the day-shift section foreman stopped cutting also. Therefore, Mr. Kincell found it necessary to speak to Mr. Robison a few times about his failure to cut head coal.

(18) Another criticism Mr. Kincell had about Mr. Robison was that Mr. Robison had failed to follow the roof-control plan on or about May 3, 1979, because Mr. Robison had violated the roof-control plan by starting a cut in the crosscut from the No. 4 entry, at the same time that a cut had been made from the No. 3 entry into that same crosscut at a time when the roof had not been bolted after the first cut had been removed. Mr. Kincell stated that it was a combination of all of these matters which caused him to conclude in a discussion with the mine superintendent, Mr. Beres, that Mr. Robison should be discharged.

I think that the findings above summarize the pertinent facts in this proceeding.

This type of case is always difficult to decide. The testimony in this case is actually more consistent and all the witnesses have demonstrated a greater degree of credibility than in almost any one of these cases I have ever had. There is very little real controversy about what happened.

The difficulty in all these cases, however, is that I am always faced with the question of whether respondent discharged complainant for the reason respondent says he was discharged, or whether respondent discharged the complainant because the complainant had been engaging in a protected activity which disturbed the respondent so much that it wanted to eliminate that particular individual from its payroll. I never find in one of these cases a situation in which the respondent's representative comes in and says, "Yes, that's right. I discharged this employee in violation of section 105(c)(1)." So it is always up to me to try to determine what really was the reason for the discharge.

I do not think that there is any doubt but that Mr. Robison sincerely feels that he was discharged because he could not get Mr. Shorter and Mr. Martin to run the continuous-mining machine because Mr. Kincell agreed he had mentioned that as one of the things that was discussed on the day of the discharge. Nevertheless, I do not think the preponderance of the evidence will permit me to find that the company did discharge Mr. Robison for that reason. I believe that the evidence shows that Mr. Robison was discharged for the reasons that Mr. Kincell gave, rather for the fact that Mr. Robison could not get some men to work in unsafe conditions with the result that a violation of section 105(c)(1) of the Act occurred.

I shall give a few reasons for my coming to that conclusion. As I indicated in my questions of Mr. Kincell and I do not think Mr. Kincell ever really understood what I was driving at, but one of the things that has been inconsistent in Mr. Robison's complaint from the beginning was that I could not understand why Mr. Kincell would caution Mr. Robison when he went into the mine on May 4 to make sure that he had an adequate amount of ventilation, if Mr. Kincell would then discharge Mr. Robison the next day for failing to have persuaded two men to work when the air was less than it should have been on the section. I feel the fact that Mr. Kincell did tell Mr. Robison before he went in the mine on May 4 to make sure he had an adequate amount of ventilation is a very good reason for belieiving that Mr. Kincell would not have discharged Mr. Robison for failing to get two men to work at a time when the ventilation was not up to standard.

I do not like to criticize Mr. Robison, but the evidence in this case does show that he did know certain things were not being done in the mine, but he said nothing about those things to his mine foreman, Mr. Kincell, or to the mine superintendent, Mr. Beres. Specifically, I am talking about the fact that Mr. Robison indicated in connection with his Exhibit 9 that he knew the brattice curtain was improperly hung on the right side of entry No. 6. He said when it was on the right side, the air would flow up the right side and then come down across the continuous-mining machine and that such air flow was not proper.

Mr. Robison said that in his opinion the curtain should have been hung on the left side of the entry so that the air would have been directed only across the front of the continuous-mining machine, then behind the curtain, and down the No. 6 entry. Despite the fact that he knew that the curtain had been improperly installed, Mr. Robison did not say anything to Mr. Kincell about it. Mr. Robison said he had

learned to keep quiet about things like that because you just do not upset the mine foreman unnecessarily by telling him about things that are wrong. Now if Mr. Robison had learned to cooperate like that and not rock the boat, so to speak, I believe he was not complaining about safety in the mine or health conditions in the mine to such an extent that Mr. Kincell would have had a motivation for discharging him because of his failure to violate some safety or health standard at the request of the mine foreman.

Also, again I do not like to be critical of Mr. Robison, but the evidence does show that he did not know what the last open crosscut volume of air should be under the company's ventilation plan. It is required under the plan to be 9,000 cubic feet at the last open crosscut. Section 75.301 of the regulations requires the same thing. Mr. Robison had access to the ventilation plan (Tr. 183) and should have known what the volume of air was that was required at the last open crosscut. Otherwise, he would not know when he had an amount of ventilation that was adequate and when he did not.

Likewise, it is a fact Mr. Robison indicated he had started that crosscut to the left of the No. 4 entry, when in fact the crosscut had not been bolted on the side beginning from the No. 3 entry. Additionally, Mr. Robison said that he generally had a higher production level on his shift than existed on the day shift. Maintenance of a high production level is indicative of a person who is ambitious and wants to get ahead. There is nothing wrong with being ambitious, except that there may have been some undercutting or undermining of the mine foreman in various remarks Mr. Robison may have made about him. In other words, the preponderance of the evidence supports a finding that the reasons Mr. Kincell gave for the discharge of Mr. Robison were the ones that brought about his discharge, rather than the reason that Mr. Robison thinks was the cause of his discharge.

I find that Mr. Robison's discharge was not the result of his participation in a protected activity under section 105(c)(1) of the Act; therefore, Mr. Robison's complaint will have to be denied.

After the bench decision set forth above had been rendered, the Commission issued on October 14, 1980, its decision in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC _____, 80-10-13, holding that a prima facie case is made if a complainant shows that he engaged in a protected activity and that the adverse action or discharge was motivated in any part by the protected activity. The Commission noted that complainant has the burden of showing that his discharge was in any part caused by his

engaging in a protected activity. The Commission also held that if respondent's evidence shows that the discharge was in part the result of complainant's participation in a protected activity, respondent has the burden of showing that the discharge would have taken place in any event because of complainant's unprotected activity.

Application of the rationale of the Pasula case to the facts in this proceeding does not require any change in my findings or conclusions. Although respondent's mine foreman agreed that he had mentioned during the discharge discussion that he believed that complainant could have persuaded the miners to work on May 3, 1979, the request that the miners resume operation of the continuous-mining machine was made after ventilation had been restored (Finding Nos. 9 and 10, supra; Tr. 178-179, 189-191). Therefore, the complainant was never asked to have miners work at a time when a proper volume of air was unavailable. The mine foreman referred to complainant's inability to get the miners to work on May 3 as an example of the failure of complainant, who was a section foreman, to provide the mine foreman with the type of support which the mine foreman believed that complainant should have provided at that time as well as on other occasions.

I find that complainant did not sustain his burden under the Pasula case of showing that the mine foreman ever asked him to have miners to work when there was inadequate ventilation. In other words, in this case, complainant never did prove that the discharge was motivated in part by the fact that complainant was engaged in a protected activity.

WHEREFORE, it is ordered:

The complaint filed in Docket No. WEVA 80-246-D is denied for failure to prove that complainant's discharge involved a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

Richard C. Steffey

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

Distribution:

David P. Born, Esq., Attorney for William A. Robison, 613 Deveny Building, P.O. Box 1305, Fairmont, WV 26554 (Certified Mail)

Richard Bunner, Esq., Attorney for William A. Robison, Adams Street, Fairmont, WV 26554 (Certified Mail)

William H. Higinbotham, Esq., Attorney for South Union Coal Company, 174 Chancery Row, Morgantown, WV 26505 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. LAKE 80-173-M
v.	:	A.C. No. 20-00741-05003
	:	
	:	Docket No. LAKE 80-189-M
J. P. BURROUGHS & SONS, INC.,	:	A.C. No. 20-00741-05004
Respondent	:	
	:	Holly Sand and Gravel Plant

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner; Robert J. Krupka, Esq., Cook, Nash & Deibel, Saginaw, Michigan, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above cases were commenced by the filing of petitions for the assessment of civil penalties for alleged violations of mandatory safety standards promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801. Three violations were alleged in Docket No. LAKE 80-173-M; four were alleged in Docket No. LAKE 80-189-M, one of which was vacated prior to the hearing as having been issued in error.

Pursuant to notice, the cases were called for hearing on the merits on August 4, 1980, in Midland, Michigan. By order issued on the date of hearing, the cases were consolidated for the purposes of hearing and decision, since they involved the same mine and the same witnesses. Robert L. Polkinghorne, a Federal mine inspector, testified for Petitioner; Wayne Michelson testified for Respondent. Both parties have filed posthearing proposed findings and legal briefs. To the extent that the proposed findings and contentions are not accepted in this decision, they are rejected.

REGULATIONS

30 C.F.R. § 56.14-29 provides: "Mandatory. Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is

blocked against motion, except where machinery motion is necessary to make adjustments."

30 C.F.R. § 56.4-29 provides: "Mandatory. When welding or cutting, suitable precautions shall be taken to ensure that smoldering metal or sparks do not result in a fire. Fire extinguishing equipment shall be immediately available at the site."

30 C.F.R. § 56.9-87 provides:

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

30 C.F.R. § 56.9-22 provides: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

30 C.F.R. § 56.17-1 provides: "Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times pertinent to this case, Respondent was the operator of a sand and gravel plant in Oakland County, Michigan, known as the Holly Sand and Gravel Plant.

2. There is no direct evidence in the record as to the size of Respondent's business, either in terms of production or the number of employees. There is evidence that at the Holly Sand and Gravel Plant, Respondent mines, washes and sizes sand and gravel. It has front-end loaders, a primary wash plant and other secondary plants (Tr. 8). It has a conveyor and a crushed stone feed tunnel. It has other plants in addition to Holly (Tr. 34). From these facts, I can infer that it is at least a medium-sized operation.

3. Between September 1, 1977, and August 31, 1979, there were 22 paid violations of mandatory safety standards at the subject mine. None involved 30 C.F.R. § 56.14-29; none involved 30 C.F.R. § 56.4-29; one involved 30 C.F.R. § 56.9-87; one involved 30 C.F.R. § 56.9-22, none involved 30 C.F.R. § 56.17-1. I do not regard this history of prior violations to be such that penalties otherwise appropriate should be increased because of it.

4. In each case involved herein, Respondent abated the alleged violations promptly and in good faith.

5. Citation No. 298066 issued on September 13, 1979, alleged a violation of 30 C.F.R. § 56.14-29 in that an employee was welding at a discharge

chute without blocking the chute in an open position. There is conflicting testimony as to whether the power to the shaker screen to which the discharge chute was attached was on or off. Since the citation did not allege that the power had not been turned off, it is unnecessary to resolve the conflict. Was the chute blocked against motion before repairs were begun? The chute was hinged at the bottom and resting on a handrail at an angle of about 35 degrees which blocked it from falling "downward." It could fall "backward" only if someone deliberately lifted it (it weighs approximately 300 pounds) and tipped it toward the closed position. It could not have occurred accidentally. In view of the facts, I conclude that the standard does not apply to the situation described in the citation. The citation will be vacated.

6. Citation No. 298067 issued on September 13, 1979, alleged a violation of 30 C.F.R. § 56.4-29 in that employees were welding and cutting without a fire extinguisher at the site. The employees were welding and cutting on a platform at the discharge chute. The nearest fire extinguisher was on a maintenance truck about 50 feet away down a ladder and around or under a conveyor. The standard requires a fire extinguisher to be "immediately available at the site." Respondent argues that this standard is "vague and ambiguous, since it is subject to various interpretation." A work site may, of course, vary in its dimensions, but safety standards can hardly be expected to be so tightly drawn that an inspector (or an operator) would not have to use judgment in their application. The term "working site" is not vague, nor is the term "immediately available." The facts are clear here: A fire extinguisher which is on a truck on a level below the area of work which could be reached by going down a ladder, traveling 30 or more feet around or under a conveyor, is not "immediately available." The citation described a violation. It is moderately serious, and was the result of Respondent's negligence.

7. Citation No. 298068 alleges a violation of 30 C.F.R. § 56.14-29 in that an employee was performing maintenance in a chute above a conveyor belt without turning off the power to the belt. The inspector believed that the employee might fall through the opening at the bottom of the chute on to the running belt. The evidence establishes, and I find, that it would not have been physically possible for the employee to fall through the opening which measured 12 inches by 14 inches. The evidence does not establish a violation and the citation will be vacated.

8. Citation No. 298065 charges a violation of 30 C.F.R. § 56.9-87 in that a front-end loader did not have an audible backup alarm. The evidence establishes that the operator of the front-end loader in question had an obstructed view to the rear. The loader had a bell-type alarm on its wheel. The inspector stated it was not audible above the surrounding noise when the loader was in operation. He was standing approximately 30 feet from the machine as it backed up, and could not hear the alarm. Mr. Michelson stated that he could hear the alarm. I accept the testimony of the inspector and find that the backup alarm was not audible above the surrounding noise and therefore a violation of the standard was established. The violation was moderately serious. Petitioner did not establish that it resulted from negligence.

9. Citation No. 298073 charges a violation of 30 C.F.R. § 56.9-22 in that a guard or berm was not provided on an elevated roadway in the pit area on September 13, 1979. The evidence establishes that the area in question was not a roadway but an area being mined out. It was not a place of vehicular travel and the standard cited does not apply. The citation will be vacated.

10. Citation No. 298089 charges a violation of 30 C.F.R. § 56.17-1 in that the crushed stone feed tunnel did not have sufficient light to work safely. The tunnel housed a conveyor belt and employees enter it periodically to perform cleanup work. There is a dispute between Inspector Polkinghorne and Mr. Michelson as to the amount of light and the difficulty in seeing. There were one or two light bulbs in the tunnel. I reject Respondent's argument that the standard is impermissibly vague. I reject its contention that a measuring device or a scientific test is required to establish insufficient illumination. Respondent cited Freeport Kaolin Company, 1 FMSHRC 2343 (1980), and Kaiser Steel Corporation, 1 FMSHRC 2367 (1980), but failed to cite Secretary of Labor v. Clinchfield Coal Company, Docket No. NORT 78-417-P issued March 12, 1979, review denied by the Commission in April 1979, affirmed sub nom. Clinchfield Coal Company v. Secretary of Labor, unpublished opinion issued April 8, 1980 (4th Cir.). The Court of Appeals upheld a finding of insufficient illumination based upon the "informed judgment [of the inspector] of what constituted sufficient illumination." In this case, I rely on the judgment of the inspector that the illumination in the tunnel was not sufficient to provide safe working conditions. A violation was established. It was not serious, but was the result of Respondent's negligence.

ADDITIONAL CONCLUSIONS OF LAW

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

2. Respondent is subject to the provisions of the Mine Safety and Health Act of 1977 in its operation of the Holly Sand and Gravel Plant.

3. Based upon the evidence introduced at the hearing, the contentions of the parties, and a consideration of the criteria in section 110(i) of the Act, I determine that the following penalties are appropriate for the violations found to have occurred:

Citation No.	30 C.F.R. Standard	Penalty
298067	56.4-29	$100
298065	56.9-87	100
298089	56.17-1	50

ORDER

Therefore, IT IS ORDERED (1) Citation Nos. 298066, 298068, and 298073 are VACATED and no penalty is imposed. IT IS FURTHER ORDERED that Respondent

shall, within 30 days of the date of this decision, pay $250 for the violations found herein to have occurred.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Robert J. Krupka, Esq., Attorney for J. P. Burroughs & Sons, Inc., Cook, Nash & Deibel, 1201 Second National Bank Building, Saginaw, MI 48607

B3,4 Gerald A. Hudson, Esq., Attorney, Office of the Solicitor, U.S. Department of Labor, 231 West Lafayette Street, Room 657, Detroit MI 48226

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-48-M
Petitioner	:	A.C. No. 20-2370-5002
v.	:	
	:	Middlemiss Pit
CASH & CARRY GRAVEL, INC.,	:	
Respondent	:	

ORDER DENYING MOTION
TO APPROVE SETTLEMENT;
DECISION

Appearances: Allen H. Bean, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner; John L. Cote', Esq., and Richard G. Swaney, Swaney and Thomas, Holland, Michigan, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding was commenced by the filing of a petition for the assessment of civil penalties for six alleged violations of mandatory safety standards promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801. Pursuant to notice, the matter was heard on the merits in Holland, Michigan on August 12, 1980. Thomas Wasley, a federal mine inspector, testified on behalf of Petitioner; Cornelius Brewer, president of Respondent, testified on behalf of Respondent. Counsel made closing statements on the record and were given the opportunity to submit written proposed findings of fact and conclusions of law. On October 21, 1980, the parties filed a motion to approve a settlement.

MOTION TO APPROVE SETTLEMENT

The parties have proposed to settle the six violations, originally assessed at $773 for a payment of $580. I have reviewed the motion and the evidence received at the hearing and conclude that the proposed settlement does not effectuate the purposes of the Act. Therefore the motion is DENIED.

AFFECTING COMMERCE

Respondent argues that it is not subject to the Act because it sells its product, sand and gravel, entirely within the state of Michigan. The Mine Safety Act applies to mines "the products of which enter commerce, or the operations or products of which affect commerce." 80 U.S.C. § 803. By this language, taken from the Coal Mine Safety Act of 1969, Congress intended to exercise its full authority under the Commerce Clause. The evidence establishes that Respondent produces and sells sand and gravel on the open market. Among its customers are a concrete manufacturer and the County Road Commission. These facts bring its operation under the Act. See the discussion of this issue in Secretary of Labor v. Capitol Aggregates, Docket No. DENV 79-163-PM, 2 FMSHRC 2373 (1980), decision by Judge Moore; and Secretary of Labor v. New York Department of Transportation, Docket No. YORK 79-21-M, Order Denying Motion to Dismiss by Judge Laurenson, March 21, 1980, and the cases cited in these decisions.

WARRANTLESS INSPECTION

The inspection which resulted in the citations at issue was made without a warrant, and over Respondent's protest. The Act requires inspections and directs that they be made without advance notice. The legislative history of the Act makes it clear that it is intended that the Secretary has the right to inspect without a warrant. S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 (1978). The right to conduct warrantless inspections under the Act has been upheld in Marshall v. Nolichuckey Sand & Gravel Co., Inc., 606 F.2d 693 (6th Cir. 1979); Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980); and Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979).

STATUTORY CRITERIA COMMON TO ALL CITATIONS

Respondent is a very small operator, employing two people. There is no evidence that penalties assessed herein will affect its ability to continue in business, but I note and will consider the testimony of Respondent's president that the operation loses money. In the 24 months immediately preceding the citations at issue seven violations were charged and paid. This history is not such that penalties otherwise appropriate should be increased because of it. The evidence establishes that each citation was abated in good faith.

FINDINGS OF FACT

The Electrical Violations

1. On July 18, 1979, wires leading to the water pump did not enter an electrical box but were covered with tape.

2. Although the pump was not operating at the time, the line was energized.

3. The area was very wet.

4. The pump was being repaired at the time and the wires were taped by an electrician.

5. Respondent knew or should have known of the hazard created by the conditions described in Findings 1 through 3.

6. The hazard created by the conditions described in Findings 1 through 3 was very serious in that an employee who contacted the wires could have received an electrical shock.

7. On July 18, 1979, a cover was missing from an electrical box in the shop area of the subject mine. Energized wires were leading from the box to the water pump.

8. The pump was not in operation at the time the citation was issued. The pump was being repaired.

9. Respondent knew or should have known of the absence of the cover.

10. The condition described in Finding 8 was moderately serious in that wires inside the box were exposed and an employee contacting them could have received an electrical shock.

11. On July 18, 1979, the audible reverse alarm on the Trojan front-end loader was not operating when observed by the inspector.

12. The alarm was present, but because the switch was not pulled out, it did not operate.

13. The condition described in Finding 11 was not serious and not the result of Respondent's negligence.

14. On July 18, 1979, the cab window on the Trojan front-end loader was cracked in several places.

15. The condition described in Finding 14 impaired the visibility of the operator of the loader.

16. The condition described in Finding 14 was moderately serious.

17. The condition described in Finding 14 was known or should have been known by Respondent.

18. On July 18, 1979, a guard was not provided at the head pulley along an elevated walkway at the stone conveyor.

19. A pinch point existed which could have injured an employee who contacted the pulley.

20. The condition described in Finding 18 was moderately serious. It was located in an area where employees seldom went when the machinery was in operation.

21. Respondent knew or should have known of the condition described in Finding 18.

22. On July 18, 1979, Respondent failed to have a copy of the last quarterly report available at the mine site.

23. Respondent did not keep the reports at the mine site because of frequent break-ins at the site.

24. The condition described in Finding 22 was not serious. It did not result from Respondent's negligence.

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1979 in the operation of the Middlemiss Pit.

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

3. The condition described in Finding 1 constituted a violation of the mandatory safety standard contained in 30 C.F.R. § 56.12-30. The violation was very serious and resulted from Respondent's negligence. I will assess a penalty of $250 for this violation.

4. The condition described in Finding 7 constituted a violation of 30 C.F.R. § 56.12-32. The violation was moderately serious and resulted from Respondent's negligence. I will assess a penalty of $200 for this violation.

5. The condition described in Finding 11 constituted a violation of the mandatory safety standard contained in 30 C.F.R. § 56.9-2. The violation was not serious and did not result from Respondent's negligence. I will assess a penalty of $75 for this violation.

6. The condition described in Finding 14 constituted a violation of 30 C.F.R § 56.9-11. The violation was moderately serious and resulted from Respondent's negligence. I will assess a penalty of $125 for this violation.

7. The condition described in Finding 18 constituted a violation of 30 C.F.R. § 56.14-1. The violation was moderately serious and resulted from Respondent's negligence. I will assess a penalty of $100 for this violation.

8. The condition described in Finding 22 constituted a violation of 30 C.F.R. § 50.30. The violation was not serious and did not result from Respondent's negligence. I will assess a penalty of $50 for this violation.

ORDER

Respondent is ORDERED to pay within 30 days from the date of this decision the following penalties for violations of mandatory safety standards.

Citation	30 C.F.R. Standard	Penalty
295698	56.12-30	$ 250
295699	56.12-32	200
295700	56.9-2	75
295701	56.9-11	125
295702	56.14-1	100
295703	50.30	50
	Total:	$ 800

James A. Broderick
Chief Administrative Law Judge

Distribution:

Allen H. Bean, Attorney, Office of the Solicitor, U.S. Department of Labor, 231 W. Lafayette, Rm 657, Detroit, MI 48226 (Certified Mail)

John L. Cote', Attorney at Law, 30 East Ninth St., Holland, MI 49423 (Certified Mail)

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6230

NOV 14 1980

JIM WALTERS RESOURCES, INC., Contestant	:	Contest of Citation
v.	:	Docket No. SE 80-43-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 80-141
	:	A.C. No. 01-00758-03058F
v.	:	
	:	No. 3 Mine
JIM WALTERS RESOURCES, Respondent	:	

DECISION

Appearances: Robert W. Pollard, Esq., Birmingham, Alabama, for Jim Walters Resources, Inc.;
Murray A. Battles, Esq., Birmingham, Alabama, for Secretary of Labor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This action was commenced on December 26, 1979, when Jim Walters Resources, Inc., (hereinafter Jim Walters) filed a notice of contest of a citation issued on November 23, 1979, under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a) (hereinafter the Act). Upon completion of prehearing requirements, the contest of citation was heard in Birmingham, Alabama, on July 22, 1980. H. E. Melhorn and William Pitts testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). Frederick Carr, Jesse E. Cooley, and Thomas H. Coleman testified on behalf of Jim Walters. Both parties submitted posthearing briefs. On October 10, 1980, MSHA filed a proposal for assessment of a civil penalty based on the citation which is here contested by Jim Walters. Because the two cases involve similar issues of law and fact, pursuant to 29 C.F.R. § 2700.12, I order the cases consolidated.

ISSUE

The issue in this case is whether the citation for violation of 30 C.F.R. § 75.200 was properly issued.

APPLICABLE LAW

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

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 C.F.R. § 75.200 provides:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

STIPULATIONS

The parties stipulated the following:

1. Jim Walters is the owner and operator of the No. 3 mine in question.

2. The No. 3 mine is subject to the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction of this proceeding, pursuant to Section 105 of the Act.

4. The Citation in question and the Termination were properly served on Jim Walters by a duly authorized representative of the Secretary and will be admitted into evidence as authentic.

FINDINGS OF FACT

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

1. The No. 3 Mine is owned and operated by Jim Walters.

2. Inspector H. E. Melhorn, who issued the subject citation, was a duly authorized representative of the Secretary of Labor.

3. On November 21, 1979, a fatal roof fall accident occurred at the No. 3 Mine in the face area of No. 3 entry, No. 6 section.

4. At the time of the accident, the crew had cut approximately 19 feet inby the last permanent support. In order to extend the line curtain, one temporary support had been set approximately 5 feet inby the last permanent support and approximately 5 feet from the nearest rib.

5. The victim was attempting to set a second temporary support. He walked on the wide side of the first temporary support (that is, not between the temporary support and the nearest rib) about 5 feet inby the first temporary support. At all times he was within 5 feet of the first temporary support.

6. As he was attempting to set the second temporary support, the victim was struck and killed by a rock which fell from the roof.

7. Paragraphs 4 and 5 of the Jim Walters roof control plan provide:

4. When testing roof or installing supports in the face area, the workmen shall be within 5 feet of a temporary or permanent support.

5. Where it is necessary to perform work such as extend line curtains or ventilating devices inby the roof bolts or to make methane tests inby the roof bolts, a minimum of two temporary supports shall be installed. This minimum is applicable if they are within 5 feet of the face or rib and the work is done between such supports and the nearest face or rib.

8. MSHA investigated the accident and on November 23, 1980, Inspector H. E. Melhorn issued Citation No. 237745 which stated:

A fatal roof fall accident occurred in No. 6 Section at the face of No. 3 Entry and based on evidence and testimony the victim traveled from permanent roof support to a point of approximately 10 feet inby under unsupported roof. The approved roof control plan requires that no person advance beyond permanent roof support unless they travel between the rib and temporary supports.

DISCUSSION

The issue in this case is whether these facts establish a violation of Jim Walters roof control plan. A violation of the approved roof control plan is a violation of the mandatory standard contained in 30 C.F.R. § 75.200. See Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). At hearing, MSHA conceded that because the victim was always within 5 feet of the first temporary support, paragraph 4 of the roof control plan was not violated. MSHA contends that paragraph 5 of the plan required that the miner travel between the first temporary support and the nearest rib when walking inby permanent support to set a second temporary support in order to extend the line curtain. MSHA further contends that this part of the plan was violated by the actions of the victim preceding the accident. Jim Walters contends that miners are not required to travel between the rib and temporary support when setting other temporary support; they are only required to stay within 5 feet of permanent or temporary support. Jim Walters therefore asserts that because the victim stayed within 5 feet of the first temporary support, the roof control plan was not violated.

The specific issue in this case then is whether paragraph 5 of the roof control plan requires miners to travel between temporary support and the nearest rib when setting other temporary support in order to extend the line curtain. I find that it does not.

Paragraph 5 of the roof control plan is not clearly drafted. It requires that when such work as extending line curtains or taking methane tests inby permanent support is being done, certain precautions have to be taken. These precautions are that at least two temporary supports must be set; the temporary supports must be within 5 feet of the face or rib; and the work must be done between the nearest face or rib and the temporary supports. Paragraph 5 of the plan does not prescribe how temporary supports

should be installed. Paragraph 4 of the plan explicitly states what precautions should be taken when roof supports are to be installed. That paragraph requires that when roof supports are being installed, the miner must stay within 5 feet of other temporary or permanent support. That is what was done here. I find that paragraph 4, not paragraph 5 describes what precautions must be taken when roof supports are being installed and in this case, those precautions were taken.

I am mindful that this case involves very unfortunate circumstances and that the primary purpose of the Act is to insure the health and safety of miners. Nevertheless, an operator is entitled to know what is required of it and what conduct constitutes a violation. Here, I have found that the plain wording of the roof control plan did not proscribe the conduct cited. The operator's employees testified that they never interpreted the plan to require what MSHA asserted it required. The MSHA inspector testified that he had previously seen miners travel on the wide side of temporary supports to set other temporary supports and had not cited the operator nor warned the operator that the conduct was in violation of the plan. MSHA in approving Jim Walters plan had the opportunity to require in plain language what it is attempting to require here and it may require it in the future, but it has not done so. I find that the facts of this case do not establish a violation of Jim Walters roof control plan. Therefore, no violation of the Act or mandatory standard has been proven.

CONCLUSIONS OF LAW

1. This Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

2. The evidence of record fails to establish a violation of the approved roof control plan pursuant to 30 C.F.R. § 75.200.

3. On November 23, 1980, Citation No. 237745 was improperly issued under section 104(a) of the Act; Citation No. 237745 is vacated; and Jim Walters' contest of citation is granted.

4. Because Citation No. 237745 was improperly issued, the proposal for a civil penalty based on the citation is dismissed.

ORDER

WHEREFORE IT IS ORDERED that the contest of Citation No. 237745 is GRANTED and said citation is VACATED.

IT IS FURTHER ORDERED that the proposal for a civil penalty based on Citation No. 237745 is DISMISSED.

James A. Laurenson, Judge

Issued:

Distribution by Certified Mail:

Robert W. Pollard, Staff Attorney, Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, AL 35283

H. Gerald Reynolds, Jim Walter Corporation, 1500 North Dale Mabry Highway, Tampa, FL 33607

Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, 1929 9th Avenue, South, Birmingham, AL 35205

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. DENV 79-291-PM A/O No. 41-01643-05001
v.		
LONE STAR STEEL COMPANY,	Respondent	Docket No. DENV 79-439-PM A/O No. 41-01643-05002 F Benefication Plant

DECISION

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Steve Wakefield, Esq., Donald Dowd, Esq., Dallas, Texas, for Respondent.

Before: Judge Stewart

These are civil penalty proceedings brought pursuant to section 110(a) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 820(a), hereinafter referred to as the Act.

Petitioner timely filed petitions for assessment of civil penalty in these cases with the Mine Safety and Health Review Commission and Respondent timely filed its answers to these petitions. The hearing in these matters was held in Dallas, Texas. A brief and proposed findings of fact and conclusions of law were submitted by Respondent.

The primary issues are (1) whether the mine owner, Lone Star Steel Company, should be cited for violations of the Mine Safety and Health Act committed by its contractor, H. B. Zachry Company, (2) whether there was a violation of mandatory safety or health standards, and (3) the amount of the civil penalty that should be assessed for the violations.

The following stipulations between the parties which were accepted at the hearing are entered as findings:

1/ Section 110(a) of the Act reads as follows:
"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

The Lone Star Steel Company is engaged in interstate commerce.

The employee, Tracy Alan Monkhouse, fell and was killed April 26, 1978.

He was not tied off as alleged.

The H. B. Zachry Company, reported the death some 23 hours later on April 27, 1978.

The size of the company, based on the manhours worked for 1978, is 255,573 hours.

This would indicate that Lone Star is a medium-sized mining operation.

The penalty will not affect continuation in the business.

There is no prior history of violations under this Act.

Respondent showed good faith in abating the alleged violations.

On April 26, 1978, at approximately 11:05 a.m., Tracy Alan Monkhouse fell from atop a 56-foot column to his death. At the time of his death, Mr. Monkhouse was employed by H. B. Zachry Company (Zachry). His job was to climb to the top of steel columns and connect cross-members. A column that Monkhouse had climbed tilted, causing him to fall or jump from the column.

Zachry, a large construction contractor, had entered into a contract with Lone Star Steel Company (Lone Star) to build part of a new sintering (benefication) plant for Lone Star at Lone Star's iron ore mining and processing facility near Lone Star, Texas. The iron ore facility is located approximately 3 miles northeast of Lone Star's main steel plant. The sintering plant is that part of the steelmaking operation in which raw iron ore is upgraded and prepared for melting in the blast furnace.

The benefication plant project was a major one, calling for a total expenditure of over 20 million dollars. Zachry was to remove two existing kilns, and erect and install a refurbished sintering machine at an estimated cost to Lone Star of over 2 million dollars. As many as 158 employees worked at a time and it took approximately 11 months to complete that part of the project.

According to Lone Star's project engineer and the contract itself, Zachry exercised control over the details of work. Zachry also assumed responsibility for the safety of its employees. 2/ In a meeting with the company safety director prior to the beginning of construction, Zachry

2/ The contract between Zachry and Lone Star called for Zachry to comply with the Occupational Safety and Health Act of 1970, as well as all Federal and State environmental statutes and all regulations issued pursuant to such statutes. No explicit requirement was contained in the contract to the effect that Zachry was responsible for compliance with the Act and the regulations issued pursuant thereto.

officials stated that they were familiar with MSHA regulations. At the hearing, Zachry's project safety engineer stated that it was his understanding that Zachry was to be totally responsible for compliance with MSHA regulations. The attempt was made to isolate the job and make it off limits to Lone Star employees. The construction area was roped off and signs were posted indicating construction was in progress and warning Lone Star employees to keep out. There were at least two incidents where Lone Star employees, one of whom was the plant superintendent, were warned that the area was off limits to Lone Star personnel.

When the accident occurred, Mr. Monkhouse was wearing a safety belt. When he climbed to the top of the column, however, he did not tie-off with the belt. Testimony indicated that it was not common practice in the trade for "connectors" to tie-off and, depending upon the operation to be performed, connectors may have difficulty tying-off. Testimony also indicated that the deceased may have precipitated the tipping of the beam by rocking it and that Mr. Monkhouse may have attempted to jump from the column he was was straddling to a nearby column.

Zachry reported the death to MSHA some 23 hours later. After an MSHA investigation, Lone Star was cited for violations of 30 C.F.R. § 50.10 which calls for "immediate" reporting of all fatal accidents and 30 C.F.R. § 55.55-5 which requires tying-off when working in high places. MSHA inspector Julian Kennedy testified that Lone Star was cited because it was MSHA policy to cite the mine owner instead of the independent contractor at that time.

Lone Star's good faith and lack of a prior history of violations were stipulated. It was also stipulated that Lone Star's mining operation was in the medium-size range. The inspector's report with regard to Citation No. 00154817 (failure to tie-off) states that the condition resulting in the fatality could not have been known or predicted by Lone Star.

The MSHA inspector's statement with respect to Citation No. 00154816 (late reporting) notes that this was a technical violation only.

Liability of Operator for Act of Independent Contractor

Lone Star contends that the Act requires that the contractor be cited in circumstances such as those that exist in this case and asserts that even if a citation of contractors is within the discretion of the Secretary of Labor, the Secretary has clearly abused his discretion in this case by continuing to blindly follow a policy of administrative convenience.

Although the Federal Mine Safety and Health Amendments Act of 1977 (Pub. L. 95-164, 30 U.S.C. § 801 et seq.) amended the definitions of "operator" to include an "independent contractor," conditions under which the independent contractor rather than the owner-operator should be cited were not prescribed. The Act still imposes strict liability on the owner-operator for violations and Lone Star has not been relieved of its liability by contracts and understandings with Zachry.

The Federal Mine Safety and Health Review Commission has recently ruled on this question in two cases, Secretary of Labor, Mine Safety and Health Review Commission v. Old Ben Coal Co. (MSHRC Docket No. VINC 79-119) (now pending before the Circuit Court of Appeals of the District of Columbia, Docket No. 79-2367), and Monterey Coal Company v. Secretary of Labor, Mine Safety and Health Administration and United Mine Workers (MSHA Docket Nos. HOPE 78-469 through HOPE 78-476), (now on appeal to the Fourth Circuit Court of Appeals). In Old Ben, the Commission held that the Secretary of Labor retained the discretion under the Act to cite the mine owner even though the 1977 Amendments amended the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In Monterey Coal, the Commission, citing Old Ben, reversed an administrative law judge's decision in which he had held the owner not liable.

Lone Star also contends that the purposes of the Act can best be served by citing the party best able to protect the health and safety of the miner. While Zachry might have been in violation of the two cited regulations and may have also been negligent, these issues have not been litigated by the independent contractor at a hearing. The Act imposes liability on Lone Star and none of its provisions required the inspector to cite Zachry rather than Lone Star for violations. Although the inspector's report with respect to Citation No. 00154817 (failure to tie-off) states that the condition resulting in the fatality could not have been known or predicted by Lone Star, there is no requirement under the Act that Respondent must be negligent in order to be liable. Negligence is one of the statutory criteria to be considered in determining the amount of civil penalty that should be assessed, but it is not a condition for finding Respondent liable. 3/

Citation No. 00154817

In citing a violation of 30 C.F.R. § 55.15-5 on April 28, 1978, the inspector stated on the citation form issued to Respondent that some H. B. Zachry employees (connectors) were not "tying-off" with the safety belts provided while working at the top of free landing columns. 30 C.F.R. § 55.15-5 provides: "Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

3/ Section 110(i) of the Act provides:

"The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

The record establishes the occurrence of a violation of 30 C.F.R. § 55.15-5 as alleged. Mr. Monkhouse wore a safety belt but failed to attach a line as required by the mandatory standard. Testimony was offered to the effect that it was not the common practice for connectors to tie-off. The plain language of the standard, however, requires that they do so.

It is probable that this violation would result in serious injury or death to the person failing to tie-off and it did in fact contribute to the death of Mr. Monkhouse. It would normally be expected that one person would be affected by his failure to tie-off.

Negligence on the part of Respondent has not been established; it was not shown that Respondent knew or should have known of the failure of Mr. Monkhouse to tie-off as required. Clearly, it was not established that Respondent had actual knowledge of the failure to tie-off. The area was off limits to Respondent's personnel, Respondent's management had no supervisory authority over Zachry personnel, and Zachry had assumed responsibility for the safety of its own employees. The record will not, therefore, support a finding that Respondent had constructive knowledge of the failure of Mr. Monkhouse to tie-off.

The findings with respect to the remaining statutory criteria are as follows: the operator has no history of previous violations; Respondent is a medium-sized mining operation; the civil penalty assessed will not affect the operator's ability to continue in business; and Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In view of the above, Respondent is assessed a civil penalty of $500 for this violation.

Citation No. 00154816

In citing a violation of 30 C.F.R. § 50.10 on April 28, 1978, the inspector stated on the citation forms issued to Respondent that: Tracy Allan Monkhouse, an employee of the H. B. Zachry Company died at approximately 11:05 a.m., April 26, 1978, from injuries suffered in an industrial accident which occurred at that time. The MSHA subdistrict office was notified at 11 a.m., May 27, 1978. The H. B. Zachry Company was engaged in plant construction work for the Lone Star Steel Company at this plant. Telephone communication between MSHA and the mine site was available at the time of this accident. 30 C.F.R. § 50.10 provides:

> 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.

This is only a technical violation as acknowledged by the inspector in his statement and the record does not establish negligence on the part of Lone Star for the 1-day delay by Zachry in reporting the accident. The operator has no history of previous violations. Respondent is a medium-sized mining operation. The civil penalty assessed will not affect the operator's ability to continue in business. Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

The petition for assessment of civil penalty also alleged a violation of 30 C.F.R. § 55.12-18. On this citation, the inspector stated: "There were several electrical disconnect switches that were not labeled to show what units they control, located in the Ore lab building." At the outset of the hearing, Petitioner announced that it would not have any evidence to offer on that matter. The proceeding in regard to that citation is accordingly dismissed.

The Federal Mine Safety and Health Review Commission, on August 4, 1980, issued its decision in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburgh & Midway Coal Mining Company (P&M). That case was remanded to the judge to allow Petitioner an additional opportunity to elect the parties against which it desired to proceed.

In view of the Commission's decision, an order was issued affording the Secretary of Labor an opportunity determine whether to continue to prosecute the citations against Lone Star, or the independent contractor which was claimed to have violated the standards cited, or both.

The Secretary complied with that order by filing a response stating that "since this matter has already been tried and submitted we choose to proceed against Lone Star only."

Proposed findings of fact and conclusions of law consistent with this decision are rejected.

In consideration of the findings of fact and conclusions of law contained in this decision, an assessment of $550 is appropriate under the criteria of section 110 of the Act.

ORDER

Respondent is ORDERED to pay Petitioner the sum of $550 within 30 days of the date of this order.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 501, 555 Griffin Square Building, Dallas, TX 75202 (Certified Mail)

Steve Wakefield, Esq., Donald W. Dowd, Esq., P.O. Box 35888, Dallas, TX 75235 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

NOV 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. UNION ROCK & MATERIALS CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-93-M A/O NO. 02-00711-05004 MINE: MESA PLANT AND PIT

Appearances:

Alan Raznick, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, Room 11071 Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102
for Petitioner,

Gary Houston, Esq., Union Rock & Materials Corporation, 1000 Kiewit Plaza, Omaha, Nebraska 68131
for Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding, the Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration (MSHA), charges that Union Rock and Materials Corporation violated safety regulations issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Pursuant to notice a hearing on the merits was held in Phoenix, Arizona on April 1, 1980.

The parties filed post trial briefs.

ISSUES

The issues are whether Union Rock violated the safety regulations.

CITATION 379463

This citation alleges a violation of 30 CFR 56.11-12.[1]

The facts are uncontroverted.

1. There was a three foot wide opening under a classifier along a walkway (Tr. 10, 28, R 1, R 2).

2. A person could fall through the opening into the screw type flow (Tr. 10).

3. The opening was at the right side of a travelway (Tr. 10-11).

Union Rock argues that it complied with the standard in providing a handrail and that it was not necessary to provide a midrail. Further, Union Rock contends this was sufficient protection in view of the infrequent use of the walkway.

Union Rock's arguments are rejected. There existed an unguarded opening beneath the railing and workers should have been further protected. A midrail should have been provided.

Mere infrequent use does not constitute a defense since such a defense concedes exposure of Union Rock's employees to the hazard.

The citation should be affirmed.

CITATION 379465

This citation alleges a violation of 30 C.F.R. 56.17-1. [2]

The facts are conflicting. I find the following facts to be credible.

1. There were five electric lights in Union Rock's fifty foot long tunnel (Tr. 32, 33, 40, R 3).

2. There was a broken light bulb close to the open end of the tunnel (Tr. 33, R 3, R 4).

3. The broken bulb did not affect the illumination in the tunnel area (Tr. 33).

1/ 56.11-12 Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

2/ 56.17 Illumination. Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

MSHA contends it presented sufficient evidence to sustain this citation. I agree. However, the test is whether MSHA's evidence is persuasive. I find that Union Rock's evidence is more credible.

The facts presented an underlying issue of whether the photographs were taken at the tunnel where the citation was issued. Union Rock's personnel should know its own tunnel. The photographs show four functioning lights in the tunnel (R 3, R 4). MSHA failed to prove there was insufficient illumination in the tunnel within the meaning of 30 CFR 56.17-1. Accordingly, this citation should be vacated.

CITATION 379468

This citation alleges a violation of 30 CFR 56.12-20.[3]

The evidence is essentially uncontroverted.

1. The rubber mat at the motor control electrical panel was holding water (Tr. 19).

2. The electrical equipment switches located at this point carried 480 volts (Tr. 20).

3. If the mat is dry the electrical current will not go to ground (Tr 21).

4. If the electrical equipment developed a short the wet rubber mat, with water around it, would serve as a conductor (Tr. 23, 24).

Union Rock asserts that it should prevail. It argues that the uncontroverted evidence shows that its witness examined the mat out of the presence of the inspector and he found the underneath portion to be dry. I disagree. The water lying on, and around the mat, is sufficient to establish the hazard contemplated by the regulation.

This citation should be affirmed.

PROPOSED CIVIL PENALTIES

Considering the statutory critera [4] I deem the proposed civil penalties for Citations 379463 and 379468 to be appropriate.

3/ 56.12-20. Mandatory. Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, noncurrent-carrying parts of the power switches to be operated may be used.

4/ 30 U.S.C. 820 (i).

WITHDRAWAL OF CONTEST AND MOTIONS TO VACATE

At trial Union Rock moved to withdraw its notice of contest and pay the proposed penalties for citations 379461, 379464, and 379469 (Tr. 5). The motion is granted.

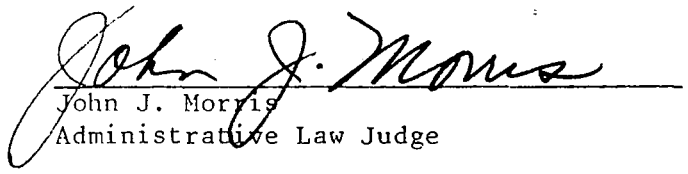
MSHA moved to vacate citation 379462 and 379467 (Tr. 7). The motions are granted.

Based on the foregoing findings of fact, conclusions of law, and motions I hereby enter the following

ORDER

1. Citations 379461, 379463, 379464, 379468, and 379469 and the proposed penalties therefor are affirmed.

2. Citations 379462, 379465, 379467 and all proposed penalties therefor are vacated.



John J. Morris
Administrative Law Judge

Distribution:

Alan Raznick, Esq., Office of Daniel W. Teehan, Regional Solicitor
United States Department of Labor
Room 11071 Federal Building, 450 Golden Gate Ave.
San Francisco, California 94102

Gary W. Houston, Esq., Union Rock and Materials Corporation
1000 Kiewit Plaza, Omaha, Nebraska 68131

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 14 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 80-68-M
Petitioner	:	A.C. No. 27-00233-05001
v.	:	
	:	Docket No. YORK 80-72-M
TACEY TRANSPORT CORPORATION,	:	A.C. No. 27-00233-05002
a.k.a. Tacey Trans. Corp.	:	
Respondent	:	Tacey Pit and Plant

DECISION

Appearances: Frederick E. Dashiell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Larry Trebino, Billerica, Massachusetts, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." A hearing on the merits was held in Manchaster, New Hampshire, on September 30, 1980, following which I issued a bench decision. That decision which appears below with only nonsubstantive corrections is affirmed as my final decision at this time.

> The general issue in these cases is whether the Tacey Transport Corporation (Tacey) has violated the provisions of the Mine Safety Act and its implementing regulations as charged in the citations before me and, if so, what are the appropriate civil penalties that should be assessed.
>
> In Docket No. YORK 80-72-M, there are two citations both charging violations of the standard at 30 C.F.R. § 56.14-1. That particular standard reads as follows:
>
> > Gears; sprockets; chains; drive, head, tail and take-up pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts, which may be contacted by persons and which may cause injury to persons, shall be guarded.

Citation No. 208691 charges that the Caterpillar Model No. 3304 S/N 2B-7016 Diesel Power Plant, V-belt drive pulley and flywheel were not adequately guarded on the work platform side. Citation No. 208692 charges that an adequate guard was not provided for the flat belt drive flywheel on the Telsmith crusher.

I find that the violations have been proven as charged. The testimony of the inspector in essential respects has not been contradicted and I find it to be credible. At his inspection on September 20, 1979, MSHA inspector Donald Fowler saw the flat belt drive flywheel operating without protection. The access ladder to the upper part of the plant passed within 1 foot of the flywheel. It was necessary to use this ladder to start and stop the plant. The flywheel itself was 4 feet in diameter and was constructed with spokes. A person slipping on the ladder could receive serious injuries if his leg or arm passed into the flywheel spokes. There was also danger to employees working on the platform within 6 inches of the flywheel. At least half of the diameter of the flywheel was exposed at this point.

The issue of negligence is not at all clear. While the inspector thought that the condition should have been known to the operator because it was in "plain view" the testimony of Mr. Trebino; President of Tacey, indicates that the equipment was already partially guarded. While I do not agree that those guards were sufficient I find that the operator could have reasonably believed that his guarding was in compliance. I also note that this was the first MSHA inspection of this operator. I have been apprised that MSHA will now, under todays practice, provide a one-time first inspection to point out potential hazards and violations to the operator without citing or penalizing those conditions. This operator was not afforded that opportunity and I have therefore considered this in determining the amount of penalty.

With respect to the violation alleged in Citation No. 208691, again, in essential respects the inspector's testimony is uncontradicted. He found that the drive pulley (the multi V-belt pulley from which power is transmitted to the plant) was exposed to people traveling across the work access platform. The drive pulley pinch points were approximately 2 feet away from and 18 inches above the platform. I find that an employee could slip into the pinch points, particularly when stepping over the transmission area to gain access to the transmission lever. At this point the lever is only 14 inches from the pinch point possibly placing the employee only 6 to 8 inches away. The

danger is, of course, that an arm or foot could slip into that pinchpoint thereby causing loss or crushing of a limb. The inspector thought the operator should have seen the hazard. However for the reasons stated with respect to the previous violation, I also find reduced negligence here.

Citation No. 208696 in Docket No. YORK 80-68-M charges that the 966-C Caterpillar S/N 766J4201 front-end loader was operating on ramps and elevated haulage roads without adequate brakes. Inspection revealed that the left rear brake "can" had been removed and the brake lines blocked off with a plug. The machine operator admitted that it had been in this condition for approximately 2 weeks.

The cited standard, 30 C.F.R. § 56.9-3, requires that powered mobile equipment be provided with adequate brakes. The violation is indeed conceded by the operator. The cited condition presented essentially three possibilities for serious or even fatal injuries. The front-end loader could lose control and turn over, could run into a truck, or could run into pedestrians walking near the trucks being loaded.

There is no question but that there was a high degree of negligence here. It took an affirmative act on the part of the operator, or someone acting on his behalf, to insert the plug in the brake line. Clearly, also, there was gross negligence on the part of Mr. Vailloncourt, the foreman, who admitted he had the replacement brake "can" in his pick-up truck for some 2 to 3 weeks. He nevertheless did not bother to make the repairs and continued to operate the machine knowing of its serious defect. Vailloncourt's negligent acts as foreman are chargeable to the operator.

It is conceded by the Government that the cited guarding conditions were corrected within the time set for abatement. I therefore consider that the operator demonstrated good faith in those two cases in attempting to achieve rapid compliance after notification of the violation. With respect to the brake condition, a great deal of testimony was produced from the Government regarding an exchange between Trebino and Vailloncourt and between Trebino and the inspector regarding Trebino's ostensible reluctance to have the equipment removed from service. Once the equipment was subject to a withdrawal order and after Inspector Fowler explained the effect of the withdrawal order, however, I believe that Mr. Trebino did in fact exercise appropriate good faith abatement in that the equipment was withdrawn from service and was repaired.

There is no evidence that any penalties I would assess in these cases would affect the operator's ability to continue in business. Although Mr. Trebino claims that he is essentially

out of this mining business he nevertheless concedes that Tacey is a viable concern and that it has some material in stockpile in the area of the cited plant. He concedes that given the opportunity for a sale it would be removed. He has submitted no evidence of what financial impact any penalties in these cases might have upon the ability of Tacey to continue in business. The size of the business is concededly small and I assume that it has not increased in size since the facts that we have available were obtained. Since this plant had not been inspected before, there is of course no history of violations.

Considering all of these factors, I feel that the following penalties are appropriate. Going first of all to the citations in Docket No. YORK 80-72-M, I feel that a reduction from the penalty as originally assessed in this case would be appropriate in light of the findings that I have made regarding reduced negligence. Therefore, I would assess a penalty of $20 as to Citation No. 208691, and $20 as to Citation No. 208692. In Docket No. YORK 80-68-M I found the one violation cited to be a major hazard and involved gross negligence, I find that a penalty of $200 is appropriate.

ORDER

Wherefore the operator is ORDERED to pay a penalty of $245 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Frederick E. Dashiell, Office of the Solicitor, U.S. Department of Labor, JFK Federal Building, Boston, MA 02203 (Certified Mail)

Larry Trebino, President, Tacey Transport Corporation, 5 Riverhurst Road, Billerica, MA 01821 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. YORK 80-66-M
Petitioner	:	A.C. No. 27-00222-05001
v.	:	
	:	Fillmore Pit and Plant
FILLMORE INDUSTRIES, INC.,	:	
Respondent	:	

DECISION

Appearances: Frederick E. Dashiell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Arthur C. Fillmore, Concord, New Hampshire, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." At hearing on August 12, 1980, in Manchester, New Hampshire, Petitioner submitted a proposal for settlement requesting approval of a 50-percent penalty reduction. I approved the settlement proposal at hearing and I reaffirm that decision at this time.

This case involves four citations (Nos. 216614, 216615, 216616, and 216617) each alleging one violation of 30 C.F.R. § 56.14-1 (requiring the guarding of exposed moving machine parts), and each initially assessed at $40. Petitioner proposes a $20 reduction in penalty for each citation because of the operator's confusion over the implementation of the standard. Respondent erroneously believed that guards were not needed if it had skirtboards located along the edge of the beltline. Respondent also purchased the equipment with the understanding from its manufacturer that it was in compliance with safety standards.

I accept Petitioner's representations. Considering the documentary evidence submitted in light of the criteria set forth in section 110(i) of the Act I conclude the settlement is appropriate.

WHEREFORE, I ORDER Respondent to pay the agreed penalty of $80 within 30 days of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Frederick E. Dashiell, Esq., Office of the Solicitor, U.S. Department of Labor, JFK Federal Building, Room 1803, Boston, MA 02203 (Certified Mail)

Arthur C. Fillmore, President, Fillmore Industries, Inc., RFD Rte. #8, Concord, NH 03301 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

NOV 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-121
	:	A.O. No. 44-05124-03009V
v.	:	Laurel Mine No. 2
TAZCO, INC., Respondent	:	

DECISION AND ORDER

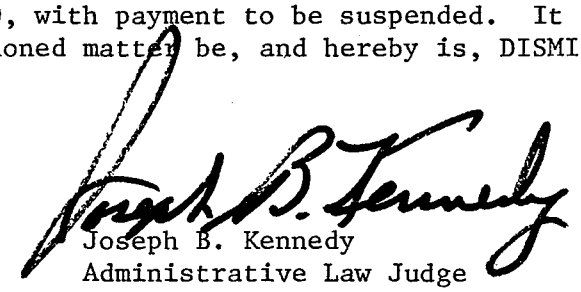
The parties move for approval of a settlement of a serious roof control violation at a 20% reduction in the amount initially assessed, $500.

Based upon an independent evaluation and de novo review of the circumstances and the amount of the penalty warranted, I conclude the reduction fails to give sufficient weight to the exemplary action the operator took to deter future violations and insure voluntary compliance. In the thousands of violations that have come before me for adjudication, this is the first in which an operator, and a small nonunion operator at that, undertook to impose the most severe of disciplinary sanctions for a miner's grossly negligent refusal to comply with a mandatory safety standard, namely summary discharge for cause. If more operators could be persuaded to follow this course of action, there would be far fewer deaths and disabling injuries in the mines. I wish to commend this operator and once again endorse the following recommendation of the President's Commission on Coal:

> That shared responsibility by management and labor for improving the safety of underground mining include acceptance of the principle that coal companies not prepared to operate safe mines and miners not prepared to observe safe mining practices have no place in the industry.

See also, Secretary v. Davis Coal Company, WEVA 80-589, et al., Order Denying Settlement, dated November 12, 1980, copy attached.

Accordingly, it is ORDERED that for the violation found the operator pay a penalty of $400, with payment to be suspended. It is FURTHER ORDERED that the captioned matter be, and hereby is, DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

David Street, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Paul Merritt, Tazco, Inc., P.O. Box 367, Doran, VA 24612 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

NOV 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-540 A.O. No. 46-03491-03005
v.	:	No. 1 Surface
GOODE CONTRACTORS, Respondent	:	

DECISION AND ORDER

For the reasons set forth in the order to show cause and the Secretary's response, including counsel's oral withdrawal of her caveat to the suspension, it is ORDERED that the operator pay a penalty of $1.00, and that payment be suspended, for the violation found. It is FURTHER ORDERED that the captioned matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Gerald Goode, P.O. Box 117, Cagin Creek, WV 25935 (Certified Mail)

Barbara Kaufmann, U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
Phone (703) 756-6236

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VINC 75-180-P
Petitioner	:	A/O No. 2607-89
v.	:	Docket No. VINC 75-181-P
	:	A/O No. 2607-93
OLD BEN COAL COMPANY,	:	No. 21 Mine
Respondent	:	
	:	Docket No. VINC 75-183-P
	:	A/O No. 2604-95
	:	No. 24 Mine
	:	
	:	Docket No. VINC 75-185-P
	:	A/O No. 2617-85
	:	Docket No. VINC 75-186-P
	:	A/O No. 2617-87
	:	No. 26 Mine

DECISION

On June 10, 1976, I issued a decision in the above cases which disposed of 47 allegations of violations of the health and safety standards. 1/ A total penalty of $5,925 was assessed for those violations I found to have occurred.

On October 24, 1980, the Federal Mine Safety and Health Review Commission issued a decision in which it set aside my ruling as to six of the notices of violation that I had vacated. I will assume therefore that my prior decision still stands except for the six notices of violation mentioned in the Commission's decision. It is noted that, according to a document filed with the Commission on April 15, 1980, by Old Ben Coal Company, the penalties which I assessed were paid by Old Ben as of June 30, 1976.

The Commission did not identify the notices by initials and dates but inasmuch as I vacated only two notices of violation involving 30 C.F.R. § 75.400, the notices remanded to me by the Commission must have been 3 MK dated January 15, 1974, and 2 MK dated February 28, 1974.

1/ Fourteen of these alleged violations were in Docket No. VINC 75-184-P which was not appealed.

Also, inasmuch as I vacated four notices involving 30 C.F.R. § 75.403, the Commission must have remanded to me Notices of Violation 1 MK dated February 25, 1974, 1 DLG dated November 26, 1973, 1 NEN dated December 19, 1973, and 1 NEN dated January 10, 1974. This is also confirmed by the Secretary's appeal brief. Old Ben did not file a brief.

Notices of Violation 3 MK dated January 15, 1974, and 2 MK dated February 28, 1974, both involve accumulations of combustible material on a piece of mining equipment. 2/ While I find only a moderate degree of hazard in the absence of testimony regarding the dimensions of the accumulations, Respondent was nonetheless negligent in allowing the accumulations to exist. All of the other required criteria were considered in the original opinion. As I read the Commission's decision I have no choice but to find that the violations did occur and I accordingly assess a penalty of $100 for each of these notices.

As to the other four notices of violation involved, I vacated the notices because the band sample method was used to collect the material, which was analyzed and found to have less than the required percentage of non-combustible material. The Commission has approved the band sample method so the violations were accordingly established. I find a low order of negligence but the existence of hazardous conditions with respect to each notice of violation. A penalty of $100 for each notice is assessed.

2/ In my original opinion, for some reason that I cannot recall, I cited K & L Coal Company 6 IBMA 130 (1976) as the basis of my decision vacating the two citations when North American Coal Corp. 3 IBMA 93 (1974) would have been a more appropriate citation. The Commission recognized that I had relied on and followed North American but nevertheless stated that I erred in doing so. Most of the judges with whom I have discussed the effect of the Interior Board's decisions consider that under Section 301 of the transfer provisions of the amending act, the Commission Judges are bound to follow Board decisions until they are reversed by the Commission. Under this view it would be error for a judge to refuse to follow a Board decision that he disagreed with. But if it is error to follow a Borad decision which the Commission later disagrees with then it would not be error for a Commission Judge to ignore a Board decision if the Commission later determined that the Board was wrong. The precedential value of a Board decision would thus depend on whether the judge thinks the Commission will agree with the Board decision. That amounts to Board decisions having little or no precedential value, and I question whether that was the Commission's intent.

ORDER

IT IS THEREFORE ORDERED that Respondent pay to MSHA, within 30 days, a civil penalty in the total amount of $600.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Edmund J. Moriarty, Esq., Old Ben Coal Company, 125 South Wacker Drive, Chicago, IL 60606 (Certified Mail)

Thomas A. Mascolino, Esq., Cynthia L. Attwood, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

NOV 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 80-137 A.O. No. 44-05144-03016V
v.	:	Mine No. 1
RED ASH SMOKELESS COAL CORP., Respondent	:	

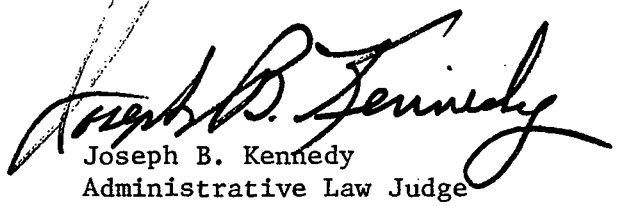
DECISION AND ORDER

These two serious roof control violations were initially assessed at $2,500. The parties propose a settlement in the amount of $2,000. Based on an independent evaluation and de novo review of the circumstances, I find the amount of the settlement proposed is, insofar as the corporate operator is concerned, in accord with the purposes and policy of the Act. I wish to record once more my vigorous disagreement with the abuse of prosecutorial discretion involved in MSHA's failure and refusal to initiate penalty proceedings against the individuals responsible for these violations. Section 2(g) of the Mine Safety Law, 30 U.S.C. § 801(g)(2), specifically provides that it is the purpose of the law "to require that . . . every miner" employed in a mine "comply with [the mandatory safety] standards."

It is my firm belief that the grant of immunity conferred on the workforce by MSHA is a violation of this provision and encourages disrespect for the law. I note that the carnage in the mines has sharply increased and that in one recent thirty day period 22 miners were killed, or almost one for every working day. Mr. Lagather is quoted as saying he doesn't "have any concrete reason to point to". I suggest he does, and that lax enforcement against miners who commit safety violations is a very "concrete" reason.

If I thought it would change the administration's policy I would approve this settlement but suspend payment of the penalty unless and until appropriate action is taken against the individuals who bear culpable responsibility for the violations in question. I recognize, however, that we are in a period of transition and that until that is resolved little change in this misguided policy can be hoped for.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $2,000, on or before Monday, December 1, 1980, and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

David E. Street, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Terry L. Jordan, Esq., Jordan & Farmer, P.O. Box 747, Grundy, VA 24614 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. BARB 79-69-P : A.O. No. 40-01995-03001
v.		: Westel Tipple
HI TENN, INC.,	Respondent	:

DECISION

Appearances: Michael Bolden, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The proposals were filed on October 28, 1978, and subsequently on June 4, 1979, Chief Judge Broderick issued an order directing the respondent to show cause why it should not be deemed in default because of its failure to answer the proposals.

By letter dated June 12, 1979, and filed June 18, 1979, respondent filed an answer to the show-cause order explaining the circumstances concerning one of the citations (No. 141646), and stating that it does not contest the second citation (No. 141647), and has made payment to MSHA in the amount of $72 for this citation, the $72 being the initial assessment made and proposed by the petitioner in its pleadings.

By notice of hearing issued by me on August 25, 1980, and amended on September 19, 1980, the parties were notified that the matter was scheduled for hearing in Chattanooga, Tennessee, on October 1, 1980. Petitioner appeared at the hearing but the respondent did not. Under the circumstances,

the hearing proceeded without the respondent and petitioner presented testimony and evidence in support of the citations and its proposal for assessment of civil penalties. A bench decision was rendered, and is herein reduced to writing pursuant to 29 C.F.R. § 2700.65(a).

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

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

Applicable Statutory and Regulatory Provisions

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

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

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

Discussion

I consider respondent's failure to appear at the hearing to be a waiver of any further rights to be heard. The record reflects that respondent received the two notices of hearing issued by me in this proceeding. Under these circumstances, I find that respondent has been given more than an adequate opportunity to be heard, and I conclude that respondent has waived its right to any further hearing and that the issuance of any show-cause order would be a fruitless gesture. I have considered this case de novo and my decision in this regard is made on the basis of the evidence and testimony of record as presented by the petitioner in support of its case at the hearing.

At the hearing, petitioner's counsel was unable to verify respondent's claim that it had paid the initial assessment of $72 for Citation No. 141647. In addition, counsel failed to bring with him to the hearing any evidence concerning respondent's prior history of violations. Under the circumstances, the record was left open, and petitioner was afforded an opportunity to file

this information with me at a later date. Subsequently, by letter received October 22, 1980, petitoner filed a copy of an MSHA computer printout reflecting respondent's prior history of paid citations. In addition, petitioner confirmed that the respondent had in fact paid a civil penalty in the amount of $72 for Citation No. 0141647, and that a check in that amount had been received by MSHA's Office of Assessments on June 20, 1979, some 8 months after petitioner's proposals for assessment of civil penalties were filed with the Commission, and some 2 months prior to the initial notice of hearing was served on the parties.

Since the payment of the initial assessment of $72 came after the docketing of this case by the Commission, that payment, if in fact accepted by MSHA as payment for Citation No. 0141647, is in effect an offer of settlement for payment of the full assessment made by MSHA. Since petitioner was oblivious to the fact that payment had been made, even though it had apparently been accepted by MSHA, testimony and evidence was taken at the hearing with respect to the facts and circumstances surrounding the violation and I assessed a civil penalty of $100 for the violation. However, in fairness to the respondent, since the payment of $72 was obviously made in good faith, I will treat it as an offer of settlement and will affirm and adopt this amount as payment for the citation in question, and my tentative decision made at the hearing assessing a $100 civil penalty for this citation is rescinded.

Findings and Conclusions

Fact of Violation

Citation No. 141646, April 5, 1978, 30 C.F.R. § 77.400(b), states that "The tail pulley and V-belt located on the portable crusher was not provided with a guard while crushing coal at this installation."

MSHA inspector Lee Aslinger confirmed that he issued the citation in question during the course of a regular inspection conducted at respondent's tipple on April 5, 1978. The tail pulley in question was not provided with a guard and if the pulley belt were to break or snap, it would cause a whipping action and possibly cause injury to persons below the pulley location (Tr. 9-12). The crusher was in operation at the time he observed the condition (Tr. 18), and the pulley was located some 8 to 10 feet above the ground (Tr. 19). The belt was approximately 6 to 8 feet long, and the crusher operator would possibly be in the area of the unguarded pulley to oil, adjust, or perform maintenance on the belt (Tr. 25).

I conclude and find that petitioner has established a violation of section 77.400(b) as charged in Citation No. 141646, and it is AFFIRMED (Tr. 39).

Gravity

I find that the violation is nonserious. The inspector candidly admitted that the lack of a guard was not hazardous unless someone was directly in the

immediate vicinity of the V-belt (Tr. 17). He also stated that the area beneath the pulley was not an area where employees would travel in the normal course of their duties (Tr. 23), and he conceded that the probability of anyone being struck by a broken belt was remote (Tr. 24-25).

Negligence

I find that the respondent failed to exercise reasonable care to prevent the condition cited by the inspector which resulted in the issuance of the citation in question and that such a failure on respondent's part constitutes ordinary negligence. Inspector Aslinger testified that he had previously advised the respondent about the guarding requirements for the pulley V-belt (Tr. 13-16).

Good Faith Compliance

The citation was abated by removing the crusher from mine property (Tr. 16-17), and I find that respondent exercised normal good faith compliance in this regard (Tr. 42).

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

Petitioner's evidence reflects that respondent's mine production was 100 tons of coal daily on one production shift and that respondent employed from two to four employees at its tipple (Tr. 34-35, Exh. P-1). Petitioner conceded that respondent's tipple operation was small in size (Tr. 35), and I adopt this as my finding in this case.

Since the respondent did not appear at the hearing, there is no information that the civil penalty assessed by me in this case will adversely affect the respondent's ability to continue in business, and I conclude that it will not.

History of Prior Violations

Respondent's prior history of violations as reflected in the computer printout submitted by the petitioner reflects that for the period April 5, 1976, through April 5, 1978, respondent paid $229 for six assessed violations. I cannot conclude that this record is a bad one, nor can I conclude that respondent's history of prior violations warrants any increase in the civil penalty assessed for the violation which has been affirmed in this case.

Penalty Assessment

Petitioner's counsel asserted that the proposed civil penalty advanced in this case accurately reflects and takes into account an evaluation of all of the statutory criteria found in section 110(i) of the Act, and that it is petitioner's position that as a minimum, the proposed assessment of $210 should be affirmed (Tr. 43).

I conclude that the proposed civil penalty of $210 is reasonable for Citation No. 141646, April 5, 1978, 30 C.F.R. § 77.400(b), and I adopt it as my civil penalty assessment in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $210 for the citation which has been affirmed in this case, payment to be made within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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

Donovan F. Lueking, President, Hi Tenn, Inc., Route 6, Box 24, Harriman, TN 37748 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. LAKE 79-217-M
v.	:	A.O. No. 33-00099-05006
	:	
	:	Docket No. VINC 79-100-PM
THE STANDARD SLAG COMPANY,	:	A.O. No. 33-000099-05003
Respondent	:	
	:	Marblehead Stone Plant & Quarry

DECISIONS

Appearances: Linda Leasure, Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the petitioner;
William Ramage and Stephen Hedlund, Esqs., Youngstown, Ohio, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with six alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

Respondent filed timely answers contesting the civil penalty proposals and requested a hearing. A hearing was convened on July 10, 1980, in Marblehead, Ohio, and, at the request of the parties, the hearing was conducted at the mine site in order to facilitate a visit to the areas where the alleged violations occurred for the purpose of visually familiarizing me and the parties with the conveyor belt which was cited for unguarded pulley areas and the gallery where the access citation was issued. The parties filed posthearing briefs, and the arguments presented have been considered by me in the course of these decisions.

Issues

The principal issues presented in these proceedings are: (1) whether respondent has violated the provisions of the Act and implementing regulations

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

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

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties agreed to the following (Tr. 2-4):

1. Respondent's mining operations constitute a "mine" within the meaning of the Act and respondent is subject to MSHA's enforcement jurisdiction.

2. Respondent has a good history of prior violations.

3. The scope of respondent's mining operations at the mine in question constitute a medium-to-large mining operation.

4. Respondent demonstrated good faith compliance in abating the citations which were issued in these proceedings.

Discussion

Docket No. VINC 79-100-PM

Citation Nos. 368786 and 368787, both issued by MSHA inspector Michael J. Pappas on August 2, 1978, cite violations of 30 C.F.R. § 56.14-1, and the conditions described assert that guards were not provided on the head and tail pulley of the No. 18 conveyor belt.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Michael J. Pappas, testified that he conducted a spot inspection of the mine site on August 2, 1978, and upon observation and determination that the head and tail pulley of the No. 18 conveyor belt were not guarded he issued the two citations in question and cited a violation of the guarding requirements of mandatory standard 56.14-1. The head pulley pinch point was at the top of the pulley drum and the tail pulley pinch point was at the bottom of that pulley. The hazards involved at both locations involved persons becoming entangled by getting their clothing or hands and arms caught in the pinch points. The belt was not in operation at the time the cited conditions were observed and it was the inspector's understanding that electrical maintenance work was being performed on the belt, but he could not remember observing anyone around the belt areas in question (Tr. 5-8).

On cross-examination, Mr. Pappas confirmed that the belt was a new piece of equipment and that it was not in operation at the time the citations issued. However, he was made aware of the fact that the belt had been previously used and was in operation, but he could not recall to what extent it had been used to transport stone, and he confirmed that electrical maintenance work was being performed on the belt (Tr. 9-10).

In response to bench questions, Mr. Pappas stated that it was his understanding that the belt was not in full production because the electrical installation had not been completed. However, he stated that it is his practice to cite an operator for guarding violations if he does not observe any actual or obvious maintenance being performed. If he observes a guard off a piece of equipment which is down for maintenance he will not issue a citation. In this particular case, he observed no guarding devices at all (Tr. 10-12).

Respondent's Testimony and Evidence

Plant superintendent Joseph Lucas testified that the cited conveyor belt was installed in approximately March of 1978 and it was used to transport and load a particular type of stone being stored in the area. After the initial installation of the belt, work had been performed on it, and according to company records, it was first operated on July 27, 1978. However, electrical problems were encountered after an hour or so of using the belt. The belt was operated so as to check out its tracking during the actual loading process and to ascertain whether any adjustments were required. No guards were installed on the belt during this initial operational period because the system had to be checked out to determine whether it was functioning properly before any guards were manufactured and installed, and no one was around the pulley areas. Electrical problems were encountered as soon as the belt began to run, and according to company maintenance records, repairs were begun on July 27th, and subsequent maintenance work was performed on August 2, 4, 5, and 7 on the belt centrifugal switches. During this maintenance work, the power would be shut off, the belt locked out, and another belt was used to transport the stone materials (Tr. 22-30; Exhs. R-1 through R-3(a)). The guards were installed on August 5th (Tr. 37).

On cross-examination, Mr. Lucas reviewed his maintenance records and testified as to certain maintenance which had been performed on the belt in question as reflected by those records during the periods July 27 through August 2, 1979, during which time the belt would have run empty and with no materials on it (Tr. 30-35). Aside from testing the belt while materials are on it, when actual electrical maintenance is performed on the belt it is locked out and not running (Tr. 38).

General superintendent Thomas Neopolitan testified that at the time the custom belt specifications were submitted for the fabrication of the conveyor itself, guards were not included because the conveyor had to be installed first in order to determine the types of guards required. He fully intended to install the guards, and he agreed that failure to guard such equipment would expose someone to danger. He confirmed that the conveyor in question was initially fabricated and installed in July 1978, and final installation took place in August. He also confirmed that other similar conveyors used at the mine were guarded (Tr. 38-42).

Docket No. LAKE 79-217-M

By motion filed June 26, 1980, petitioner moved to dismiss three citations on the ground that they were vacated by MSHA. The motions were granted at the hearing and the citations were dismissed (Tr. 2). The citations in question are as follows:

Citation No.	Date	30 C.F.R. Section
368909	3/21/79	56.11-2
368910	3/21/79	56.14-1
368911	3/21/79	56.14-1

Citation No. 368912, issued on March 21, 1979, by MSHA inspector Michael Pappas, charges a violation of 30 C.F.R. § 56.11-1, and the condition or practice described by the inspector on the face of the citation states: "A safe means of access was not provided to the 4-A galleys [sic]. Buildup of material on walkway of approx. 8'-12', 20"-24"."

Testimony and Evidence Adduced by the Petitioner

Inspector Pappas confirmed that he inspected the mine site on March 21, 1979, and observed the conditions of the 4-A gallery. Access to the gallery is by means of an elevated walkway, and access to the catwalk area where the violation occurred was by means of a ladder leading down to the catwalk and work platform. He cited a violation of section 56.11-1 after finding an excessive buildup of materials on the catwalk leading to the work platform under the takeup belt pulley area of the gallery belt. The extent of the material buildup was some 6 to 7 feet to a height of 2 feet. The elevation of the work platform was approximately 90 feet off the ground and the hazard involved was that someone would have to walk over the buildup on the catwalk in order to reach the work platform. Abatement was achieved by cleaning the catwalk (Tr. 13-16).

On cross-examination, Mr. Pappas confirmed that the gallery area cited was the catwalk area reached by means of a ladder located at the top of the gallery. He believed the area should have been cleaned up by shoveling the material off the catwalk, and unless the material is cleaned periodically, the metal catwalk would in time be subjected to rust, rot, and corrosion. His principal concern, however, was the fact that a person walking on the catwalk would have to crawl over the buildup of materials, and he believed that such an area should be cleaned before anyone goes over it (Tr. 16-17).

In response to further questions, Mr. Pappas described the materials which were built up on the catwalk as fine stone particles which fall from the self-cleaning belt pulley located above the catwalk, and due to the dampness of the materials, it adheres together in a lumpy mass similar to mud. He did not know how long the materials had been on the catwalk and he made no inquiry of the respondent in this regard. He was not sure whether the belt had been running on the day in question and he observed no one in the gallery area, and no one was working in or around the area cited. Plant Superintendent Lucas was with him at the time and the conditions cited were discussed with him but he could not recall the specifics of that conversation. Mr. Pappas could not state how frequently any employee is required or likely to be in the cited area in the normal course of his duties and he checked no plant maintenance records to ascertain the frequency of any maintenance work being performed in the cited area. He reiterated that his concern was over the fact that someone walking over the catwalk to reach the work platform would have difficulty climbing over the buildup and would likely fall off the catwalk to the ground below (Tr. 17-21).

Respondent's Testimony and Evidence

Plant Superintendent Lucas described the operation and function of the gallery and indicated that it is part of a belt-conveyor system used to transport and store washed stone at the stockpiles beneath the gallery. He identified Exhibits R-4 and R-5 as photographs showing the access way to the gallery. A person would be required to go the top of the gallery area in order to grease rollers, and a person would have occasion to walk the top area once or twice a week to see that the system is working properly. Access to the work platform area cited by Mr. Pappas is by means of a ladder, and he could not remember the last time someone was in that area. The only reason one would have for being in the cited area would be to change out the conveyor boot pulley or in the event of a major breakdown, people would have to go there. The boot pulley has been changed out within the last year or two, but lubrication can be performed from the top and greasing is performed when the conveyor is shut off and locked out. He identified Exhibit R-6 as a photograph of the inside of the gallery, and he confirmed the fact that materials do build up on the work platform and they result from fine wet materials falling off the end of the belt after the bulk of it has been dumped to the storage piles below the gallery.

Mr. Lucas indicated that the belt usually runs 24 hours a day during its regular operation, and he estimated it would take less than a week for any

accumulation or material buildup of the size described by the inspector. However, he also indicated that under standard plant procedures, material buildups are cleaned off before anyone goes to the platform area. He identified photographs of the ladderway, work platform, and material buildup (Exhs. R-7 through R-10). He indicated that materials continually build up at a fast rate and a person cannot be stationed there while the conveyor is running. The conveyor should be shut down when materials are being cleaned up, and it is in fact locked out when maintenance is being performed, and except for someone going up to the gallery to check on the materials tripper, no one is there while the conveyor is running (Tr. 42-50).

On cross-examination, Mr. Lucas stated that the wash plant operator would have occasion to walk through the area for the purpose of visually observing the belt rollers and tripping device, but he would have no reason to climb down the ladder to the work platform area in question since everything can be observed from above that location. However, if one had reason to go to the work platform area under the belt pulley he would have to use the ladder to get there. Mr. Lucas confirmed that he understood the fact that the inspector was citing the work platform area where the materials were built up (Tr. 50-52).

In response to bench questions, Mr. Lucas stated that the work platform was apparently installed to facilitate access to the conveyor belt tripper from underneath the belt, but that the tripper is usually changed out from the other end of the belt. Although he indicated that the belt could function without the work platform, he also admitted that it might have to be used. In the event the platform is used, the belt is shut down and someone will clean the platform area in advance of anyone going there and this would be the responsibility of the maintenance foreman on each shift. However, any work required to be performed in that area usually entails major problems taking more than 8 hours to correct and no one has any reason to perform any maintenance work there which might take 5 or 10 minutes. The person who walks the area to observe the belt in operation has no reason to routinely climb down the ladder and walk around the work platform, and in the 4 years that he has been superintendent he has never had any occasion to walk into that area, but he could not confirm that anyone else has been there in this time period (Tr. 53-56).

Findings and Conclusions

Docket No. VINC 79-100-PM

Fact of Violations--Citation Nos. 368786 and 368787

In this case, respondent is charged with violations of section 56.14-1 for failure to have guards at the head and tail pulley of one of its conveyor belts. Section 56.14-1 provides as follows: "Mandatory. 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."

Mandatory safety standard section 56.14-6, provides that "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

Petitioner argues that section 56.14-1 mandates guarding on various machine moving parts, including head and tail conveyor pulleys, to preclude contact with the pinch points, and that the facts establish that prior to the inspection, the respondent operated the conveyor without the guards in place. Even assuming that the "testing or repairs" exceptions set forth is in section 56.14-6, are applicable here, petitioner asserts that the exception refers to curing specific mechanical malfunctions rather than to the testing phase of plant setup. In support of this argument, petitioner maintains that any electrical repairs performed by the respondent in this case were at locations removed from the unguarded pulley areas and that such testing for electrical problems would not have necessitated removal of the guards. In short, petitioner takes the position that the exception found in section 56.14-6, simply does not apply to the facts presented in the instant proceeding.

In support of its position, petitioner cites a decision by Judge Fauver in MSHA v. Union Rock and Materials Corporation, Docket No. DENV 78-579-PM, March 5, 1980, where he affirmed a violation of section 56.14-6, after concluding that the phrase "except when testing machinery" is limited to the testing or repairing of the equipment's mechanical parts due to a malfunction rather than to the testing phase designed to align the conveyor belts and to check their rotation. Judge Fauver found that "testing machinery" is not synonomous with a "testing phase" because the first situation involves curing a mechanical malfunction while the second involves assuring the smooth running of the complete operation. He observed that in the latter instance, which could last as long as 6 to 7 days, the moving parts of the conveyor would be in operation creating a hazard which the safety standard is designed to prevent, but that when a piece of equipment is malfunctioning, the guards would have to be removed only for short periods of time while making the repairs.

Respondent's defense to the citation centers on its assertion that at the time Inspector Pappas inspected the newly installed conveyor, it was not in operation but had been shut down, with the power locked out, for maintenance, and that it was impossible for anyone to have been injured by the unguarded pulleys. Further, respondent asserts that the only time the conveyor had been run prior to the inspection of August 2, was for the purpose of testing it. Since section 56.14-6, provides an exception to and limitation of the guarding requirements of section 56.14-1, respondent concludes that during the testing of equipment, whether newly installed or after maintenance, it would not be practicable or necessary to have guards in place on the pulleys. In support of its interpretation, respondent points out that in Docket No. LAKE 79-217-M, two of the three citations vacated and dismissed at the hearing on motion by the petitioner also concerned alleged violations of section 56.14-1, cited by Inspector Pappas March 21, 1979, for failure to provide guards for the A-20 stacker conveyor drive motor belts and tail pulley, and that the petitioner moved to dismiss them after it was

pointed out that the stacker was out of service because maintenance was being performed at the time of the inspection.

Petitioner's written motion of June 26, 1980, for the dismissal of the two March 21, 1979, citations for violations of section 56.14-1, simply states that they were vacated by MSHA, and no further information was presented by the parties during the hearing with respect to the facts and circumstances surrounding MSHA's vacation of those citations. However, in its answer and notice of contest filed September 14, 1979, respondent states that at the time the equipment was cited it was in scheduled maintenance, that work had commenced on March 13, 1979, and was completed on April 2, 1979, 9 working days after the inspection of March 21, 1979, and that the inspector was informed at that time by the mine superintendent that the stacker was being worked on and was not ready for production. In support of its contentions in this regard, respondent included copies of its daily maintenance time records which reflected the hours that were worked on the stacker, and aside from the general remarks on most of the time sheets, four of the records of March 26, 29, and April 2, 1979, specifically show work performed on the guards and belt. Under these circumstances, respondent's assertion that the circumstances surrounding petitioner's vacation of the two section 56.14-1 citations of March 21, 1979, present identical situations requiring consistent application of the standard has merit and there is a strong inference that petitioner's rationale for vacating the citations and moving for dismissal of the charges was based on its acceptance of respondent's contentions in this regard.

Inspector Pappas had no independent knowledge as to how long the belt in question had been operated in an unguarded condition. At the time the citation issued, he was told that the belt had not been fully operational and in production because the electrical installation taking place nearby the belt had not been completed, and he indicated that the area where the electrical maintenance was taking place was separate and apart from the physical location of the cited unguarded belt pulleys (Tr. 10). He was aware of the fact that the belt had been previously in operation for the purpose of loading and transporting stone to a boat (Tr. 9). When asked whether he observed the belt being worked on when he cited it, he answered "There was electrical work being done on the electrical system" (Tr. 9). However, with respect to his being advised that the belt had been used sometime in the past to some degree, he did not know whether the use of the belt in this regard was for testing or production (Tr. 10).

In explaining his interperation and application of section 56.14-1, Mr. Pappas stated that he recently observed actual maintenance taking place in a similar situation as the one presentd in this case and the guards were off the equipment. He did not issue a violation because he actually observed the men performing the work. He also indicated that he would not issue a citation in such a situation if he is advised that maintenance is in progress but that the men are simply taking a lunch break. In short, if he does not actually observe the maintenance taking place, and has no personal knowledge of this fact, he will issue a citation for unguarded pulleys. In the instant

case, no guards were in place or near the equipment and he saw no evidence of any maintenance being performed (Tr. 12). He was aware of the fact that the equipment was new, that it was not in operation at the time he cited it, and that he observed no one in the area of the unguarded pulley pinch points.

Respondent's testimony and evidence clearly indicates that the installation of a workable conveyor system to accommodate the specific needs and requirements of the oeprator in the conduct of his daily mining operations is no easy task. Respondent has established through credible testimony of its plant superintendents that the guards ultimately installed on its conveyors once they become fully operational as an integral part of its production process are fabricated and manufactured in accordance with specifications drafted by respondent's engineering department after analysis of the types of materials which have to be moved. Since the respondent's mining operation involves the movement of different types of materials over great distances to the boat-loading dock, each part of the conveyor system must necessarily be tailored to its specific needs and requirements.

Superintendent Neopolitan's testimony reflects that the conveyor belt in question is a customized conveyor installation made up of stock parts such as head pulley gear reducers and motors, and head pulleys and guards which have to be shop-fabricated and machined. Once the belt system is put together, the guards cannot be fabricated and installed until such time as the operator is satisfied that the system will work under normal production conditions (Tr. 38-41). I find this practice and procedure to be a reasonable and common sense approach, and Mr. Neopolitan himself candidly agreed that aside from testing, failure to guard the conveyor parts in question, in the normal course of business, would expose someone to a danger (Tr. 40). Mr. Neopolitan also testified that similar conveyor belt operations at other mine locations which operate the same way as the conveyor which was cited are guarded, but he did not know whether the other equipment guards were fabricated or installed following the same procedures he described because that equipment was installed and operational before his employment at the mine (Tr. 41). However, he did state that the plant belt lines are not purchased on the open market with manufacturer's guards already installed on them (Tr. 41).

Plant Superintendent Lucas testified that the conveyor belt in question was first operated on July 27, 1978, that work had been performed on the belt from the day it was initially installed sometime in March 1978. It was initially installed at that time for the purpose of handling a particular type of stone being stored in that area. Prior to this time, the plant was operating with other conveyor systems, and work was being performed on the conveyor right up to the time it was put in operation on July 27. However, the belt was only operated for an hour or so before electrical problems developed causing it to be buried while it was loading a boat, and this was the first time it had run since it was put together (Tr. 23-24). The purpose for running the belt with loaded stone was to ascertain whether it was operating properly and to determine whether the belts were "tracking" properly on the belt rollers. If the tracking is not working properly, work has to done on the pulleys, rollers, and on the motor taper locks and shivs, and the pulley itself may have to be replaced.

Mr. Lucas conceded that no guards were in place when the conveyor was first used because it had to be operated to ascertain that everything was in proper working order while the material was being loaded. An inoperable switch failed to cut another feeder belt off and the material kept running and buried the conveyor belt in question (Tr. 26), and company maintenance records reflected that work began to correct that problem on August 2, 1978, and the next time the belt was used to load a boat was on August 7, 1978, and the guards were installed before that time, namely, on August 5, 1978 (Tr 28). He conceded that the belt was tested again on and off before the guards were installed to insure that it was functioning properly, but did not know how many times it was run (Tr. 28).

Mr. Lucas testified that during the time work was performed on the conveyor, the power would be shut off, the equipment is locked out, and the person that locks it out retains the key. During this testing period, loading is conducting by means of another belt-conveyor route, but in order to determine whether the conveyor is tracking properly, it has to be done with materials on it and it is necessary that a ship be present so that the materials are not dumped in the lake (Tr. 29). However, he was unsure whether the belt ran between July 27 and August 2, but if it did, it would have been empty because the next time a boat was loaded was on August 8 (Tr. 31).

After careful review of Judge Fauver's findings of fact in Union Rock and Materials Corporation, supra, it seems clear to me that the facts in that case are somewhat different from those presented in this case. There, the entire existing plant equipment consisting of 15 conveyor belts had been completely moved to a new mine location for set up some 6 to 7 days before the inspection, and the conveyors would normally not be operated without the guards around the tail pulleys and belt drives except in those instances where the guards had to be removed to allow belt adjustments to be made. Since the existing equipment was simply being moved from one location to another, I assume that it included existing guards which had also been removed during the moving process but not reinstalled at the time the inspectors arrived on the scene. Observation of materials stockpiled at the end of the belt led the inspectors to conclude that the belts had been running without guards in place for about and hour or so to check their rotation and alignment.

On the facts presented in this case, the conveyor belt cited by Inspector Pappas was a newly installed single and fairly short and isolated conveyor which was not in operation when Mr. Pappas observed it. He saw no stockpiled materials and had no basis for concluding that the belt was used for production other than a statement made by some unidentified person that stone was moved on the belt sometime in the past during a period of time when the belt was not in full production because the electrical installation had not been completed. Mr. Pappas also confirmed that electrical work was being done nearby on the electrical system, and he pointed out the area where it was being done during the site visit (Tr. 9-11).

Petitioner argues that any repair to the conveyor electrical system could have been performed with the guards in place, and that the only necessary alteration in its procedures to insure compliance with section 56.14-1, would be to fabricate and install guards early on during the conveyor hook-up sequence. Such a broad and general conclusion flies in the face of the specific facts of this case, and acceptance of petitioner's rigid application of section 56.14-1 would place the cart before the horse, and would require an operator to manufacture and install guards during the initial conveyor installation without really knowing whether the system will work. I simply cannot accept this as a rational and reasonable interpretation and application of the standards in question. I conclude that on the facts of this case, the requirements of section 56.14-1 cannot be divorced from the exception stated in section 56.14-6. I conclude further that the term "testing machinery" as found in section 56.14-6, includes the initial setup of the equipment, including its operation with loaded materials to determine whether it will function properly. Once this initial testing phase is completed, and the equipment is put into normal production, an operator would be required to insure that the guards stay on the equipment as required by section 56.14-1, as well as section 56.14-6. I reject Judge Fauver's narrow interpretation that the section 56.14-6 exception applies only to actual mechanical breakdown of the equipment. In my view, there is little or no practical distinction between a mechanical and electrical breakdowns insofar as the requirements of the standards in question are concerned. Any repair work necessary to render the equipment operational again would have to be done in accordance with the requirements of section 56.12-16, which mandates deenergizing and locking out the equipment before any mechanical work is undertaken.

In view of the foregoing findings and conclusions, I conclude and find that at the time Inspector Pappas observed the conveyor belt in question, it was down and locked out for repairs and testing, and he was aware of this fact because he observed maintenance being performed on the conveyor's electrical system nearby. I conclude further that since the conveyor was newly installed and undergoing tests to determine whether it was operating and functioning properly, it was not required to be guarded until such time as those tests were completed and the conveyor system was put into normal production. The fact that the conveyor was operated in the past for an hour or two with stone on it does not detract from the fact that respondent has established through credible evidence that it was operated only during the testing phase. Accordingly, the exception applied at that time, and petitioner has not convinced me otherwise. I find that petitioner has failed to establish a violation, and Citation Nos. 368786 and 368787, issued August 2, 1978, are VACATED.

Findings and Conclusions

Docket No. LAKE 79-217-M

In this case, respondent is charged with one violation of the provisions of mandatory safety standard section 56.11-1, which provides as follows:

"Safe means of access shall be provided and maintained to all working places." Citation No. 368912, on its face, alleges a violation of the "safe access" provision of section 56.11-1, in that there was an alleged buildup of material on the walkway of the 4-A gallery. As part of its posthearing arguments, petitioner includes a motion to amend its civil penalty proposal to charge the respondent, in the alternative, with a violation of mandatory standard section 56.20-3, which provides as follows:

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

In support of its motion to amend, petitioner relies on Rule 8(e)(2) and 15(b) of the Federal Rules of Civil Procedure, and asserts that the amendment is proper inasmuch as it neither alters nor increases the facts or issues in dispute, that respondent is not prejudiced, and that an amendment to conform to the evidence is appropriate.

On October 20, 1980, respondent filed an opposition to petitioner's motion to amend the charges to cite an alternative violation of section 56.20-3, and argues that to permit such an amendment after all of the evidence and testimony is in, and after the hearing has been concluded, is basically unfair since respondent has no opportunity to offer new evidence to meet such a charge. Respondent points out that Inspector Pappas' reason for issuing the citation in the first place was his concern that a person could have fallen from the area cited due to the buildup of materials. Further, respondent asserts that while Mr. Pappas made a passing reference on cross-examination to his concern that the walkway could rot over a period of time due to weather, there is no evidence that he ever inspected it for rotting, and while petitioner had ample opportunity to amend its pleadings at the hearing while the witnesses were present, it did not do so.

After consideration of the arguments presented, petitioner's motion to amend at this late date is DENIED. The thrust of petitioner's case is the asserted hazard of someone tripping and falling from the walkway in question due to the material buildup. Petitioner's attempts to transform a tripping and falling citation into an after-the-fact housekeeping violation is rejected. In my view, piecemeal enforcement through posthearing amendments based on an inspector's testimony a year or so after his initial observations and issuance of a citation is not the best way to insure compliance with any mandatory safety standard. It seems to me that if the inspector in this case really believed that rot was a problem, it was incumbent on him to inspect the walkway for that condition and to include it as part of the condition cited on the face of the citation. In this case, petitioner is bound by the

citation as issued and I will consider only the alleged violation of section 56.11-1.

Fact of Violation--Citation No. 368912, 30 C.F.R. § 56.11-1

Respondent is charged with failing to provide and maintain a safe means of access to a working place. Although the description of the condition cited by the inspector on the face of the citation is not a model of clarity, I believe it is clear that the respondent knew the precise area which concerned the inspector and the testimony of Mr. Lucas and the photographs he introduced confirm this fact. Having viewed the site of the alleged infraction, the area cited by Inspector Pappas is a narrow catwalk leading to a work platform under the conveyor belt on the 4-A gallery. Access to the top of the gallery itself is by an elevated inclined metal grated walkway as depicted in photographic Exhibits R-4 through R-5, and access down to the catwalk is by means of a metal ladder normally protected by a piece of chain as depicted in Exhibits R-8 and R-9. Accordingly, the issue presented is whether the buildup of materials on and about the catwalk area in question constituted a violation of section 56.11-1.

In support of its case, petitioner asserts that the evidence establishes that respondent failed to remove a buildup of consolidated wet limestone particles measuring approximately 2 feet in height and 6 to 7 feet in length which were present on the catwalk leading to the work platform under the gallery conveyor belt. Petitioner asserts further that the buildup materials effectively blocked ingress and egress to the platform area, that the fall distance from the catwalk to the ground below was some 90 feet, and that employees regularly utilize the platform to perform maintenance on the takeup pulley located under the gallery conveyor.

Respondent argues that section 56.11-1 should be read in light of the definition of the term "travelways," which is the regulatory heading under which the section is found. Coupled with the definition of the term "working place," respondent maintains that it is clear that working places and other areas to which safe access is required are for areas regularly used by mine personnel. Since the evidence establishes that the area in question is not regularly used by personnel, and is in fact used very infrequently, respondent argues that a requirement that this area be kept clean at all times is a totally unreasonable application of section 56.11-1, and is contrary to the purpose of that section. Respondent also maintains that no one is compelled to attempt to cross the area before it is cleaned, that the only forseeable danger would be in the cleaning operation itself, and by requiring respondent to repeatedly shut the conveyor down in order to clean the area, the chances of injury are greatly increased due to the instances in which someone would have to be in the area to shovel off the debris. Regarding the inspector's concern that an employee might inadvertently wander into the area, respondent maintains that this is extremely unlikely due to its location which requires an employee to walk all the way to the end of the gallery, remove a chain, go down six or seven steps, and then proceed across a walkway which leads to no other place frequented by employees.

Respondent does not dispute the fact that there was a buildup of materials on the catwalk in question and it is clear from the testimony presented that the material existed as stated by Inspector Pappas. It is also clear that Mr. Pappas did not know how long the materials had been present, and since he did not review any maintenance records he had no basis for determining how often anyone is required to climb down the ladder and walk across the catwalk to the platform adjacent to the underside of the conveyor belt, and he candidly admitted that he had no knowledge of the frequency of travel along the catwalk. Further, it is also clear to me that Mr. Pappas cited section 56.11-1, out of a concern that someone using the catwalk would have to climb over the material buildup and that this presented a tripping or falling hazard. His off hand remark concerning possible rusting and rotting of the catwalk, even if true, would still in my view constitute a condition to be cited under section 56.11-1, since the existence of a rotted or rusted catwalk, if proved to be in that condition and in fact contributed to the weakening of the structure, would not constitute a safe means of access. However, the inspector was not concerned with any such condition at the time he issued the citation, and in fact, made no inspection of the catwalk to determine whether it had been corroded or rusted. He clearly believed that the obstruction caused by the materials on the catwalk precluded safe access to the platform area beneath the conveyor.

The unrebutted testimony of Plant Superintendent Lucas is that during the normal operation of the conveyor there is no need for anyone to climb down the ladder and walk across the catwalk in question. Visual inspections, greasing, and other lubrication of the conveyor is performed from above the platform above the area in question. Any cleanup or maintenance work is performed while the conveyor is shut down or locked out, and company procedures dictate that when anyone is required to descend the ladder to reach the work platform adjacent to the underside of the conveyor, someone is dispatched to the area in advance to clean up the area. Mr. Lucas also indicated that the only time anyone has any occasion to descend the ladder and cross the catwalk is when there is a major break down of the conveyor or when the conveyor boot pulley is changed out, and that while the pulley has been changed in the last year or two, he could not remember the last time anyone had occasion to be in the catwalk area and he personally has not been there in the last 4 years.

Petitioner's conclusions at pages 6 and 7 of its brief that the catwalk was used on a regular basis to gain access to the work platform to perform maintenance on the takeup pulley is unsupported by any credible testimony of record. Having walked the entire length of the gallery in question with the parties during the site visit, including climbing down the ladder which was protected by a chain for the purpose of viewing the catwalk in question, it seems clear to me, and I conclude that the area cited is not a regularly used passage, walk, or way regularly used and designated for persons to go from one place to another in the mine.

Section 56.11-1 requires that a safe means of access be provided and maintained to all working places. The phrase "working place" is defined by section 56.2 as "any place in or about a mine where work is being performed."

The term "travelway" is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." Petitioner's suggestion that the phrase "travelway" is somehow part of the specific safety standard cited in this case is rejected. The term is simply used as a heading under which are found specific standards, including requirements for painting ladders.

After review and consideration of all of the evidence and testimony adduced in this case, I conclude that in order to establish a violation of section 56.11-1, petitioner must establish by a preponderance of the evidence that the catwalk and platform area beneath the gallery conveyor was in fact a working place as that term is defined by section 56.2. In short, petitioner must establish that work was taking place at the time the conditions were observed. Here, Inspector Pappas conceded that no work was taking place and he mentioned not one shred of evidence that he observed any indication of recent or ongoing maintenance or other work being performed along the catwalk or platform area which he cited. Under the circumstances, I conclude and find that petitioner has failed to establish a violation of section 56.11-1, and the citation is VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED that Citation Nos. 368786 and 368787, August 2, 1978, for alleged violations of 30 C.F.R. § 56.14-1 (Docket No. VINC 79-100-PM), be VACATED; and that Citation No. 368912, March 21, 1979, citing an alleged violation of 30 C.F.R. § 56.11-1, (Docket No. LAKE 79-217-M), also be VACATED.

/s/ George A. Koutras

George A. Koutras
Administrative Law Judge

Distribution:

Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 E. Ninth St., Cleveland, OH 44199 (Certified Mail)

William C. H. Ramage, Stephen D. Hedlund, Esqs., Harrington, Husley, & Smith, 1200 Mahoning Bank Building, Youngstown, OH 44502 (Certified Mail)

J. Mulichak, Manager, Safety & Personnel, The Standard Slag, Company, 1200 Stambaugh Building, Youngstown, OH 44501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. SE 79-128 : A.O. No. 40-02419-03002
v.		: No. 1 Wartburg Mine
G & M COAL COMPANY,	Respondent	:

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
Bill Marshall, pro se, Harriman, Tennessee, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety standards found in Part 75 and Part 77, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened at Knoxville, Tennessee, on October 29, 1980. The parties waived the filing of posthearing proposed findings and conclusions, were afforded an opportunity to present arguments in support of their respective positions on the record, and agreed to a bench decision which is herein reduced to writing as required by Commission Rule 65, 29 C.F.R. § 2700.65.

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 penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the

criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties agreed to the following (Tr. 7-11):

1. Respondent's No. 1 Wartburg Mine is subject to the Act, and I have jurisdiction to hear and decide this case.

2. Respondent is a small operator who was operating the subject mine at the time the citations in this case were issued.

3. Respondent's history of prior violations is not excessive.

4. MSHA mine inspectors Harrison R. Boston and Arthur C. Grant are duly authorized representatives of the Secretary of Labor and issued the citations in question upon inspection of respondent's mine.

Findings and Conclusions

Fact of Violations

Citation No. 140915, May 17, 1978, 30 C.F.R. § 77.1301, states as follows: "Detonators and explosives were not stored in magazines in that explosives and detonators were being stored in the temporary mine office."

Section 77.1301(a) requires tht detonators and explosives be stored separately in magazines. MSHA inspector Harrison R. Boston confirmed that he issued the citation after inspecting the mine and finding detonators and explosives stored and stacked together in a small building or shed approximately 10 feet by 10 feet which also served as an office. He discussed the matter

with mine owner Bill Marshall who advised him he would move the explosives and store them as required by the standard. Mr. Boston did not believe that the situation posed any imminent danger and he believed that the respondent should have known about the requirements of section 77.1301(a). He confirmed that the respondent is a small operator and that there was no immediate possibility of any explosion.

Mine operator Bill Marshall testified that the explosives and detonators had just been delivered to the mine and placed in the office temporarily until he could store them properly. He did not believe that the standard required a magazine since the mine had not begun any coal production and he was simply in the process of reviewing the feasibility of starting up production.

I conclude and find that the petitioner has established a violation by a preponderance of the evidence and the citation is AFFIRMED.

Citation No. 0743769, May 2, 1979, 30 C.F.R. § 75.200, states that "[t]he operator's approved roof control plan was not complied with on 001 section in that an approved calibrated torque wrench was not provided for the roof bolting machine."

MSHA inspector Arthur C. Grant confirmed that he issued the citation in question after conducting an inspection of the mine and determining that a torque wrench was not available to torque the roof bolts as they were installed into the mine roof. Respondent's approved roof-control plan (Exh. P-4) at page 6, paragraph 11, provides that "[a]n approved calibrated torque wrench that will indicate the actual torque on the roof bolts by a direct reading shall be provided on each roof bolting machine."

Mr. Grant stated that he discussed the matter with Mr. Marshall and he obtained a wrench and had it available the next day. Mr. Grant also indicated that the roof was in good condition and safe and he confirmed that the mine had only been in operation for a short time and that all of the required roof bolts had been installed. He also confirmed that the roof-bolting machine was capable of making roof-bolt torque adjustments but that a wrench was necessary to insure that proper torque was in fact accomplished. If this is not done, the bolts will not hold and a roof fall could result. Mr. Marshall indicated that torque wrenches were available at the mine but that he had theft problems and people were stealing his equipment.

I conclude and find that petitioner has established a violation of section 75.200 by a preponderance of the evidence. Failure to follow the roof-control plan requirement that a torque wrench be provided constitutes a violation of the cited standard. Accordingly, the citation is AFFIRMED.

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

The evidence establishes that at the time the citations were issued respondent operated a very small mining venture employing three or four people

at most, including the mine owner, Mr. Bill Marshall. Petitioner asserted that coal production was some 6,000 tons annually, but Mr. Marshall stated that at most, production was only 4,600 tons. In addition, the record establishes that Mr. Marshall is no longer in the mining business, that the mine is not in operation, that one of the two working sections has been permanently sealed, and for the approximate period from May 22, 1978, to March 1, 1979, the mine was not in production.

The parties agreed that the respondent was a small operator and that since he no longer is in business, the question of his ability to remain in business is moot. As for respondent's ability to pay the penalties assessed by me in this case, I have considered respondent's assertion that he is in debt, but absent any documentation on his part that he is unable to pay the penalties assessed by me in this matter, I cannot conclude that the penalties are unreasonable.

Good Faith Compliance

The record establishes that both conditions cited by the inspectors were abated in good faith and that respondent exercised rapid compliance in obtaining the required roof-bolt torque wrench the day after the citation issued, 1 day earlier than the time fixed for abatement by the inspector. As for the storage of explosives and detonators, Inspector Grant confirmed that they were subsequently stored in an approved storage area and subsequently removed from mine property.

Negligence

The inspectors testified that respondent should have been aware of the fact that the explosives and detonators were not properly stored in a manner as required by the cited standard, and that respondent did not have a torque wrench at the time the inspector observed the conditions cited. I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence.

Gravity

I conclude that the particular facts and circumstances which prevailed at the time the citations issued support a finding that both violations were nonserious, and that the inspector conceded that this was the case. The roof conditions were good, all required roof bolts were in place, the roof-bolting machine was engineered to pretorque the bolts as they were installed, and the inspector testified that he sounded and inspected the roof and found that it was safe.

With regard to the explosives and detonators citation, the facts establish that they were permissible explosives and were stored on the surface some 100 feet from the entrance to the underground mine, that no mining was taking place, and Inspector Boston testified that when he first observed the

condition cited he could find no one at the mine. He conceded that in the circumstances presented, the probability of any explosion occurring was unlikely, and the evidence establishes that the explosives had been present for a short period of time and were possibly delivered to the mine the day before the citation actually issued.

History of Prior Violations

Respondent's history of prior violations as reflected in MSHA's computer printout (Exh. P-4) shows that respondent made payment in the amount of $96 for four prior assessed violations, none of which are repeat violations. I cannot conclude that respondent's history of prior violations is such as to warrant any increase in the civil penalties assessed in this case. Further, I have taken into consideration the testimony by Inspector Grant that the respondent was a responsible operator who attempted in good faith to comply with the mandatory safety requirements of the Act.

Penalty Assessment

In response to a show-cause order issued by Chief Judge Broderick on May 15, 1980, for failure to file an answer to the petitioner's proposals for assessment of civil penalties, respondent stated that all assessed penalties for the period May 1978, through December 1979, had been paid and that the No. 1 Mine was closed in December 1979, and all mine openings were sealed. A copy of respondent's response was furnished to the petitioner as part of my order of June 6, 1980, in which I ruled that the response satisfied the show-cause order. Since no further information was forthcoming regarding respondent's claims that the assessments had been paid, the case was docketed for hearing.

Respondent could not substantiate his claims that he had paid the initial assessments made by MSHA for the two citations in question, and the computer printout reflects that they have not been paid. However, the parties were directed to further review their records in this regard and to file any evidence of payment with me. No such evidence has been forthcoming.

After careful review and consideration of the evidence adduced in this proceeding, including the six statutory criteria found in section 110(i) of the Act, and in particular respondent's prior history of violations, good faith compliance, my gravity findings and the fact that respondent is no longer in the mining business, I conclude that the following civil penalty assessments are reasonable considering the particular circumstances of this case:

Citation No.	Date	30 C.F.R. Section	Assessment
140915	05/17/78	77.1301	$15
0743769	05/02/79	75.200	10
			$25

ORDER

Respondent IS ORDERED to pay civil penalties totaling $25 within thirty (30) days of the date of this decision for the two citations in question, and upon receipt of payment by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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

Bill Marshall, G & M Coal Company, Route 4, Harriman, TN 37748 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. SE 79-24 A.O. No. 40-01612-03010
v.	:	Docket No. SE 79-40 A.O. No. 40-01621-03011
FIRE CREEK COAL COMPANY OF TENNESSEE, Respondent	:	Docket No. SE 79-68 A.O. No. 40-01612-03012
	:	Fire Creek No. 1 Mine

DECISIONS APPROVING SETTLEMENTS

Appearances: George Drumming, Jr., Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner.

Before: Judge Koutras

Statement of the proceedings

These civil penalty proceedings were initiated by the petitioner against the respondent through the filing of proposals for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 11 alleged violations of certain mandatory safety standards promulgated pursuant to the Act.

Respondent filed timely answers and the cases were scheduled for hearing in Knoxville, Tennessee, October 30, 1980. However, in view of a proposed settlement made by the parties, petitioner was permitted to submit its arguments on the record concerning the proposed settlement disposition of the dockets, a bench decision was issued, and it is herein finalized in writing as required by the Commission's rules. The citations, initial assessments, and the proposed settlement amounts are as follows:

Docket No. SE 79-24

Citation No.	Date	30 CFR Section	Assessment	Settlement
131663	11/17/78	75.1100-2(F)	$ 140	$ 52

Docket No. SE 79-40

Citation No.	Date	30 CFR Section	Assessment	Settlement
0743707	1/25/79	75.1100-2(e)	$ 90	$ 33
0743708	1/25/79	75.807	98	36
0743709	1/25/79	75.200	98	36
0743710	1/25/79	75.200	78	29
0743711	1/26/79	75.1714	114	42
0743712	1/26/79	75.304	180	67
0743713	1/26/79	75.200	114	42
0743714	1/26/79	75.1102	98	36
			$ 870	$ 321

Docket No. SE 79-68

Citation No.	Date	30 CFR Section	Assessment	Settlement
0743732	2/27/79	75.302(a)	$ 140	$ 52
0743733	2/27/79	75.200	72	27
			$ 212	$ 79

Discussion

In support of the proposed settlement negotiated by the parties petitioner has submitted information concerning the six statutory criteria found in section 110(i) of the Act. This information reflects that respondent is a small operator, has no excessive history of prior violations, abated all of the citations in question in good faith, and exhibited ordinary negligence in connection with the conditions or practices cited as violations. Further, while all of the citations ranged from serious to moderately serious, petitioner points out that none of them resulted in any injuries to miners.

In a prior decision issued by me on April 5, 1979, in MSHA v. Fire Creek Coal Company, Dockets BARB 79-3-P, BARB 79-4-P, and BARB 79-59-P, concerning a total of 27 citations issued during March and April, 1978, I found that respondent presented credible evidence and documentation concerning the financial condition of the respondent's small company. I found that the initial assessments made by MSHA, if affirmed, would effectively put the respondent out of business. In the circumstances, the financial condition of the respondent was considered in my assessment of civil penalties totaling $2,000 for the citations in question.

In the instant proceedings, respondent has reasserted the financial and economic conditions of its company, states that it is on the verge of bankruptcy, indicates that the mine is shut down and is not producing, and that there is little or no income from the company's mining venture.

Petitioner's counsel confirmed the fact that the Fire Creek No. 1 mine has been closed since July 1979. Counsel also agreed that respondent's financial condition is such that full payment of the civil penalties initially assessed by MSHA for the citations in question in these proceedings would in fact adversely affect respondent's stated intention of attempting at some time in the future to re-open the mine and again engage in the business of mining coal. Further, petitioner asserted that respondent's adverse financial condition stems from the fact that respondent's mining operation was conducted on a contract basis with a contract miner who purportedly absconded with the company assets.

Conclusion

After careful review and consideration of the pleadings, arguments, and submission in support of the petitioner's motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 20 C.F.R. § 2700.30, the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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

Michael R. Kizerian, c/o Fire Creek Coal Co., 699 E. South Temple, Rm. 200, Salt Lake City, UT 84102 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 2 0 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. KENT 79-349 A/O No. 15-11001-03005
v.		
DKT COAL COMPANY,	Respondent	No. 3 Mine

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Roy Darrell Coleman, Co-Owner, DKT Coal Company, Elkhorn City, Kentucky, for Respondent.

Before: Judge Cook

I. Procedural Background

On October 15,, 1979, the Mine Safety and Health Administration (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act), alleging five violations of various provisions of the Code of Federal Regulations as set forth in citations issued pursuant to section 104(a) of the 1977 Mine Act. DKT Coal Company (Respondent) filed an answer on October 31, 1979.

The hearing was held on July 16, 1980, in Pikeville, Kentucky. Representatives of both parties were present and participated. An oral motion was made requesting approval of settlement as relates to Citation No. 706588, and evidence was presented as relates to the four remaining citations.

The parties waived the filing of posthearing briefs and proposed findings of fact and conclusions of law.

II. Violations Charged

Citation No. 706554, February 26, 1979, 30 C.F.R. § 75.523-1
Citation No. 706555, February 26, 1979, 30 C.F.R. § 75.316
Citation No. 706556, February 26, 1979, 30 C.F.R. § 75.1722
Citation No. 706558, February 27, 1979, 30 C.F.R. § 75.316
Citation No. 706559, February 27, 1979, 30 C.F.R. § 75.400

III. Witness and Exhibits

A. Witness

Petitioner called Federal mine inspector Franklin Goble as a witness. Respondent did not call any witnesses.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 706554, February 26, 1979, 30 C.F.R. § 75.523-1, and a copy of the termination thereof.

M-2 is a copy of the inspector's statement pertaining to M-1.

M-3 is a copy of Citation No. 706555, February 26, 1979, 30 C.F.R. § 75.316, and a copy of the termination thereof.

M-4 is a copy of the approved ventilation system and methane and dust control plan for the 001-0 working section of Respondent's No. 3 Mine, in effect on February 26, 1979.

M-5 is a copy of the inspector's statement pertaining to M-3.

M-6 is a copy of Citation No. 706556, February 26, 1979, 30 C.F.R. § 75.1722, and a copy of the termination thereof.

M-7 is a copy of the inspector's statement pertaining to M-6.

M-8 is a copy of Citation No. 706558, February 27, 1979, 30 C.F.R. § 75.316, and a copy of the termination thereof.

M-9 is a copy of the inspector's statement pertaining to M-8.

M-10 is a copy of Citation No. 706559, February 27, 1979, 30 C.F.R. § 75.400, and a copy of the termination thereof.

M-11 is a copy of the inspector's statement pertaining to M-10.

2. Respondent did not introduce any exhibits in evidence.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of a mandatory health or safety standard 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

2. Citation No. 706555, February 26, 1979, 30 C.F.R. § 75.316

Citation No. 706555 was issued at Respondent's No. 3 Mine by Inspector Goble at approximately 12:30 p.m. on February 26, 1979. The citation alleges a violation of mandatory safety standard 30 C.F.R. § 75.316 in that: "The approved ventilation system, dust and methane control plan was not being complied with in that the air ventilation was not being controlled on the 001-0 section by means of check curtains and the wing curtain was 30 feet back from the face where coal was being mined" (Exh. M-3, Tr. 29-30). The cited mandatory safety standard provides as follows:

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

The portion of the regulation at issue in the instant case requires the mine operator to adopt a ventilation system and methane and dust control plan approved by the Secretary. The mine operator violates 30 C.F.R. § 75.316 by failing to comply with the approved plan. Peabody Coal Company, 8 IBMA 121, 84 I.D. 469, 1977-1978 OSHD par. 22,111 (1977); Zeigler Coal Company, 4 IBMA 30, 82 I.D. 36, 1974-1975 OSHD par. 19,237 (1975), aff'd. sub nom. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). The inspector's testimony reveals that the citation alleges the existence of two separate conditions that fail to comply with two separate provisions of the approved plan.

As relates to the first condition, the inspector's testimony establishes that the wing curtain terminated at a point 30 feet outby the face (Tr. 29-30, 38). The continuous miner was cutting coal from the face mentioned in the citation when the inspector observed the condition (Tr. 40-41). The applicable provision of the approved plan required the curtain or other approved device to "be installed and maintained to within ten feet of the point of deepest penetration where coal is being cut, drilled, mined, or loaded unless otherwise specified by the District Manager" (Exh. M-4, p. 4; Tr. 31-32). The district manager had not specified otherwise, and no other approved devices were in use at the time (Tr. 32). Accordingly, it is found that the wing curtain terminated at a point 30 feet outby the face where coal was being mined, and that such condition violated the applicable provision of the plan.

The second condition cited is the failure to use check curtains to control the ventilation. In fact, Respondent was not using any check

curtains (Tr. 40), and it was the inspector's opinion that the failure to use such curtains violated the provisions of the approved plan. The inspector's testimony reveals that check curtains are those curtains used outby the last open crosscut to maintain proper air flow from an intake to a return (Tr. 38-40), and that a map or sketch should have been attached to the approved plan designating their location (Tr. 38-40). Such map or sketch is not attached to Exhibit M-4. Without the map or sketch, the inspector was unable to point to a provision in the approved plan specifically requiring the use of check curtains outby the last open crosscut as a ventilation control device. Accordingly, it is found that Petitioner has failed to establish by a preponderance of the evidence that the absence of check curtains violated the approved plan.

In view of the foregoing, the discussion of the statutory penalty assessment criteria will be confined to the condition constituting a proved violation of the approved plan.

Respondent knew or should have known that the wing curtain terminated at a point 30 feet outby the face. Such actual or constructive knowledge is attributable to the presence of Mr. James Coleman, the foreman, in the area (Tr. 33). Accordingly, it is found that Respondent demonstrated ordinary negligence.

The occurrence of the event against which the standard is directed was probable. The possible events included a methane or dust ignition, or inhalation of the dust. Two persons would have been exposed to injuries resulting in lost work days to restricted duty (Exh. M-5, Tr. 34). Accordingly, it is found that the violation was accompanied by moderate gravity.

3. Citation No. 706556, February 26, 1979, 30 C.F.R. § 75.1722

This citation was issued at Respondent's No. 3 Mine by Inspector Goble at approximately 1 p.m. on February 26, 1979. The citation alleges a violation of mandatory safety standard 30 C.F.R. § 75.1722 in that the blower motor belts on the Lee Norris roof bolter (Serial No. 220092) were not properly guarded (Exh. M-6). The cited mandatory safety standard provides, in pertinent part, as follows: "(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."

The inspector's testimony reveals that the blower motor belts on the machine were not properly guarded, and that such belts were exposed moving machine parts which could have been contacted by, and which could have caused injury to, the operator of the machine. The blower motor and belts were located inside a 6- to 12-inch opening in the structure of the machine. The opening was located near the seat on the operator's side. While tramming the machine, the machine operator would have been within 6 to 12 inches from the pulley and belts. A hand, an arm or clothing could have achieved physical contact with, and could have been caught by, the belts (Tr. 41-42). Yet, no

E. Size of the Operator's Business

The parties stipulated that the No. 3 Mine produced approximately 40,000 tons of coal in 1979, and that the controlling company produced approximately 112,000 tons of coal in 1979 (Tr. 8-9). Accordingly, it is found that Respondent is a small operator.

F. Effect of a Civil Penalty on Respondent's Ability to Remain in Business

No evidence was presented establishing that the assessment of civil penalties will affect Respondent's ability to remain in business. Accordingly, it is found that civil penalties otherwise properly assessed in this proceeding will not impair Respondent's ability to remain in business. See, Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972).

VI. Motion to Approve Settlement

The proposed settlement is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
706558	2/27/79	75.316	$ 98	$ 98

The citation alleges a failure to comply with the approved ventilation system and methane and dust control plan in that the 001-0 section had been advanced seven crosscuts inby permanent stoppings. The approved plan required permanent stoppings up to, and including, the third crosscut (Tr. 12, Exh. M-8).

Information as to the six statutory criteria contained in section 110 of the Act has been submitted, which includes a copy of the inspector's statement describing the violation in terms of negligence, gravity and good faith (Exh. M-9). This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The motion to approve settlement was set forth on the record orally, and states as follows:

> JUDGE COOK: This Hearing will come to order.
>
> Now, did you Mr. Stewart, have a chance to discuss with Mr. Coleman a settlement?
>
> MR. STEWART: Yes, Your Honor. My understanding we agreed to settle the contested citation #706-558 in that as previously stated, DKT Coal Company admits the facts

of violation in that citation. After discussing the matter with Mr. Coleman move to approve the settlement, approve the assessment in the amount of Ninety-eight ($98.00) Dollars which was the original penalty.

JUDGE COOK: Is that agreeable, Mr. Coleman?

MR. COLEMAN: It wasn't agreeable but we settled on it.

(Tr. 64-65).

After according the information submitted due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest. An order will be issued approving the proposed settlement.

VII. Conclusions of Law

1. DKT Coal Company and its No. 3 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Franklin Goble was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The violations charged in Citation Nos. 706554, 706556, 706558, and 706559 are found to have occurred as alleged. One of the violations charged in Citation No. 706555 is found to have occurred as alleged.

5. All of the conclusions of law set forth previously in this decision are reaffirmed and incorporated herein.

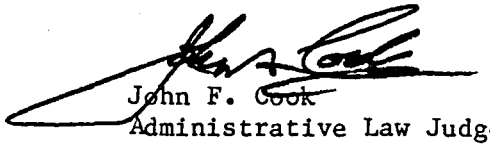
VIII. Penalty Assessed

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

Citation No.	Date	30 C.F.R. Standard	Penalty	
706554	2/26/79	75.523-1	$ 70.00	
706555	2/26/79	75.316	45.00	
706556	2/26/79	75.1722	65.00	
706558	2/27/79	75.316	98.00	(settlement)
706559	2/27/79	75.400	150.00	
			$428.00	

ORDER

The proposed settlement outlined in Part VI, supra, is APPROVED. Respondent is ORDERED to pay civil penalties in the total amount of $428 within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

Distribution:

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

Roy Darrell Coleman, Co-Owner, DKT Coal Company, Route 1, Box 1528, Elkhorn City, KY 41522 (Certified Mail)

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 2 0 1980

HELVETIA COAL COMPANY,	:	Application for Review
Applicant	:	
v.	:	Docket No. PENN 80-143-R
	:	
SECRETARY OF LABOR,	:	Lucerne No. 6 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: W. Joseph Engler, Jr., Esq., Vice President and General Counsel, Rochester and Pittsburgh Coal Co., Indiana, Pennsylvania, for Applicant;
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by Helvetia Coal Company (hereinafter Helvetia) under section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e) (hereinafter the Act), to vacate an order of withdrawal due to imminent danger issued by a Federal mine inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 107(a) of the Act. The parties filed prehearing statements and the case was heard in Indiana, Pennsylvania, on September 23, 1980.

This matter involves the issue of whether miners were exposed to imminent danger due to the close proximity between a bare energized conductor and the metal frame of a battery charger which was allegedly improperly grounded.

ISSUE

Whether the issuance of the order of withdrawal due to imminent danger was proper.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. § 817(a), provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

STIPULATIONS

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

2. The operator and the mine are subject to the Act.

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

4. The inspector who issued the order in question was a duly authorized representative of the Secretary of Labor.

5. Copies of the order are authentic and were properly served upon Helvetia.

FINDINGS OF FACT

I find from the preponderance of the evidence of record the facts as follows:

1. Lucerne No. 6 Mine is owned and operated by Helvetia.

2. William R. Collingsworth, who issued the order in controversy, was an electrical inspector employed by MSHA and a duly authorized representative of the Secretary of Labor at all times pertinent herein.

3. On January 9, 1980, Inspector Collingsworth performed a regular inspection of the Lucerne No. 6 Mine and issued Order No. 0818207 pursuant to section 107(a) of the Act.

4. The order in question was issued on a battery charger because of the existence of the following conditions:

(a) The ground wire was inadequately secured to the frame of the battery charger;

(b) A bare energized phase conductor was lying loose inside the battery charger in close proximity to the metal frame; and

(c) The bare energized phase conductor in the 480-volt battery charger had a potential of 300 volts.

5. The battery charger in question was located in a narrow travelway where miners were likely to come in contact with it.

6. It was likely that the bare energized conductor would touch the frame of the battery charger at the same time a miner was touching the frame of the battery charger with the result that the miner would be exposed to 100 to 300 volts.

7. A person who is exposed to 100 to 300 volts could be reasonably expected to suffer death or serious physical injury.

DISCUSSION

Helvetia concedes that the ground wire of the battery charger was poorly connected and that there was no ground monitor on this equipment. Helvetia did not dispute the fact that a bare energized conductor in a 480-volt battery charger was in close proximity to the frame of this unit. However, Helvetia contends that the imminent danger order of withdrawal was improper in this case for the following reasons: (1) the alleged hazard was not discovered by the inspector until the battery charger had been de-energized after the issuance of a citation for improper grounding of the unit and the normal practice of abatement of this citation would be to keep the battery charger de-energized until the condition had been corrected; and (2) the occurrence of the hazard was only speculative because the battery charger had a sufficient ground which would open the circuit in the unlikely event of a simultaneous touching of the frame by a miner and the bare energized phase conductor.

Helvetia's first contention that the discovery of the bare energized phase conductor in close proximity to the battery charger frame cannot constitute an imminent danger because the battery charger was de-energized at that time is rejected. In a case involving an imminent danger order, the Fourth Circuit Court of Appeals stated: "[t]he Secretary determined, and we think correctly, that 'an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical

harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.'" Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeal, 491, F.2d 277, 278 (4th Cir. 1974), aff'g. Eastern Associated Coal Corporation, 2 IBMA 128 (1973). See also Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975).

As the above cases indicate, the test is whether the condition could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition was eliminated. The imminently dangerous condition cannot be divorced from normal work activity. Under normal mining operations, the battery charger in question would have been used in the condition discovered by the inspector. The previously discovered grounding violation in the battery charger was the subject of a citation issued under section 104 of the Act rather than a withdrawal order of that equipment. The prior issuance of a citation is irrelevant in determining whether an imminent danger existed.

Helvetia's second contention raises the issue of the likelihood of the occurrence of death or serious physical harm to a miner. The definition of the term "imminent danger" is identical in the 1969 and 1977 Acts. In interpretating the 1969 Act, the Interior Board of Mine Operations Appeals required that before an imminent danger could be found to exist, the evidence must establish that "it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973). Thereafter, this "as probable as not" standard was approved by the Fourth and Seventh Circuit Courts of Appeals. Eastern Associated Coal Company v. IBMA, 491 F.2d 277 (4th Cir. 1974); Freeman Coal Mining Co. v. IBMA, 504 F.2d 741, 745 (7th Cir. 1975); and Old Ben Coal Corp. v. IBMA, 523 F.2d 25 (7th Cir. 1975). However, in enacting the 1977 Act, the Senate Committee on Human Resources stated:

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the commission.

Leg. Hist. of the Federal Mine Safety & Health Act of 1977, 95th Cong., 1st Sess. (hereinafter Leg. Hist. 1977 Act) at 38.

Earlier this year, the Federal Mine Safety and Health Review Commission announced that: "We * * * do not adopt or in any way approve the 'as probable as not' standard * * *. With respect to cases that arise under the [1977 Act], we will examine anew the question of what conditions or practices constitute an imminent danger." Pittsburg & Midway Coal Mining Co. v. MSHA, IBMA 76-57 (April 21, 1980).

Hence, in cases involving imminent danger orders under the 1977 Act, there is no longer a requirement that MSHA prove that "it is just as probable as not" that the accident or disaster would occur. In light of the legislative history of the 1977 Act, it is doubtful that any quantitative test can be applied to determine whether an imminent danger existed. Rather, each case must be evaluated in the light of the risk of serious physical harm or death to which the affected miners are exposed under the conditions existing at the time the order was issued.

In the instant case, Helvetia is in no position to challenge the conditions observed by Inspector Collingsworth since it elected not to designate a management escort for this inspection or to call the miners' representative, who accompanied the inspector, as a witness. Rather, Helvetia's assistant chief engineer, James G. Wiley, testified that the conclusions drawn by the inspector were erroneous. Mr. Wiley stated that the bare energized conductor could not have been touching the battery-charger frame at the time the inspector first saw the unit because such a touching would have energized a ground-fault trip relay which would have tripped the circuit breaker at the power center. He admitted that a person who came in contact with the battery charger at a time when the bare energized conductor was touching the frame would receive an electrical shock although he stated that this would not necessarily be a fatal shock. He stated that if the ground wire on the battery charger was efficient at the time of such a simultaneous touching of the frame by a person and the conductor, the circuit breaker would de-energize the circuit instantaneously and no more than 100 volts would be on the frame. However, he also conceded that if something was wrong with the grounding system, the voltage on the frame could exceed 100.

Inspector Collingsworth testified that, based upon his experience and training as an electrical inspector, the bare energized power conductor with a 300-volt potential in close proximity to the metal frame of the battery charger which had an improperly connected ground wire constituted an imminent danger to people walking in the travelway who could be expected to come in contact with the battery charger. He stated that it was likely that such persons would touch the battery charger because the top of the battery charger was clean, indicating that people did touch it. Even if the bare conductor was not touching the frame at the time of the order, Inspector Collingsworth stated that it could come in contact with the frame by the vibration of the transformer or a person jarring the battery charger while passing it. Inspector Collingsworth's opinions concerning the existence of an imminent danger were corroborated by Michael Yenchek, an electrical engineer employed by MSHA. Mr. Yenchek stated that the ground wire wrapped around the metal screen on the face of the battery charger did not provide a reliable, solid connection. He further testified that even if the circuit breaker opened instantaneously, a person touching the frame of the battery charger would get enough exposure to an electrical current to kill him. He cited examples of persons who were fatally electrocuted by as little as 100 volts. He agreed with Inspector Collingsworth that the condition of the battery charger as described by the inspector constituted an imminent danger.

I conclude that Helvetia has failed to establish that the imminent danger order was improperly issued. Rather, the preponderance of the evidence establishes that there was a reasonable expectation that the combination of the improperly connected ground wire and the energized bare conductor in close proximity to the metal frame of the battery charger could cause death or serious physical harm to miners before it could be abated. This is particularly true because the battery charger was located in a narrow travelway where the evidence indicated that it would likely be touched by passing miners. Under these circumstances, section 107(a) of the Act authorizes the issuance of a withdrawal order to protect the miners. Helvetia's evidence concerning the adequacy of the circuit breaker system and the slight chance of a serious injury from this condition are rejected because they are less persuasive than the evidence presented by MSHA on these issues. Therefore, Helvetia's application for review is denied.

CONCLUSIONS OF LAW

1. I have jurisdiction over this matter pursuant to section 107 of the Act.

2. The inspector properly issued the subject order of withdrawal pursuant to section 107(a) of the Act because an imminent danger existed in that there was a reasonable expectation that the condition of the battery charger which he found could cause death or serious physical harm before it could be abated.

3. The application for review is denied.

ORDER

THEREFORE, IT IS ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

James A. Laurenson, Judge

Distribution by Certified Mail:

W. Joseph Engler, Jr., Esq., Rochester & Pittsburgh Coal Company, R & P Coal Company Building, Indiana, PA 15701

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 2 0 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. BARB 78-705-P
	:	A/O No. 15-09816-03001
v.	:	
	:	Docket No. BARB 79-185-P
BLACKJACK COAL COMPANY, INC., Respondent	:	A/O No. 15-09816-03004
	:	
	:	Docket No. BARB 79-270-P
	:	A/O No. 15-09816-03005
	:	
	:	No. 1 Surface Mine
	:	
	:	Docket No. KENT 79-60
	:	A/O No. 15-11680-03001
	:	
	:	Docket No. KENT 79-204
	:	A/O No. 15-11680-03002
	:	
	:	No. 3 Surface Mine

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Larry Cleveland, Esq., Frankfort, Kentucky, for Respondent.

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (Petitioner) filed petitions for assessment of civil penalties in Docket Nos. BARB 78-705-P; BARB 79-185-P, BARB 79-270-P, KENT 79-60, and KENT 79-204, on September 25, 1978, December 20, 1978, January 31, 1979, June 18, 1979, and July 20, 1979, respectively. The petitions were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act), and allege a total of 24 violations of various provisions of the Code of Federal Regulations. Answers were filed by Blackjack Coal Company, Inc. (Respondent).

The parties stipulated that the cited violations occurred, and also entered into stipulations addressing five of the six statutory penalty assessment criteria set forth in section 110(i) of the 1977 Mine Act for each of the violations. Pursuant to notices of hearing, the hearing was held on May 9, 1980, in Lexington, Kentucky, with representatives of both parties present and participating. Evidence was presented addressing the sole issue not covered by the stipulations, i.e., the effect of a civil penalty on the mine operator's ability to continue in business. The record was left open until July 7, 1980, to permit Respondent to file a copy of its 1979 Federal income tax return, a copy of the decision in a case pending at the time before an Administrative Law Judge of the National Labor Relations Board, In re Blackjack Coal Company, Inc., and Garland W. McWhorter, Case No. 9-CA-14343, and copies of any judgments entered against Respondent between May 9, 1980, and July 7, 1980. On July 14, 1980, Respondent filed a letter indicating that such documents would not be filed. 1/

A schedule for the submission of posthearing briefs was agreed upon on May 9, 1980. Briefs were due on or before August 12, 1980. On July 25, 1980, Respondent filed a memorandum and proposed findings of fact and conclusions of law. On August 11, 1980, Petitioner filed a recommendation regarding the assessment of civil penalties.

II. Violations Charged

A. Docket No. BARB 78-705-P

Citation/Order No.	Date	30 C.F.R. Standard
8-0016	1/11/78	77.1303(d) 77.1301(c)(2)
123413	4/11/78	77.1605(b)
123414	4/11/78	77.1605(b)
123415	4/11/78	77.410
123416	4/11/78	77.1713(c)

1/ This letter, dated July 7, 1980, states, in part, as follows:
"I have waited until this last day in hopes of acquiring such items; however, I am unable to forward these at this time. Surprisingly, no further actions have been taken by the plaintiffs in the cases in which Blackjack is defendant and so there have been no additional Judgments entered since [May 9, 1980]. When the NLRB action came on for hearing in Jackson, Kentucky on May 14, 1980, it was learned that the Administrative Law Judge assigned to the case was ill and the same was required to be rescheduled for July 28, 1980, and so no decision has yet been reached in that case. Finally, although Blackjack's accountant has been urged to complete the 1979 Federal Tax return for this purpose, the same has not yet been completed and filed, and so this also is unavailable. Thus, although it was honestly felt on May 9, 1980 that these items could be submitted as requested, it now appears Blackjack must be denied the evidentiary advantage of these documents."

123417	4/11/78	77.1102
123418	4/11/78	77.410
123419	4/11/78	77.410
123420	4/11/78	77.410
123421	4/11/78	77.410
123422	4/11/78	77.1713(c)
123423	4/11/78	77.1605(a)

B. Docket No. BARB 79-185-P

Citation No.	Date	30 C.F.R. Standard
144085	8/15/78	77.410
144086	8/15/78	77.1104

C. Docket No. BARB 79-270-P

Citation No.	Date	30 C.F.R. Standard
144087	8/15/78	77.1301(c)(5)

D. Docket No. KENT 79-60

Citation No.	Date	30 C.F.R. Standard
142473	12/4/78	77.410
142474	12/4/78	77.1109(c)(1)
142475	12/4/78	77.1102
142476	12/4/78	77.1301(c)(5)

E. Docket No. KENT 79-204

Citation No.	Date	30 C.F.R. Standard
737401	2/5/79	77.1605(b)
737402	2/5/79	77.410
737403	2/6/79	77.1110
737404	2/6/79	77.1606(c)

III. Witnesses and Exhibits

A. Witnesses

Respondent called as its witnesses Burl Black, its project manager; Bobbie Jean Black, its president, bookkeeper, and sole stockholder; and John Avent, a certified public accountant.

Petitioner did not call any witnesses.

B. Exhibits

(1) Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Order No. 8-0016, January 11, 1978, 30 C.F.R. § 77.1303(d).

M-2 is a copy of the termination of M-1.

M-3 is a copy of Order No. 123413, April 11, 1978, 30 C.F.R. § 77.1605(b), and a copy of the termination thereof.

M-4 is a copy of Order No. 123414, April 11, 1978, 30 C.F.R. § 77.1605(b), and a copy of the termination thereof.

M-5 is a copy of Citation No. 123415, April 11, 1978, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-6 is a copy of Citation No. 123416, April 11, 1978, 30 C.F.R. § 77.1713(c), and a copy of the termination thereof.

M-7 is a copy of Citation No. 123417, April 11, 1978, 30 C.F.R. § 77.1102, and a copy of the termination thereof.

M-8 is a copy of Citation No. 123418, April 11, 1978, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-9 is a copy of Citation No. 123419, April 11, 1978, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-10 is a copy of Citation No. 123420, April 11, 1978, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-11 is a copy of Citation No. 123421, April 11, 1978, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-12 is a copy of Citation No. 123422, April 11, 1978, 30 C.F.R. § 77.1713(c), and a copy of the termination thereof.

M-13 is a copy of Citation No. 123423, April 11, 1978, 30 C.F.R. § 77.1605(a), and a copy of the termination thereof.

M-14 is a copy of Citation No. 144087, August 15, 1978, 30 C.F.R. § 77.1301(c)(5), and a copy of the termination thereof.

M-15 is a copy of Citation No. 142473, December 4, 1978, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-16 is a copy of Citation No. 142474, December 4, 1978, 30 C.F.R. § 77.1109(c)(1), and a copy of the termination thereof.

M-17 is a copy of Citation No. 142475, December 4, 1978, 30 C.F.R. § 77.1102, and a copy of the termination thereof.

M-18 is a copy of Citation No. 142476, December 4, 1978, 30 C.F.R. § 77.1301(c)(5), and a copy of the termination thereof.

M-19 is a copy of Citation No. 737401, February 5, 1979, 30 C.F.R. § 77.1605(b), and a copy of the termination thereof.

M-20 is a copy of Citation No. 737402, February 5, 1979, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-21 is a copy of Citation No. 737403, February 6, 1979, 30 C.F.R. § 77.1110, and a copy of the termination thereof.

M-22 is a copy of Citation No. 737404, February 6, 1979, 30 C.F.R. § 77.1606(c), and a copy of the termination thereof.

M-23 is a copy of Citation No. 144085, August 15, 1978, 30 C.F.R. § 77.410, and a copy of the termination thereof.

M-24 is a copy of Citation No. 144086, August 15, 1978, 30 C.F.R. § 77.1104, and a copy of the termination thereof.

(2) Respondent introduced the following exhibits in evidence:

R-1 is a complaint and notice of hearing in the case of In re Blackjack Coal Company, Inc., and Garland W. McWhorter, Case No. 9-CA-14343 (NLRB, Region 9).

R-2 is a certified copy of a security agreement entered into between Respondent and Southern Explosives Corporation.

R-3A is a copy of a civil summons and complaint in the case of Ford Motor Credit Company v. Blackjack Coal Company, Inc., Case No. 79-CI-11200 (Circuit Court, Jefferson County, Kentucky).

R-3B is a notice pertaining to R-3A dismissing the proceeding for lack of venue and jurisdiction.

R-3C is a notice of appeal pertaining to R-3A.

R-4 is a copy of a civil summons and complaint in the case of Kentucky Machinery, Inc. v. Blackjack Coal Company, Inc., Case No. 80-CI-01885 (Circuit Court, Jefferson County, Kentucky).

R-5 is a copy of the complaint in the case of Brandeis Machinery and Supply Corporation v. Blackjack Coal Company, Inc., Case No. 79-CI-06950 (Circuit Court, Jefferson County, Kentucky).

R-6 is a copy of the civil summons and complaint in the case of Progressive Insurance Agency v. Blackjack Coal Company, Inc., Case No. 80-CI-0580 (Circuit Court, Franklin County, Kentucky).

R-7 is a certified copy of a default judgment entered against Respondent in the amount of $3,631.45, plus interest and costs, in the case of Clark GM Diesel v. Blackjack Coal Company, Case No. 80-CI-0296 (Circuit Court, Franklin County, Kentucky, filed April 9, 1980).

R-8 is a certified copy of a default judgment entered against Respondent in the amount of $38,749.15, plus interest and costs, in the case of C.I.T. Corporation v. Blackjack Coal Company, Inc., et al., Case No. 80-CI-0072 (Circuit Court, Franklin County, Kentucky, filed February 14, 1980).

R-9 is a copy of a summary judgment entered against Respondent in the amount of $129,933.27, plus interest and costs, in the case of Associates Commercial Corporation v. Blackjack Coal Company, Inc., Case No. 79-CI-09609 (Circuit Court, Jefferson County, Kentucky, filed March 10, 1980).

R-10 is a certified copy of a default judgment entered against Respondent in the amount of $1,578.30, plus interest and costs, in the case of Cummins Diesel Sales of Louisville, Inc. v. Blackjack Coal, Inc., Case No. 80-CI-0445 (Circuit Court, Franklin County, Kentucky, filed April 29, 1980).

R-11 is a document styled "Blackjack Coal Company - Litigation."

R-12 is a certified copy of a state tax lien in the amount of $2,281.68 filed against Respondent on December 21, 1979.

R-13 is a certified copy of a Federal tax lien in the amount of $27,148.68 filed against Respondent on March 31, 1980.

R-14 is a copy of Respondent's consolidated balance sheet as of December 31, 1979.

R-15 is a copy of Respondent's 1978 Federal corporation income tax return.

R-16A is a letter dated November 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Mrs. Bobbie Jean Black.

R-16B is a copy of a notice of public sale.

R-16C is a letter dated September 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Respondent.

R-16D is a letter dated September 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Respondent.

R-16E is a notice of public sale.

R-16F is a letter dated November 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Respondent.

R-17A is a letter dated November 12, 1979, from the collection manager, General Electric Credit Corporation, to Respondent.

R-17B is a letter dated September 24, 1979, from the district credit manager, Associates Commercial Corporation, to Respondent.

R-17C is a letter dated February 29, 1980, from the collection manager, General Electric Credit Corporation, to Respondent.

R-17D is a letter dated February 29, 1980, from the collection manager, General Electric Credit Corporation, to Bobbie Jean Black.

IV. Issues

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

V. Opinion and Findings of Fact

A. Stipulations

(1) Respondent is subject to the provisions of the 1977 Mine Act (Tr. 125).

(2) The parties stipulated the qualifications of John Avent, certified public accountant (Tr. 60).

(3) The alleged violations occurred as cited in each of the five cases styled Blackjack Coal Company, Inc., Docket Nos. BARB 78-705-P; BARB 79-185-P; BARB 79-270-P; KENT 79-60; and KENT 79-204.

(4) Respondent will not contest the occurrence of the violations at the hearing.

(5) Respondent is a small operator and its average annual production for 1979 was 234,020 tons (Tr. 9-12).

(6) Respondent does not appear to have an excessive history of previous violations. The history of previous violations for the 2 years preceding the most recent violations in each case is as follows:

a. BARB 78-705-P: Forty-six violations were cited of which 45 were paid for the period from January 12, 1976, to January 11, 1978.

b. BARB 79-185-P: Fifty-nine violations were cited of which 41 were paid for the period from August 16, 1976, to August 15, 1978.

c. BARB 79-270-P: Fifty-nine violations were cited of which 41 were paid for the period from August 16, 1976, to August 15, 1978.

d. KENT 79-60: Four violations were cited of which none have been paid for the period from December 5, 1976, to December 4, 1978.

e. KENT 79-204: Six violations were cited of which none have been paid for the period from February 6, 1977, to February 5, 1979.

(7) In attempting to achieve rapid compliance, Respondent demonstrated normal good faith as to all except six violations. Respondent demonstrated rapid good faith as to six of the violations listed below:

BARB 78-705-P: Citation Nos. 123418, 123419, 123420, 123421, 123422, and 123423.

(8) All of the violations except one were the result of ordinary negligence. One violation, Citation No. 8-0016, in Docket No. BARB 78-705-P, was the result of gross negligence.

(9) The gravity of each violation expressed in terms of the degree of seriousness is as follows:

a. BARB 78-705-P: All of the violations except four are serious. Citation Nos. 123417 and 123418 are moderately serious and Citation Nos. 123416 and 123422 are not serious.

b. BARB 79-185-P: Citation No. 144086 is serious and Citation No. 144085 is moderately serious.

c. BARB 79-270-P: Citation No. 144087 is serious.

d. KENT 79-60: Citation Nos. 142474 and 142476 are serious and Citation Nos. 142473 and 142475 are moderately serious.

e. KENT 79-204: Citation No. 737401 is serious and Citation Nos. 737402, 737403 and 737404 are moderately serious.

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

The parties stipulated that the violations occurred as cited and also entered into stipulations as to the negligence of the mine operator, the gravity of the violations, and the mine operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. These stipulations are reflected in the findings of fact set forth in this section of the decision.

1. Docket No. BARB 78-705-P

Order No. 8-0016 was issued on January 11, 1978, and cites Respondent for violations of mandatory safety standards 30 C.F.R. § 77.1301(c)(2) and 30 C.F.R. § 77.1303(d) 2/ as follows:

> Explosives such as dynamite, detonating cord, anfo and blasting caps were being stored in a vehicle with flammable liquid fuel. 77.1301(c)(2). The explosives were allowed to become wet, frozen, and deteriorated from severe weather conditions. 77.1303(d). The vehicle with the explosives was located within the maintenance area where employees and an open flame exists.

(Exh. M-1). The violations were serious, Respondent demonstrated gross negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123413 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1605(b) in that "[t]he No. 1 Pay Loader (140) refuse truck was operating in the No. 2 Pit without brakes" (Exh. M-3). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123414 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1605(b) in that "[t]he No. 2 Pay Loader (140) refuse truck was operating in No. 2 Pit without brakes" (Exh. M-4). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123415 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "[t]he 560 Huff end-loader working in No. 2 pit, automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse"

2/ Although Order No. 8-0016 cites Respondent for two violations, the Office of Assessments proposed a penalty only for the violation of 30 C.F.R. § 77.1303(d).

(Exh. M-5). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123416 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1713(c) in that "[a] daily record book was not being kept at this mine of hazardous conditions (No. 2 Pit)" (Exh. M-6). The violation was not serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123417 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1102 in that "[t]he above ground fuel tank in No. 1 Pit was not posted with signs warning against smoking and open flames" (Exh. M-7). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123418 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "[t]he 90 Huff Pay Loader end-loader working in No. 1 Pit auto reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-8). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123419 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "[t]he Galion road grader's automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-9). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123420 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "[t]he Massey Ferguson front-end-loader (L-0123) working in No. 1 pit, automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-10). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123421 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "[t]he TD 25 dozer (Serial No. YM 3150) working in No. 1 pit, automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-11). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123422 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1713(c) in that

"a daily record book was not being kept at this mine of hazardous conditions (No. 1 Pit)" (Exh. M-12). The violation was not serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123423 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1605(a) in that "[t]he Damco rotary rock drill windows were cracked and broken to the extent it affected the visibility of the operator" (Exh. M-13). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

2. Docket No. BARB 79-185-P

Citation No. 144085 was issued on August 15, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "[t]he audible automatic reverse warning device is inoperative on the 560 Hough front-end-loader in that it will not give an alarm when put in reverse. The 560 Hough is being operated in the strip pit area" (Exh. M-23). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 144086 was issued on August 15, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1104 in that "[a]ccumulations of combustible materials such as boxes and paper are located at the explosives magazine" (Exh. M-24). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

3. Docket No. BARB 79-270-P

Citation No. 144087 was issued on August 15, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1301(c)(5) in that "[t]he explosive magazine located next to the maintenance area is not grounded" (Exh. M-14). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

4. Docket No. KENT 79-60

Citation No. 142473 was issued on December 4, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "an automatic warning device which would give an audible alarm when such equipment is put in reverse was not provided on the Fiat-Allis 745-C end loader, which was loading coal in Pit 001" (Exh. M-15). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 142474 was issued on December 4, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1109(c)(1) in that

"[p]ortable fire protection was not provided on the Fiat-Allis 745-C end loader which was loading coal in the No. 1 Pit" (Exh. M-16). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 142475 was issued on December 4, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1102 in that "[s]igns warning against smoking and open flames was [sic] not posted on or near the 1,000 gallon above ground diesel fuel storage tank located in the No. 1 Pit" (Exh. M-17). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 142476 was issued on December 4, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1301(c)(5) in that "[t]he metal magazine which was used to store explosives in was not electrically bonded and grounded" (Exh. M-18). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

5. Docket No. KENT 79-204

Citation No. 737401 was issued on February 5, 1979, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1605(b) in that "[t]he 400 Hough end loader working in Pit 001 was not provided with adequate brakes, in that when the brakes were tested on level surface at approximately 5 miles per hour the loader would not stop" (Exh. M-19). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 737402 was issued on February 5, 1979, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.410 in that "an automatic warning device which shall give an audible alarm when the equipment is put in reverse was not provided on the 25 International dozer working in the No. 1 Pit" (Exh. M-20, Tr. 136). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 737403 was issued on February 6, 1979, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1110 in that "[s]everal portable fire extinguishers throughout the Pit 001, was [sic] not provided with a permanent tag attached to the extinguishers showing the date of examination" (Exh. M-21). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 737404 was issued on February 6, 1979, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1606(c) in that "[t]he 85-ton Rimpull rock truck (Company No. 1) hauling refuse in the No. 1 Pit was not provided with a mirror on the right side of the truck, therefore

hindering the operator's view when in reverse motion" (Exh. M-22). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

C. Size of the Operator's Business

The parties stipulated that Respondent is a small operator and that its average annual production for 1979 was 243,000 tons (Tr. 9-12).

D. History of Previous Violations

The parties stipulated that Respondent does not appear to have an excessive history of previous violations. As relates to Docket No. BARB 78-705-P, Respondent had 45 violations for which assessments were paid from January 12, 1976, to January 11, 1978. As relates to Docket Nos. BARB 79-185-P and BARB 79-270-P, Respondent had 41 violations for which assessments were paid from August 16, 1976, to August 15, 1978. As relates to Docket No. KENT 79-204, Respondent did not have any violations for which assessments were paid from February 6, 1977, to February 5, 1979. As relates to Docket No. KENT 79-60, Respondent did not have any violations for which assessments were paid from December 5, 1976, to December 4, 1978.

E. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

Respondent commenced business in January of 1976 (Tr. 19). The company terminated its mining operations in October of 1979, with the exception of certain reclamation activities (Tr. 14), and had no employees as of the date of the hearing (Tr. 16). According to the testimony of Mr. Burl Black, who served as Respondent's project manager, additional reclamation activities were expected to continue until approximately September of 1980, at a cost of approximately $20,000 (Tr. 17). Respondent's balance sheet (Exh. R-14) shows that a $15,000 reserve has been earmarked for reclamation activities (see also Tr. 64).

Respondent was set up as a corporation, and Mrs. Billie Jean Black, the wife of Burl Black, was the sole stockholder as of the date of the hearing (Tr. 38). Neither Mr. Black nor Mrs. Black own any other coal companies, nor do they have any interest whatsoever in any other mining operations (Tr. 27). Additionally, Respondent does not own and does not have an interest in any other business, does not have any interest in or maintain any coal rights, and does not own any land (Tr. 57). According to Mrs. Black, Respondent is insolvent (Tr. 39).

Respondent submitted extensive documentation outlining its financial posture, including a copy of its 1978 U.S. Corporation Tax Return; its balance sheet as of December 31, 1979, prepared without audit; certified copies of judgments and state and Federal tax liens secured against it; and various letters from creditors notifying Respondent as to the repossession

of designated equipment and, in some instances, follow-up notifications subsequent to sale of the equipment apprising Respondent as to the results of the sale and the deficiency balance due. Additionally, documents were submitted as relates to legal actions pending against Respondent before the State courts in Kentucky and the National Labor Relations Board as of the date of the hearing.

Respondent's 1978 U.S. Corporation Income Tax Return listed total income in the amount of $4,505,662, and total deductions in the amount of $4,628,119, yielding a loss for tax purposes in the amount of $122,537.

Schedule M-1 of the tax return contains a reconciliation of income per books with income per return. The entries show a net loss per books in the amount of $171,955, and an expense recorded on the books, but not deducted on the return, in the form of a $49,918 "new jobs credit." The two figures, when combined, yield the $122,537 loss referred to above.

Schedule L of the tax return contains a balance sheet setting forth Respondent's financial posture in terms of assets, liabilities and stockholders' equity as follows:

ASSETS

		Beginning of Taxable Year	End of Taxable Year
1.	Cash (overdraft)	$ 84,028	($244,582)
2.	Trade notes and accounts receivable, less allowance for bad debts	29,250	212,802
3.	Inventories	22,500	22,500
4.	Government obligations		
5.	Other current assets	144,758	470,806
6.	Loans to stockholders		
7.	Mortgage and real estate loans		
8.	Other investments		
9.	Buildings and other depreciable assets, less accumulated depreciation	1,395,103	3,200,740
10.	Depletable assets, less accumulated depletion		
11.	Land (net of any amortization)	36,500	36,500
12.	Intangible assets (amortizable only), less accumulated amortization		
13.	Other assets	118,829	293,913
14.	Total assets	$ 1,830,968	$ 3,992,679

LIABILITIES AND STOCKHOLDERS' EQUITY

15.	Accounts payable	$ 302,777	$ 489,354
16.	Mortgages, notes, bonds payable in less than 1 year	829,905	1,770,493
17.	Other current liabilities	32,132	
18.	Loans from stockholders		
19.	Mortgages, notes, bonds payable in 1 year or more	397,060	1,461,435
20.	Other liabilities (reclamation)	46,805	45,980
21.	Capital stock	2,000	2,000
22.	Paid-in or capital surplus	1,886	1,886
23.	Retained earnings--appropriated		
24.	Retained earnings--unappropriated	293,403	296,531
25.	Less cost of treasury stock	(75,000)	(75,000)
		$1,830,968	$3,992,679

Respondent's unaudited balance sheet as of December 31, 1979, sets forth Respondent's financial posture in terms of assets, liabililties and stockholders' equity as follows:

ASSETS

Current Assets:			
Accounts receivable		$ 123,088	
Total Current Assets			$ 123,088
Fixed Assets:			
Equipment	$ 263,422		
Furniture and fixtures	9,331		
Total	272,753		
Less: accumulated depreciation	186,571		
Total Fixed Assets - Book Value			$ 86,182
TOTAL ASSETS			$ 209,270

LIABILITIES AND STOCKHOLDER'S EQUITY

Current Liabilities:	
Cash overdraft	$ 66,175
Accounts payable - trade	386,027
Severance and reclamation taxes payable	16,385
Accrued payroll and payroll taxes	2,421
Mortgages payable - equipment	126,000

Notes payable - equipment	569,745	
Reserve for reclamation expenses	15,000	
Total Current Liabilities		$1,181,753
Stockholder's Equity:		
Capital stock	2,000	
Paid-in surplus	1,886	
Retained earnings (deficit)	(901,369)	
Less: Cost of treasury stock	(75,000)	
Total Stockholder's Equity (Deficit)		(972,483)
TOTAL LIABILITIES AND STOCKHOLDER'S EQUITY		$ 209,270

According to Mr. John Avent, the certified public accountant who prepared both the tax return and the balance sheet, $2,180 of the $123,088 in accounts receivable has been collected and the balance has been assigned to the Rogers Oil Company in exchange for a fuel oil debt that is included in the accounts payable (Tr. 62-63). Mr. Avent testified that the items of equipment that remained in Respondent's possession had a book value of $86,182, 3/ and have mortgages against them totaling approximately $126,000 (Tr. 63-64). 4/ All other equipment has been repossessed (Tr. 39-40). 5/ Deficiency balances on

3/ Mr. Avent was unable to express an opinion as to the actual value of the equipment (Tr. 100).

4/ Southern Explosives Corporation has a $76,780.97 security interest in the following items: One International Harvester Dozer, Model TD25C, Serial No. 2450; one Hovuette & Streeter truck scale, Serial Nos. 7809 and 0169; one Coleman, Model MH400L, portable light tower, with Deutz diesel engine and Lima generator, Serial No. L-509; one Coleman, Model MH400L light plant, Serial No. L 129; and one Coleman, Model MH400L, light tower, Serial No. 134 (Exh. R-2). An additional piece of equipment, a Massey Ferguson loader, Serial No. 1854800123, is pledged to Farmer's Bank and Capital Trust Company on a $50,000 chattel mortgage (Tr. 39-40, 72-73, Exh. R-14, p. 3). Additionally, Respondent has a 1979 Chevrolet pickup truck against which there is no security interest or mortgage (Tr. 41).

5/ The documents placed in evidence by Respondent set forth the following information as relates to the repossessed equipment: (1) By a letter dated November 14, 1979, Respondent was notified by General Electric Credit Corporation that the equipment covered by Account No. 336397 had been repossessed and would be held for private sale commencing November 26, 1979, absent redemption on or before November 25, 1979. The balance due on the account was $104,205.08 (Exhs. R-16A, R-16F). (2) On or around December 8, 1979, Respondent received a Notice of Public Sale from Leasing Service Corporation, announcing that three Komatsu crawler tractors, Serial Nos. 15866, 16220 and 16221, would be sold at public auction on December 19, 1979. The notice contains no information as to the balance due on the account (Exh. R-16B).

the notes after resale of equipment repossessed in 1979 are listed on the balance sheet under mortgages payable and notes payable (Tr. 95-96, 99). Judgments have been entered against Respondent in the amount of $173,892.17, plus court costs and interest (Exhs. R-7, R-8, R-9, R-10). These judgments involve items which are listed on the December 31, 1979, balance sheet under accounts payable or under notes payable (Tr. 77-78). 6/ A state tax lien was filed on December 21, 1979, for $2,281.68 in coal severance taxes, and a Federal tax lien was filed on March 31, 1980, for $27,148.68 (Exhs. R-12,

---

Footnote 5 (continued)
(3) By a letter dated September 14, 1979, Respondent was notified by General Electric Credit Corporation that one 1978 Rimpull Model RD65 rear dump hauler, Serial No. 780104, had been repossessed. The balance due on the account was $206,440.15. The equipment was sold at a private sale on February 29, 1980, and left a deficiency balance of $105,811.39 (Exhs. R-16C, R-17C, R-17D). (4) By letter dated September 14, 1979, Respondent was notified that a 1976 International TD25C crawler tractor, Serial No. 5657, had been repossessed. The balance due on the account was $14,830.15. The equipment was sold at a private sale on October 31, 1979, and left a deficiency balance of $8,330.15 (Exhs. R-16D, R-17A). (5) On or around September 7, 1979, Respondent received a Notice of Public Sale from Ford Motor Credit Company announcing that the following items would be sold at public sale on September 27, 1979: One Hough H100C wheel loader, Serial No. 1846; two Hough 560 wheel loaders, Serial Nos. 2226 and 2415; two IHC TD25C crawler tractors, serial Nos. 6396 and 6534; and one Rimpull RD 65 off-road truck, serial No. 780101. The notice contains no information as to the balance due on the account (Exh. R-16E). (6) By letter dated September 24, 1979, Respondent was notified by Associates Commercial Corporation that an International TD25C dozer, Serial No. 6342, and a Rimpull RD65 truck, Serial No. 770116, were sold at a public sale on September 24, 1979, yielding a deficiency balance of $129,777.04 (Exh. R-17B).
6/ The judgments against Respondent are identified as follows:
Clark G. M. Diesel v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0296. Judgment entered April 9, 1980, in favor of Clark for $3,631.45 plus 6 percent per annum interest from September 29, 1979, and 8 percent interest from April 9, 1980, plus costs.
C.I.T. Corporation v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0072. Judgment entered February 14, 1980, awarding C.I.T. $38,749.15 plus interest at rate of 8 percent per annum until paid, plus costs.
Associates Commercial Corporation v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 79-CI-09609. Judgment entered March 10, 1980, awarding Associates $129,933.27, plus interest at rate of 8 percent per annum, plus costs.
Cummins Diesel Sales of Louisville, Inc. v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0445. Judgment entered April 10, 1980, awarding Cummins $1,578.30 plus interest at rate of 8 percent from April 29, 1980, until paid, plus costs.

R-13). Additional legal proceedings were pending against Respondent on the date of the hearing (Exhs. R-1, R-2A-3C, R-4, R-5, R-6). 7/

According to Mr. Avent, Respondent showed a taxable income during 1977. In 1977, the business was in good condition and made a "good amount of money." Accordingly, Respondent purchased additional mining equipment in 1978 (Tr. 94). It appears that Respondent's financial decline was attributable to the costs of reclamation, increasing costs for supplies, and the declining market price of coal (Tr. 14-15, 95).

By December 31, 1979, Respondent had total assets in the amount of $209,270, of which $120,908 had been assigned to Rogers Oil Company as of the date of the hearing, and of which the equipment represented by a book value of $86,182 had been mortgaged for approximately $126,000, as of the date of the hearing. Total current liabililties were listed at $1,181,753. Respondent showed $296,531 in retained earnings on its 1978 tax return, a figure which had dropped to a minus $901,369 as of December 31, 1979, a net change of minus $1,197,900.

In view of the foregoing, it is found that the assessment of civil penalties in the amounts proposed by the Office of Assessments will adversely affect Respondent's ability to remain in business or to re-establish itself in such business.

7/ The pending actions are identified as follows:

Ford Motor Credit Company v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 79-CI-11200. Dismissed in circuit court, appealed to Kentucky Court of Appeals. Action seeks $304,541.30 claimed due in account, plus $10,000 attorney's fees, plus 8 percent interest from July 20, 1980, plus costs.

Kentucky Machinery, Inc. v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 80-CI-01885. Action seeks $11,991.76 plus interest at the rate of 1-1/2 percent per month from January 16, 1980, until date of judgment and 8 percent per annum thereafter, plus costs.

Brandeis Machinery and Supply Corporation v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 79-CI-06950. Action seeks following sums claimed due on account plus costs:

1. $253,211.70 plus interest at rate of 8 percent per annum from September 27, 1979, until date of judgment and 8 percent thereafter.
2. $127,837.67 plus interest at rate of 1-1/2 percent per month from January 9, 1979, until date of judgment and at the rate of 8 percent per annum thereafter until paid.
3. $8,488.25 plus interest at rate of 1-1/2 percent per month from July 9, 1979, until date of judgment and at rate of 8 percent per annum thereafter.

Progressive Insurance Company, Inc. v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0580. Action seeks $41,047.67 claimed due for insurance and bonds, plus costs and attorney's fees.

In re Blackjack Coal Company, Inc. and Garland W. McWhorter, Case No. 9-CA-14343 (NLRB, Region 9).

VI. Conclusions of Law

1. Blackjack Coal Company, Inc., and its No. 1 and No. 3 Surface Mines have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act at all times relevant to these proceedings.

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

3. All of the violations charged are found to have occurred as alleged.

4. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Respondent submitted a memorandum and proposed findings of fact and conclusions of law. Petitioner submitted a recommendation regarding the assessment of civil penalties. Such filings, 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 these cases.

VIII. Penalties Assessed

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

A. Docket No. BARB 78-705-P

Citation/Order No.	Date	30 C.F.R. Standard	Penalty
8-0016	1/11/78	77.1303(d)	$ 75
		77.1301(c)(2)	50
123413	4/11/78	77.1605(b)	50
123414	4/11/78	77.1605(b)	50
123415	4/11/78	77.410	10
123416	4/11/78	77.1713(c)	5
123417	4/11/78	77.1102	5
123418	4/11/78	77.410	10
123419	4/11/78	77.410	10
123420	4/11/78	77.410	10
123421	4/11/78	77.410	10
123422	4/11/78	77.1713(c)	5
123423	4/11/78	77.1605(a)	5

B. Docket No. BARB 79-185-P

Citation No.	Date	30 C.F.R. Standard	Penalty
144085	8/15/78	77.410	$ 10
144086	8/15/78	77.1104	15

C. Docket No. BARB 79-270-P

Citation No.	Date	30 C.F.R. Standard	Penalty
144087	8/15/78	77.1301(c)(5)	$ 50

D. Docket No. KENT 79-60

Citation No.	Date	30 C.F.R. Standard	Penalty
142473	12/4/78	77.410	$ 10
142474	12/4/78	77.1109(c)(1)	5
142475	12/4/78	77.1102	5
142476	12/4/78	77.1301(c)(5)	50

E. Docket No. KENT 79-204

Citation No.	Date	30 C.F.R. Standard	Penalty
737401	2/5/79	77.1605(b)	$ 25
737402	2/5/79	77.410	10
737403	2/6/79	77.1110	5
737404	2/6/79	77.1606(c)	5
		Total	$485

ORDER

Respondent is ORDERED to pay civil penalties in the total amount of $485 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

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

Larry Cleveland, Esq., P.O. Box 595, 314 Wilkinson Street, Frankfort, KY 40602 (Certified Mail)

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 2 0 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. WILK 79-116-P
Petitioner	:	A/O No. 36-05593-03001-R
v.	:	
	:	No. 7 Drift Mine
HERB COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Warren Vogel, Esq., Thomas B. Rutter, Ltd., Philadelphia, Pennsylvania, for Respondent.

Before: Judge Cook

I. Procedural Background

On February 22, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act). The petition alleges one violation of section 103(a) of the 1977 Mine Act as set forth in a citation issued pursuant to section 104(a) of the 1977 Mine Act. An answer was filed by Herb Coal Company (Respondent) on March 28, 1979.

On July 20, 1979, Respondent filed a request to stay the proceedings pending final resolution of an action pending against Respondent in the Federal courts. On August 1, 1979, Petitioner filed a motion to deny Respondent's request for stay of proceedings stating that the Federal court proceedings against Respondent had been concluded. Attached thereto was a copy of an order entered in the case of Marshall v. Herb Coal Company, Civil Action No. 79-313 (E.D. Pa., filed July 18, 1979), that permanently enjoined Respondent:

> [F]rom denying authorized representatives of the Secretary of Labor entry to, upon, or through [Respondent's] mine; from refusing to permit inspection of said mine;

> from interfering with, hindering, or delaying the Secretary, or his authorized representatives in carrying out the provisions of the Federal Mine Safety and Health Act of 1977 * * * .

In addition, the order denied Respondent's motion for a stay pending appeal. Accordingly, on September 7, 1979, Respondent's request for a stay was denied.

On March 7, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on May 29, 1980, in Harrisburg, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating. Respondent made an oral motion to dismiss at the close of Petitioner's case-in-chief. The motion was denied.

After the presentation of the evidence, a schedule for the submission of post-trial briefs was agreed upon. Petitioner and Respondent filed briefs on July 17, 1980, and August 1, 1980, respectively. Neither party filed a reply brief.

II. Violation Charged

Citation No.	Date	Section
225011	9/21/78	103(a)

III. Witnesses and Exhibits

A. Witnesses

Petitioner called as its witness Federal mine inspector Albert F. Zegley.

Respondent called as its witness Dale Herb, its proprietor.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a copy of an order entered in Marshall v. Herb Coal Co., Civil Action No. 79-313 (E.D. Pa., filed July 18, 1979), granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment.

M-2 is a copy of the judgment order in Marshall v. Herb Coal Co., No. 79-2152 (3rd Cir., filed February 22, 1980).

M-3 is a copy of 104(a) Citation No. 225011, issued on September 21, 1978, citing Respondent for a violation of section 103(a) of the 1977 Mine Act.

M-4 is a copy of 104(b) Order No. 225012, issued to Respondent for its failure to abate M-3.

M-5 is a copy of a controller information report prepared by the Directorate of Assessments containing information as to Respondent's size.

M-6 is a computer printout prepared by the Directorate of Assessments listing Respondent's history of previous violations for the time period beginning September 29, 1976, and ending September 28, 1978.

M-7 is a copy of a memorandum dated April 28, 1980.

M-8 is a copy of a memorandum dated August 6, 1979.

2. Respondent introduced the following exhibit in evidence:

R-1 is a copy of Dale Herb's 1978 Federal income tax return.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of section 103(a) of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Herb Coal Company operates the No. 7 Drift Mine under lease from the State of Pennsylvania, Schuylkill County (Tr. 7).

2. Herb Coal Company and its No. 7 Drift Mine are subject to the jurisdiction of the 1977 Mine Act (Tr. 7).

3. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding (Tr. 7).

B. Occurrence of Violation

Federal mine inspector Albert F. Zegley arrived at Respondent's No. 7 Drift Mine at approximately 8:45 a.m. on September 21, 1978, to conduct a regular health and safety inspection of the mine (Tr. 13-14). 1/ Inspector

1/ In September of 1978, only three individuals worked at the mine. A paid hoisting engineer and Mr. Herb appear to have been the only individuals

Zegley apprised Mr. Dale Herb, Respondent's proprietor, as to the purpose of his visit. Mr. Herb thereupon inquired as to whether Inspector Zegley had a search warrant, and apprised the inspector that, absent a search warrant, he would be denied entry to the mine. Entry was denied on this basis (Tr. 14-15, 57). Accordingly, at approximately 9:00 a.m., Inspector Zegley issued Citation No. 225011 citing Respondent for a violation of section 103(a) of the 1977 Mine Act. The citation states that "[o]n [September 21, 1978] Dale Herb, owner and mine foreman, refused to allow Albert F. Zegley, an authorized representative of the Secretary, entry into the No. 7 Drift Mine for the purpose of conducting an inspection of the mine pursuant to section 103(a) of the Act. Mr. Herb stated that the Federal inspector could not enter his mine to conduct any inspection without a search warrant. Mr. Herb was advised that a search warrant was not necessary" (Exh. M-3).

Section 103(a) of the 1977 Mine Act provides, in part, that: "For the purpose of making any inspection or investigation under this Act, the Secretary, * * * with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary * * *, shall have a right of entry to, upon, or through any coal or other mine."

Federal courts addressing the issue have ruled that a search warrant is not required in order to gain entry to a mine for the purpose of conducting health and safety inspections pursuant to the 1977 Mine Act. See Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980); Marshall v. The Texoline Company, 612 F.2d 935 (5th Cir. 1980); Marshall v. Nolichuckey Sand Company, 606 F.2d 693 (6th Cir. 1979), cert. denied, 100 S. Ct. 1835 (April 21, 1980); Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, 100 S. Ct. 665 (January 7, 1980); Marshall v. Cedar Lake Sand & Gravel Company, Inc., 480 F. Supp. 171 (E.D. Wis. 1979); Marshall v. Donofrio, 465 F. Supp. 838 (E.D. Pa. 1978), aff'd, 605 F.2d 1194 (3rd Cir. 1979), cert. denied, 100 S. Ct. 1067 (February 19, 1980). 2/ In fact, Respondent and its "agents, servants, representatives and all persons in active concert therewith" have been permanently enjoined "from denying authorized representatives of the Secretary of Labor entry to, upon, or through" its mine; "from refusing to permit inspection of said mine; from interfering with, hindering, or delaying the Secretary, or his authorized representatives in carrying out the provisions of" the 1977 Mine Act. Marshall v. Herb Coal Company, Civil Action No. 79-313 (E.D. Pa., filed July 18, 1979), aff'd., No. 79-2152 (3rd Cir., filed February 22, 1980).

---

fn. 1 (continued)
working at the mine on a regular basis, with Mr. Herb working underground and the hoisting engineer working on the surface. On September 21, 1978, Mr. John Frantz, a part-time worker who received no monetary compensation, was working underground with Mr. Herb. Mr. Herb and Mr. Frantz performed reciprocal favors for each other on occasion, thus accounting for Mr. Frantz's part-time activities at the No. 7 Drift Mine (Tr. 67-68).
2/ Two Federal courts considering the issue have reached the opposite conclusion. Marshall v. Wait, No. 78-2345 (9th Cir., filed September 29, 1980); Marshall v. Dewey, 493 F. Supp. 963 (E.D. Wis. 1980).

There is no dispute as to the fact that Inspector Zegley was denied entry to Respondent's No. 7 Drift Mine on September 21, 1978, for the purpose of conducting a health and safety inspection pursuant to the 1977 Mine Act. Accordingly, it is found that the denial of entry, as set forth in Citation No. 225011, occurred, and that such denial of entry was a violation of section 103(a) of the 1977 Mine Act.

C. Negligence of the Operator

In Marshall v. Donofrio, supra, the Secretary of Labor sought to enjoin the defendants from denying his authorized agents access to their coal mine for the purpose of conducting inspections pursuant to the 1977 Mine Act. The mine involved in the Donofrio case was an anthracite mine located in Schuylkill County, Pennsylvania. The Court addressed two issues in determining whether to grant the Secretary of Labor injunctive relief: First, whether the statute covers mines that are totally owned and operated by the same persons, i.e., those mines where the only persons working therein are the owners themselves; and second, whether warrantless inspections conducted pursuant to section 103(a) of the 1977 Mine Act run afoul of the United States Supreme Court's rationale in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), or the restraints imposed on the Federal Government by the Fourth Amendment to the United States Constitution. The United States District Court for the Eastern District of Pennsylvania answered the first question in the affirmative, and answered the second question in the negative in an opinion issued on November 16, 1978.

The District Court opinion reveals that on September 1, 1978, a hearing was conducted on the Secretary of Labor's motion for a preliminary injunction, with all parties represented, at which time the parties argued the legal issues. Following the hearing, the Court determined that it would be inappropriate to grant preliminary injunctive relief. However, the parties were able to stipulate to many of the facts at the hearing and, in view of this, the parties were asked either to stipulate that the hearing be deemed a final hearing on a permanent injunction, or to file cross-motions for summary judgment. The parties agreed to follow the latter course. No hearing was held on the motions for summary judgment because no new contentions were raised by the parties which were not raised when the motion for a preliminary injunction was argued.

The foregoing specifics of the Donofrio case are of significance to the instant case only insofar as they provide a background to study Mr. Herb's state of mind on September 21, 1978, when he denied Inspector Zegley entry to the mine. Mr. Herb, the proprietor of a small anthracite mine 3/ in Schuylkill County, Pennsylvania, attended the September 1, 1978, hearing in

3/ Neither Inspector Zegley nor Mr. Herb affirmatively testified that anthracite is mined at the No. 7 Drift Mine. However, both the tenor of the questions addressed to them and the tenor of their responses thereto indicate that anthracite is mined there.

the Donofrio case. He testified that he recalled hearing the oral argument on whether search warrants were required to conduct inspections, and recalled that Mr. Donofrio's position was that warrants were required (Tr. 59). He also recalled that the U.S. District Judge had denied the Secretary of Labor's motion for a preliminary injunction (Tr. 58), and knew, as of September 21, 1978, that no decision had been issued in the Donofrio case (Tr. 58).

Additionally, Mr. Herb's testimony makes reference to an organization amongst miners in the Pottsville, Pennsylvania, area known as the Independent Miners and Associates, an organization whose membership consists of owner-operators of large and small mines, mostly anthracite (Tr. 58, 60). According to Mr. Herb, during the summer and early fall of 1978, discussions were held amongst the owner-operators as to the need for search warrants. He testified that "we" received a memorandum in the mail in the form of a letter stating that it might be advantageous to ask the mine inspector for a search warrant (Tr. 58). Mr. Herb's testimony does not identify the drafters of this memorandum, and he did not know precisely why its drafters reached the conclusion stated therein. But it appears from his testimony that he believed the Donofrio case was somehow involved (Tr. 58-59).

When Mr. Herb stated to the inspector that he would have to produce a search warrant prior to being granted entry to the mine, the inspector produced and read from a two page memorandum addressing the Barlow's decision, and attempted to persuade Mr. Herb that, under the Barlow's decision, a search warrant was not required for an inspection conducted by the Mine Safety and Health Administration (Tr. 14, 22-23). Mr. Herb again stated that without a search warrant, the inspector would not be permitted to enter the mine (Tr. 14).

The foregoing facts and circumstances indicate that Mr. Herb's decision was based upon a bona fide uncertainty as to whether Inspector Zegley was authorized under the law to conduct an inspection of the No. 7 Drift Mine without a search warrant. The fact that the inspector attempted to persuade Mr. Herb that the Barlow's decision did not require a warrant for a mine safety and health inspection is not persuasive proof that the denial of entry was accompanied by a culpable state of mind. It must be remembered that Mr. Herb had heard a Federal Judge deny the Secretary of Labor's motion for a preliminary injunction in the Donofrio case, and that Mr. Herb knew that no final decision had been entered in that case.

Accordingly, it is found that Petitioner has failed to establish operator negligence by a preponderance of the evidence. 4/

4/ It appears that on September 21, 1978, Mr. Herb expressed his dissatisfaction with the civil penalty program (Tr. 16). Mr. Herb testified that he undoubtedly told the inspector that the fines were really hurting the small operators and that he didn't believe it was fair for small operators to have to pay fines for violations (Tr. 61-62). Petitioner points to these facts and argues that the denial of entry was "based on a calculated decision that

D. Gravity of the Violation

The inspector was unable to provide precise testimony as relates to the gravity of the specific denial of entry at issue in this case because, not having gained access to the mine, he did not know what conditions existed there (Tr. 17).

I find that the denial of entry was a serious violation of the 1977 Mine Act. One of the principal purposes of inspections conducted pursuant to the provisions of the 1977 Mine Act is to detect violations of the mandatory health and safety standards and order their abatement so as to remove the associated hazards from the miners' work environment, and to determine whether an imminent danger exists. Absent entry to the mine, these salutary and Congressionally mandated objectives cannot be achieved.

Accordingly, it is found that the violation was serious.

E. Good Faith in Attempting Rapid Abatement

Inspector Zegley testified that Mr. Herb and another individual came out of the mine at approximately 9:40 a.m. on September 21, 1978, in order to obtain some timber. The inspector asked Mr. Herb whether he would permit entry into the mine, and Mr. Herb restated his position that entry would be denied in the absence of a search warrant (Tr. 15). Accordingly, at approximately 9:45 a.m., Inspector Zegley issued Order No. 255012 pursuant to section 104(b) of the 1977 Mine Act based upon Respondent's failure to abate the violation cited in Citation No. 225011. The order of withdrawal states that "Dale Herb, owner and mine foreman, continued to deny Albert Zegley, an authorized representative of the Secretary, the right of entry into the No. 7 Drift Mine for the purpose of conducting an inspection of the mine in accordance with the requirements of section 103(a) of the [1977 Mine Act], on [September 21, 1978], after the expiration of the reasonable time allowed for Mr. Herb to comply" (Exh. M-4). The inspector's testimony reveals that a brief conversation ensued following which Mr. Herb turned to his fellow worker and stated, "Well, I guess we are done for the day" (Tr. 15).

It appears that the above-mentioned proceeding in the United States District Court for the Eastern District of Pennsylvania was initiated

---

fn. 4 (continued)
it would be cheaper to operate in violation of the law because of the mandatory fines aspect of the [1977 Mine] Act's enforcement scheme" (Petitioner's Post-trial Brief, p. 5). The record does not support the assertion advanced by Petitioner. It may well be that the civil penalty program leaves a bitter taste in the mouths of many small operators who perceive it as unfair and burdensome. It cannot be said that such perceptions would be at odds with human nature. But the fact remains that Respondent has proved that Mr. Herb's state of mind on September 21, 1978, was influenced by the controversy then surrounding the warrantless inspection issue. Petitioner has not produced probative evidence to counter this proof. (See also, Tr. 63.)

against Respondent shortly after the September 21, 1978, denial of entry. The inspector testified that he returned to the No. 7 Drift Mine on a social visit after September 21, 1978, to inquire as to the health of the hoisting engineer's son who had been injured in a motorcycle accident. At that time, Mr. Herb apprised the inspector that he did not intend to work the mine until the litigation had been concluded (Tr. 50-52). However, the testimony of Mr. Herb points to only one 3-month period, from July through September of 1979, during which mining was not conducted. Additionally, Mr. Herb testified that mining was conducted during the winter of 1979-1980, and that mining was being conducted as of the date of the hearing (Tr. 79).

On July 18, 1979, the District Court entered the above-mentioned injunction, and denied the defendant's motion for a stay pending appeal (Exh. M-1). On July 24, 1979, two Federal mine inspectors visited the No. 7 Drift Mine. The results of that visit are set forth in a memorandum dated August 6, 1979, from Federal mine inspector Charles C. Klinger to John B. Shutack, District Manager for Coal Mine Safety and Health District 1. The memorandum states as follows:

> On Tuesday, July 24, 1979, James R. Laird, coal mine inspection supervisor, and the writer, Charles C. Klinger, coal mine inspector, went to the subject mine to make a regular Safety and Health inspection following information provided by Attorney Barbara Kaufmann on July 23, 1979, concerning a Federal Court Order enjoining said mine operator from denying entry to the mine to authorized representatives of the Secretary. Dale Herb, owner and operator of the mine, was on the surface at the mine when we arrived there at about 9 a.m. We advised Mr. Herb of our reason for being there. Mr. Herb replied that he was aware of the court ruling and then he informed us that he was not working the mine because he did not have a hoisting engineer and that he was there only to pump water from the mine. He also stated that if we wanted to go into the mine to conduct any inspection we could do so because he did not intend to be in contempt; however, inasmuch as there was no hoisting engineer available and the mine was not working we could not make the inspection. Mr. Herb also stated that he did not plan to work the mine until all pending litigation with other small operators was resolved; however, he also said that if he changed his mind and decided to start working again he would telephone the Schuylkill Haven office before doing so. We departed the mine property about 10:30 a.m.

(Exh. M-8).

Inspector Zegley testified that the actions of Mr. Herb, as set forth in the August 6, 1979, memorandum, did not constitute a denial of entry to the mine (Tr. 39).

On February 22, 1980, the United States Court of Appeals for the Third Circuit affirmed the judgment entered against Respondent by the District Court (Exh. M-2). On April 28, 1980, Federal mine inspectors Michael C. Scheib and Charles C. Klinger attempted to inspect the No. 7 Drift Mine, but were denied entry by Mrs. Dorothy Herb, the wife of Dale Herb. The visit is described in a memorandum dated April 28, 1980, from the inspectors to John B. Shutack. The memorandum states as follows:

> On Monday April 28, 1980, as a result of Court Order, Civil Action No. 79-313, we, the writers, arrived at the subject mine about 9:30 a.m. to conduct an inspection of the mine. Upon arrival, Dorothy Herb approached the vehicle and before we had an opportunity to get out she yelled, "Don't bother getting out; get the hell out of here." Mr. Scheib informed her that we had a court order to conduct an inspection. Attempting to hand her a copy, she said, "I don't want that damn paper; take it and get the hell out of here." Scheib then stated, "We are required to give you a copy of the court order." At this time Scheib placed a copy of the court order on the ground. She then replied (yelling), "This is our property; don't let that damn paper lay there; if you don't take the damn paper, I'll shove it under your door." (Meaning at Scheib's residence.) She also asked, "Do you have your tape recorder turned on?" Scheib answered, "We have no need for a recorder." She then replied, "Well, I have mine, and I also have a witness." However, we did not observe any other person in the immediate area. She again stated (yelling), "Now get the hell out of here and take your damn paper with you." At this time we departed from the mine property, leaving the court order lay on the ground.
>
> Entry to this mine has been denied to MSHA personnel since September 21, 1978.

(Exh. M-7). 5/

The evidence presented reveals that Respondent was actively litigating the warrantless search issue in the Federal courts subsequent to September 21, 1978. July 18, 1979, is deemed the significant date insofar as those proceedings affect the issue of good faith in the instant case because, on that date, the United States District Court for the Eastern District of Pennsylvania issued its injunction and denied the motion for a stay pending appeal. On February 22, 1980, the United States Court of Appeals for the Third Circuit affirmed the judgment. Accordingly, as of July 18, 1979, Respondent was faced with a Federal Court order requiring it to permit warrantless inspections of its mine.

5/ For approximately 1 to 1-1/2 years prior to the hearing, Mr. and Mrs. Herb were the only individuals working at the mine. Mr. Herb worked underground and Mrs. Herb worked on the surface as a hoist operator. (See Tr. 67.)

I do not consider that the actions of the Respondent as relates to the violation at issue in this case constitute a lack of good faith in attempting abatement of the violation; since the Respondent did, as soon as the injunction was issued by the Court, offer to permit the inspectors to carry out an inspection. Until the injunction was issued, the Respondent apparently had a good faith belief that he had a right to object to a warrantless inspection. In this regard, it should be noted that the observation set forth in the last sentence of Exhibit M-7 is in error because the events of July 24, 1979, as set forth in Exhibit M-8, did not constitute a denial of entry to the mine.

The events which occurred in April of 1980, at the time that Mrs. Herb refused to permit an inspection should actually be treated as an event separate from the violation charged in this case. In the event MSHA would desire to take action as to that April 1980, incident, it could issue a separate citation.

It should be kept in mind that the Respondent's proprietor, Mr. Herb, did state during the hearing in this case that he would now admit the inspectors if they wanted to carry out an inspection and that he actually invited certain MSHA officials to visit his mine in March of 1980 (Tr. 76-79).

F. History of Previous Violations

Respondent has no history of previous violations for which assessments have been paid between September 29, 1976, and September 21, 1978 (Exh. M-6). Additionally, no evidence was presented establishing a history of previous violations for which assessments have been paid prior to September 29, 1976. Accordingly, it is found that Respondent has no history of previous violations cognizable in this proceeding. Peggs Run Coal Company, Inc., 5 IBMA 144, 148-150, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975).

G. Size of the Operator's Business

The evidence submitted by Petitioner reveals that Respondent operates one mine. Respondent produced 480 tons of coal in 1977, 1,688 tons of coal in 1978, and zero tons of coal in 1979 (Exh. M-5). Accordingly, it is found that Respondent is an extremely small operator.

H. Effect of a Civil Penalty on Respondent's Ability to Continue in Business

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

The Office of Assessments proposed a civil penalty in the amount of $800 for the violation. Respondent contends that a civil penalty assessment will affect its ability to remain in business (Tr. 64-65; Respondent's Post-trial Brief, pp. 2, 4).

The best available evidence indicates that Respondent is a sole proprietorship owned by Dale Herb. Respondent placed in evidence a copy of Mr. Herb's 1978 Federal income tax return (Exh. R-1), and Mr. Herb's testimony reveals that he had no occupation other than mining during the 1978 tax year. The tax return reveals that Respondent's gross sales for 1978 amounted to $48,756.68. Total deductions in the amount of $45,202.66 were claimed, yielding a net profit in the amount of $3,554.02. Accordingly, Mr. Herb's total income for 1978, as reflected on the tax return, was $3,554.02.

However, it is significant to note that Mr. Herb was in the process of purchasing a home of undisclosed value as of the date of the hearing, but that he was not purchasing a home during 1978 (Tr. 63-64). It appears that he owned more than one automobile in 1978, and, to the best of his recollection, was paying on them in 1978 (Tr. 65). The record does not disclose the makes, models or years of these automobiles, or whether they were purchased new or used. He further testified that his household consists of six members, i.e., Mr. and Mrs. Herb and four others (Tr. 65). There is no indication, however, as to how many, if any, of the four are dependent upon Mr. Herb for financial support.

The fact that Mr. Herb was purchasing a home in 1980, but not in 1978, strongly implies that his financial condition improved after 1978. Accordingly, it must be concluded that the 1978 tax return does not accurately reflect Mr. Herb's current financial condition. Accordingly, I find that Respondent has failed to prove that the assessment of a civil penalty in the amount set forth in Paragraph VIII of this decision will affect Respondent's ability to remain in business.

VI. Conclusions of Law

1. Herb Coal Company and its No. 7 Drift Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Albert F. Zegley was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The violation charged in Citation No. 225011 is found to have occurred as alleged.

5. The oral determination made during the hearing denying Respondent's motion to dismiss is AFFIRMED.

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

VII. Proposed Findings of Fact and Conclusions of Law

Both parties filed post trial briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

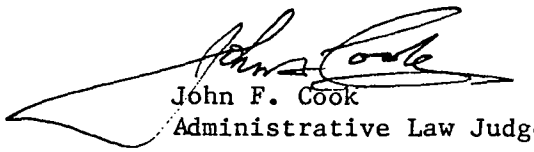
Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	Section	Penalty
225011	9/21/78	103(a)	$100

ORDER

A. The oral determination made during the hearing denying Respondent's motion to dismiss is AFFIRMED.

B. Respondent is ORDERED to pay a civil penalty in the amount of $100 within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

Distribution:

James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Warren Vogel, Esq., Thomas B. Rutter, Ltd., 872 Public Ledger Building, Independence Square, Philadelphia, PA 19106 (Certified Mail)

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

NOV 20 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY ACTION DOCKET NO. WEST 79-397-M ASSESSMENT CONTROL NO. 05-03209-05001
v.	DOCKET NO. DENV 79-483-PM ASSESSMENT CONTROL NO. 05-02994-05001
RALPH FOSTER AND SONS, Respondent.	MINE: ERDA C G27 and MINERAL CHANNEL NO. 12

APPEARANCES:

Ann M. Noble, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado
for Petitioner

Robert Foster, appearing pro se, Grand Junction, Colorado
for Respondent

Before: Judge John J. Morris

DECISION

In these civil penalty proceedings Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent violated two safety regulations promulgated under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Grand Junction, Colorado on May 19, 1980.

The parties did not file post trial briefs.

ISSUES

The following issues were raised by respondent:

I. Whether the Federal Mine Safety and Health Act violates Article I, Section 8(a) of the United States Constitution.

II. Whether respondent is entitled to a jury trial.

III. Whether respondent is subject to the Act.

IV. Whether respondent operated the mine in this contest, namely ERDA C G27.

V. Whether respondent violated the regulations.

DISCUSSION

The jurisdictional issues must first be resolved before the merits of the cases can be discussed.

I

Respondent contends that the Act is illegal in establishing the Federal Mine Safety and Health Review Commission. Respondent asserts the Commission is part of the Executive Branch and therefore it is not inferior to the Supreme Court. Respondent concludes that the authority of the Commission is in violation of Article I § 8 of the United States Constitution.

Respondent's arguments lack merit. A Review Commission ruling under the Act can be reviewed by the United States Courts of Appeals, 30 U.S.C. 816. The Supreme Court has authority over the various United States Court of Appeals.

"With the right of administrative and judicial review carefully preserved, the mere fact that the initial adjudicative function has been conferred upon the the Commission does not bring this legislation into conflict with the principle of the separation of powers." McLean Trucking Co. V. OSHRC 503 F.2d 8 (4th Cir. 1974).

II

Respondent's claim that for various reasons he is entitled to a jury trial was ruled to be contrary to his views in the factually similar case of Atlas Roofing Company v. OSHRC 430 U.S. 442, 97 S. Ct, 1261 (1977).

III

The facts show that the product of respondent's mine, a yellow cake of uranium, can be used for atomic energy throughout the United States (Tr. 12, 13).

Respondent is subject to the Act if the products of the mine enter Commerce or affect Commerce. 30 U.S.C. 803.

The above stated facts constitute sufficient evidence to establish that respondent is subject to the Act. Wickard v. Filburn, 317 U.S. 111 (1942); Marshall v. Kraznack, 604, F 2d 231 (3rd Cir. 1979).

IV

The final two issues require a review of the evidence in the cases.

WEST 79-397-M

In Citation 326566 respondent is charged with violating 30 CFR 57.15-4. 1/

1/ 57.15-4 Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

The evidence is conflicting and I find the following facts to be credible.

1. The inspector observed two men without safety glasses drilling with a jackleg drill at a mine face (Tr. 8-10).

2. Drilling without safety glasses presents numerous hazards (Tr. 11).

3. The ERDA C G27 mine has not operated since 1973 (Tr. 38).

The inspector identified the mine as ERDA C G27 and the citation described it by that name. Respondent states that ERDA C G27 has not operated since 1973. I find the respondent's testimony more credible. He has been mining in this area for forty years. In addition, there is nothing to support the inspector's testimony. Robert Foster's testimony and his sworn exhibit in October 1979 raise this same defense (R-2).

Although a violation occurred, MSHA failed to prove the mine involved in the violation. Citation 326566 should be vacated.

DENV 79-483-PM
Citation 326433

This citation alleges a violation of 30 CFR 57.14-1. 2/ The facts are uncontroverted.

1. At the time of the inspection at Mineral Channel No. 12, a uranium mine, no persons were working underground (Tr. 13).

2. The V belt drive pinch point was unguarded and exposed (Tr. 14).

3. Shortly after respondent closed this mine the inspector arrived; respondent reported the mine was closed (Tr. 25, 36).

4. Respondent had no intention of reopening the mine without remedying the defective condition. (Tr. 25).

MSHA offered no evidence that this mine was operating. This fact in combination with respondent's evidence establishes that there was no exposure to any workers. Citation 326433 should be vacated.

CONCLUSIONS OF LAW

For the reasons stated I conclude that MSHA failed to prove a violation of the above standards.

ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby enter the following order:

2/ GENERAL -- SURFACE AND UNDERGROUND
57.14-1 Mandatory. 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.

In WEST 79-397-M:

Citation 326566 and all proposed penalties therefor are vacated.

In DENV 79-483-PM:

Citation 326433 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

Ann M. Noble, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

Mr. Robert G. Foster, Ralph Foster and Sons, 2950 A 1/2 Road, Grand Junction, Colorado 81501

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6225

NOV 21 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 80-25-M
	:	A.O. No. 36-00125-05006 F
v.	:	
	:	Mine: Keystone Portland Cement Quarry and Plant
KEYSTONE PORTLAND CEMENT COMPANY, Respondent	:	

DECISION

Appearances: James Swain, Esquire, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Mark S. Refowich, Esq., Fishbone and Refowich, Easton, Pennsylvania, for Respondent.

Before: Judge Edwin S. Bernstein

On March 5, 1979, Barry Ettleman, an electrician apprentice, was electrocuted while working at an electrical panel at Respondent's plant. After an investigation, Petitioner alleged that Respondent violated the mandatory safety standard at 30 C.F.R. § 56.12-16. 1/ Respondent admitted that it violated the standard, and stipulated to four of the six criteria to be applied in determining the amount of a civil penalty under Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act). A hearing was held on September 30, 1980, in Philadelphia, Pennsylvania, to determine the amount of the penalty to be assessed. 2/

1/ The standard provides:
"Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel."

2/ Petitioner's Assessment Office proposed a penalty of $8,000. Prior to the hearing, counsel for the parties proposed to settle this case for $4,000. I rejected the settlement as being too low, based upon the facts presented to me by counsel at a prehearing conference.

Findings of Fact

The parties stipulated, and I find:

1. Respondent owns and operates a cement quarry and plant in Bath, Northampton County, Pennsylvania.

2. Respondent's facility comes within the jurisdiction of the Act, and I have jurisdiction over this proceeding.

3. Respondent violated 30 C.F.R. § 56.12-16 in connection with the death of Barry Ettleman on March 5, 1979.

4. Respondent is a medium-sized operator with approximately 328,485 man-hours of work per year.

5. Between March 8, 1977, and March 7, 1979, Respondent was cited for 36 violations under the Act, including one other violation of 30 C.F.R. § 56.12-16.

6. Respondent demonstrated good faith in abating the violation by stopping production for approximately five and one half hours while the relay circuit that caused Mr. Ettleman's death was removed and rewired.

7. The assessment of a civil penalty of $8,000 (the amount originally proposed by Petitioner), or even $10,000 (the maximum penalty allowed in this type of proceeding under Section 110(a) of the Act), will not affect Respondent's ability to remain in business.

Mr. Marvin H. Bock, an electrical inspector for MSHA, and Robert L. Rough, an MSHA metal-nonmetal inspector, testified for Petitioner. Respondent did not present any witnesses on its behalf. However, acting under the authority of Section 113(e) of the Act 3/ and Rule 614 of the Federal Rules of Evidence, 4/ I called John Flemscich, an electrician and the sole eyewitness to the fatality, to testify.

3/ Section 113(e) states in part that the Commission's judges have the power to "compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects * * *."

4/ Rule 614(a) of the Federal Rules of Evidence provides: "The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." Rule 614(b) provides that the court "may interrogate witnesses, whether called by itself or by a party."

Inspector Bock testified that he had been with MSHA for 22 months as of the date of the hearing, and that previously he spent 24 or 25 years doing electrical work for Bethlehem Mines Corporation. He has been an electrician or electrician trainee since 1943. At the time of the accident, he was an inspector trainee with MSHA, having been with the agency less than eight months.

Mr. Bock explained that on March 7, 1979, he and MSHA inspector Robert L. Rough visited Respondent's plant to investigate a fatality which occurred the previous night. The inspectors were taken by a plant official to the site of the palletizing machine where Mr. Ettleman had been electrocuted. Mr. Bock discovered a relay in the panel which was not shown on the company's electrical diagrams and was, in his opinion, added after the panel was installed. This was the part of the panel which electrocuted Mr. Ettleman. None of the people working at the plant at the time were aware of the relay's purpose. The relay was not controlled by the cutoff switch on the side of the panel, but by a power control located two floors above. Mr. Bock concluded that the relay was not original equipment, but may have been added by outside contractors. This would have been done at least 12 years before the accident. The plans for the control panel were located in a pocket in the panel's door, but they were old, hard to read, and did not contain any indication that the relay existed. Mr. Bock thus referred to the relay as a "sneak relay," one that no one was aware of.

He stated that a handle on the cabinet doors contained a lock. Therefore, nobody was exposed to any danger unless he opened the cabinet with a key.

When asked if there was any way that the operator could have or should have known of the condition, Mr. Bock replied: "There is no way that it could have been known, because it wasn't on the print. It should have been put on the print by somebody."

Robert L. Rough, an MSHA metal-nonmetal inspector, accompanied Mr. Bock on March 7, 1979, and issued Citation No. 303262 to Respondent. 5/ Mr. Rough did not personally examine the equipment, but after talking to Respondent's

5/ The citation was introduced into evidence as Petitioner's Exhibit A. It reads as follows:

"The main 440 volt power and control disconnect switch for the palletizing machinery in the packhouse was turned off, but not locked out or tagged while men were working in this power and control cabinet. Subject switch was out of men's view while working in the cabinet because of the open cabinet doors. There was another source of 440 volt power entering the control panel that was still energized while men were working on the control panel. There were no other preventative measures taken to prevent this equipment from becoming energized. The source of this other voltage was remotely located up two (2) flights of stairs, above the location of the panel the men were working at."

representatives, he concluded that they "weren't aware of this sneak source. They knew [about] it when they talked to their retired electrician." The "retired electrician" referred to by Mr. Rough was Mr. Michael Kapustic.

Mr. Rough explained that 30 C.F.R. § 56.12-16 was violated since the switch controlling the power to the relay was not locked out. He added that although this is a fairly common violation, it often results in fatal injuries. It takes approximately 40 volts of power to cause a man's heart to stop; the voltage going through the relay which caused Mr. Ettleman's death was 440 volts.

John Flemscich was the final witness, and the only one who was present when the accident occurred. He is an "Electrician A" who has been employed by Respondent for approximately seven years. He described how he and Mr. Ettleman went to the palletizing machine's switchbox on the day in question to remedy a malfunction. The switchbox is located about nine feet off the ground. Mr. Ettleman was standing on a platform about three feet high and reaching up into the control panel while Mr. Flemscich worked down below. When Mr. Flemscich heard Mr. Ettleman scream, he knew immediately what had happened. His first impulse was to turn off the power switch next to the box, but he saw that it was already in the "off" position. When Mr. Ettleman fell away from the box, Mr. Flemscich called for an ambulance.

Conclusions of Law

It is not disputed that Respondent violated 30 C.F.R. § 56.12-16. It is also undisputed that Respondent was a medium-sized operator which was cited for 36 violations of the Act during the two-year period preceding the accident. The parties agreed that Respondent demonstrated good faith in abating this violation, and that the assessment of a civil penalty will not affect Respondent's ability to remain in business.

Although the parties stated that MSHA initially found Respondent to be grossly negligent in connection with the fatality, the evidence before me does not support such a finding. At the hearing, counsel for MSHA stated that Respondent "should have known the condition existed in the exercise of ordinary care * * *." Respondent conceded that it was "guilty of ordinary negligence and not gross negligence." The testimony of all the witnesses supported that conclusion. Respondent was negligent in locating the relay in the panel where it could cause an accident, in not designating the relay on the plans, and in not having a cutoff switch any nearer than two building floors away.

The gravity of the violation was great, since an accident would almost certainly result in a fatality. This is despite the fact that the switch was high off the ground and protected by cabinet doors so only a few electrical personnel could come into contact with it.

Upon consideration of all the foregoing criteria, I assess a penalty of $4,500. 6/

ORDER

Respondent is ORDERED to pay $4,500 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

James Swain, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mark S. Refowich, Esq., Fishbone and Refowich, 505 Easton National Bank and Trust Company Building, P.O. Box 1099, Easton, PA 18042 (Certified Mail)

6/ The assessment of a civil penalty of $4,500 is entirely consistent with my earlier refusal to approve a settlement of $4,000, as recommended by the parties, or in any amount less than the original $8,000 proposal. The refusal to accept a lower amount was based upon the information presented to me by counsel for the parties. Prior to hearing, Respondent's counsel stated that a "master electrician" stood by and watched for about 20 minutes until Mr. Ettleman touched the relay and was electrocuted. Also, at the prehearing conference, counsel failed to indicate that none of Respondent's personnel knew of the relay. When I asked counsel to otherwise justify the settlement, Mr. Refowich replied: "What can I say?"

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

NOV 24 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-171-M A/O NO. 04-04256-05001
v.	)	
ELDEN AND SANDRA WAIT,	)	DOCKET NO. WEST 79-172-M A/O NO. 04-04256-05002
Respondent.	)	MINE: GREEN DECORATIVE ROCK

DECISION AND ORDER

APPEARANCES:

Alan M. Raznick, Esq., Office of the Solicitor, United States Department of of Labor, San Francisco, California
for the Petitioner

Elden L. Wait, RFD Box 8, Plymouth, California
for the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF CASE

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 (now called a proposal for a penalty, 29 CFR 2700.27) was filed June 11, 1979 alleging nine violations of mandatory safety standards contained in 30 CFR Part 56. The violations were charged in citations issued to Respondent following an inspection of a mine in Amador County, California owned and operated by the Respondent.

Pursuant to notice, a hearing on the merits was held in Sacramento, California on September 9, 1980. Federal Mine Inspector Edward Knepper testified on behalf of the Petitioner. Elden Wait, owner and operator of the mine involved herein, testified on his own behalf.

Subsequent to the hearing in this case and prior to the submission of post hearing briefs, the Respondent moved that the nine citations be dismissed based upon a recent decision of the Ninth Circuit Court of Appeals. Ray Marshall, Secretary of Labor, United States Department of Labor v. Elden Wait, Trading and d/b/a Elden Wait, Greenstone Quarry No. 78-2345. The Petitioner has indicated that in light of the above decision of the Ninth Circuit Court of Appeals, he does not object to the Respondent's motion for dismissal.

In light of the foregoing, the above captioned cases are hereby DISMISSED.

Virgil E. Vail
Administrative Law Judge

Distribution:

Alan M. Raznick, Esq., Office of the Solicitor, United States Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102

Mr. Elden L. Wait, RFD Box 8, Plymouth, California 95669

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6230

NOV 24 1980

JACKIE RAY HAMMONDS,	:	Complaint of Discrimination
Applicant	:	
v.	:	Docket No. KENT 79-345-D
	:	
NATIONAL MINES,	:	No. 33 Mine
Respondent	:	

FINAL ORDER

On October 31, 1980, Applicant filed a Statement of Non-Satisfaction of Order, stating that Respondent has not complied with the decision and order issued on September 15, 1980.

On August 14, 1980, a decision was issued in the subject proceeding holding Respondent in default. On September 15, 1980, a decision was issued, incorporating the allegations of the complaint as findings of fact. The decision issued on September 15, 1980, found that Respondent discriminated against Applicant by suspending Applicant on November 7, 1978, and discharging Applicant on November 9, 1978.

On November 17, 1980, Applicant filed a proposed final order. Respondent has filed no response to the proposed order.

CONSIDERING THE RECORD AS A WHOLE, IT IS HEREBY ORDERED that:

1. Respondent shall offer Applicant, by certified mail, reinstatement in Respondent's employment to the same position, or one equivalent to the position, which he held on November 7, 1978, with the seniority, status, classification, pay and work shift that he would have held and enjoyed had Respondent not terminated his employment as found in the decision of September 15, 1980. Such offer of reinstatement shall specify the time and place at which reinstatement shall be made effective, if accepted by Applicant, and such date shall not be sooner than 7 days nor greater than 10 days from the date the offer is delivered to Applicant. If Applicant accepts reinstatement, Respondent shall provide Applicant with necessary and adequate training or retraining to perform the duties of the position to which he is assigned.

2. Respondent shall pay to Applicant back wages and interest at a rate of 10 percent per annum: (A) in the amount of $32,305.21, which have accrued

from the date of discharge through September 26, 1980; and (B) such additional amounts as have accrued or shall accrue after September 26, 1980, and until Applicant is reinstated or, if Applicant fails to accept the offer of reinstatement provided in paragraph 1, above, until the date Respondent specifies (in the offer of reinstatement) that Applicant may return to work.

3. Respondent is entitled to deduct from back wages due Applicant under paragraph 2, above, any wages which Applicant received from other employment in the period for which back wages have accrued or shall accrue. Unemployment compensation shall not be deductible.

4. Respondent shall pay to Applicant attorney's fees: (A) in the amount of $7,369, which have accrued through September 26, 1980, which amount is hereby found to be reasonable for such period; and (B) such additional attorney's fees reasonably incurred thereafter for, or in connection with, the continued prosecution of proceedings until the satisfaction of this order.

5. Respondent shall pay to Applicant costs and expenses: (A) in the amount of $187.49, which have accrued through September 26, 1980, which amount is hereby found to be reasonable for such period; and (B) such additional costs and expenses reasonably incurred thereafter for, or in connection with, the continued prosecution of proceedings until the satisfaction of this order.

6. Respondent shall expunge from Applicant's employment records all records of and references to the unlawful suspension on November 7, 1978, and the unlawful discharge on November 9, 1978.

7. Respondent shall forthwith post: A copy of the decision of August 14, 1980, a copy of the decision and order of September 15, 1980, and a copy of this order on the mine bulletin board, or at such other conspicuous place where notices are normally posted for employees, at the No. 33 Mine, and keep such copies so posted, unobstructed and protected from the weather for a consecutive period of at least 60 days.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution:

Stephen A. Sanders, Esq., Counsel for Applicant, Appalachian Research and Defense Fund of Kentucky, Inc., P.O. Box 152, Prestonburg, KY 41653 (Certified Mail)

Ted J. Campbell, Esq., Counsel for Respondent, 400 Bank of Lexington Building, 101 East Vine Street, Lexington, KY 40507 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

NOV 25 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GALLAGHER AND BURK, INCORPORATED, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. DENV 79-517-PM A/O No. 04-00113-05001 Mine: Leona Quarry and Mill

APPEARANCES:

Linda Bytof, Esq.,
United States Department of Labor
11071 Federal Building,
450 Golden Gate Avenue, P O Box 36017
San Francisco, California 94102
for the Petitioner,

Joseph D. Ryan, Esq.
Gallagher & Burk, Incorporated
344 High Street
Oakland, California 94601
for the Respondent.

DECISION

Carlson, Judge:

This cause was heard under the Federal Mine Safety and Health Act of 1977, 30 USC § 801 et seq. ("the Act"), upon the Mine Safety and Health Administration's petition for assessment of civil penalties for three violations of mandatory safety standards. Two of the alleged violations involved grounding of explosive magazines; the other a defective horn on a front-end loader.

Neither party elected to file a post-hearing brief, but both made oral arguments at the close of the hearing.

DISCUSSION OF VIOLATIONS AND PENALTIES

Citations 374685 and 374686 - Grounding of Explosive Magazines.

The undisputed evidence shows that respondent maintained two explosives storage magazines near the access road to its quarry. These steel structures, about 6 feet high and 6 feet square, rested on steel skids. In one, respondent stored 450 pounds of dynamite; in the other it stored 250 detonating caps.

Inspector George Costanich examined the magazines on January 2, 1979, and concluded neither was grounded as required by 30 CFR 56.6-20(e), which provides:

> 56.6-20 Mandatory. Magazines shall be: (e) Electrically bonded and grounded if constructed of metal.

Inspector Costanich cited respondent based upon his belief that grounding required that the magazines be connected directly to the earth by a heavy wire attached to a metal rod driven into the earth.[1/] He testified that grounding is necessary to dissipate stray discharges of static electricity, particularly lightning.

It was undisputed that such discharges could ignite the explosives in the magazines, and that the resulting concussion and flying debris could inflict serious injury to employees on the nearby roadway or coming and going from the magazines themselves.

Respondent did not concede that the magazines were ungrounded. Rather, counsel sought to establish through cross-examination and argument that it was enough that the skids were in contact with the ground. Respondent succeeded in showing that the Secretary's inspector lacked any profound expertise in the theory of electrical phenomena. On the other hand, Inspector Costanich did demonstrate extensive practical experience with static grounding practice in storage of explosives. He indicated that wire-and-rod grounding technique was universal in other magazines he had inspected for MSHA, and those he had known while handling explosives as a miner. He supported his view by reference to Bulletin No. 256, "Static Electricity", a safety publication of the United States Department of Labor (ultimately admitted as respondent's exhibit 2) (Tr. 116). At page 7 that publication defines "grounding" as ". . . the connecting of a conductive body to earth by means of a conductive wire." (Emphasis added.) Costanich also relied upon a booklet entitled "Hazard of Electricity", published by

---

1/ Costanich conceded that the magazines were bonded, i.e. that all metal components were connected to each other by conductive materials.

the American Oil Company (respondent's exhibit 3) which defines bonding and grounding thusly at page 37:

> Bonding means connecting two objects together with metal, usually a piece of copper wire. Grounding consists of connecting an object to earth with metal, and again a piece of copper wire is used. The connection to earth is usually made to a ground rod or underground water piping.

Respondent does not challenge the authoritative quality of either source.

I conclude that petitioner's understanding of this standard is correct: that a metal magazine merely resting on the earth is not "grounded." In doing so, I specifically reject respondent's suggestion that the standard is too vague for enforcement. The term "grounded" has a commonly accepted meaning when applied to electrical safety.

In this connection, one further matter deserves mention. Respondent points to this statement in the American Oil booklet at pages 28 and 29 relating to storage structures for flammable liquids:

> Special grounding of steel tanks is not needed for lightning protection. Tanks resting on the earth, or even on concrete rings with piping disconnected, have such low electrical resistance to ground that special grounding is not necessary.

Respondent contends its steel magazines are likewise adequately protected without a wire-and-rod arrangement. The argument is unpersuasive. The language on which respondent relies clearly sets out an exception to ordinary grounding practice. The standard for explosive magazines, by contrast, expressly mandates grounding; and we must assume that that means adherence to common grounding practice. Had the drafters of the standard believed that metal magazines needed no grounding beyond simply resting on the earth, they would not have mentioned grounding at all.

Petitioner initially proposed a penalty of $40.00 in connection with each of these citations. The record shows that respondent is a small operator and has no prior history of violations (Tr. 6; respondent's answers to requests for admissions numbers 15 and 16).[2/] The violations were abated promptly (Tr. 41). The possibility of an accident was relatively remote. Nevertheless, a penalty of $40.00, as proposed in each case, is warranted. Lightning or stray electrical currents could have caused an explosion in either magazine resulting in serious injury or death to several employees (Tr. 35-38). Potential exposure to the hazard was significant because employees were required to inspect the magazines regularly and often travelled along the mine access road which runs nearby (Tr. 39). Respondent's ability to continue in business would not be affected by

---

2/ These factors have also been considered in determining an appropriate penalty in connection with Citation 374687.

imposition of this penalty (Tr. 6; respondent's answer to request for admission number 17).

Citation 374687 - - Inoperable Horn

The undisputed evidence shows that on the afternoon of the inspection, respondent was using a front-end loader which had an inoperable horn. The 90,000 pound machine was loading crushed rock at the time. Inspector Costanich cited respondent with a violation of the mandatory standard at 30 CFR § 56.9-87, which provides:

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

The inspector testified that he asked the operator of the loader to sound the horn, which is activated by a floor mounted button, and that it did not function. The operator told him that he did not know when the horn ceased to work, as he had had no occasion to use it that day.

According to the inspector, the horn was intended to warn pedestrians or other vehicles in the path of the machine. The loader had a functioning reverse alarm which he explained would not serve as a warning while the machine was moving forward.

None of these assertions were challenged by respondent. Its counsel suggested, however, that the Secretary did not prove any element of neglect. Under well established principles, however, negligence is not an element necessary for proof of violation of a mandatory standard; it bears only upon penalty. United States Steel Corp., 1 FMSHRC 1306, 1307 (September 17, 1979).

Because of language in the standard relating to reverse alarms, respondent further suggested that the standard does not clearly indicate that a manually operated alarm for forward motion -- an ordinary vehicle horn -- is necessary. I disagree. The words of the standard plainly require an automatic reverse alarm as an additional precaution for equipment with an obstructed view to the rear.

Respondent, through interrogation of the inspector, also seemed to question the utility of the horn. Would an operator, busy with gear changes and brakes, for example, be able to spare a foot for a horn button? This argument goes to the wisdom of the standard, a matter committed by law to the discretion of the Secretary.

Finally, respondent argued that its loading operation was beyond the jurisdiction of the Act. In this regard it relied on an interagency agreement between the Mine Safety and Health Administration and the Occupational Safety and Health Administration (respondent's exhibit 1). The inspector did acknowledge that the loader in question was loading stockpiled rock into commercial trucks. Respondent points to nothing in the Act or the

agreement, however, suggesting that the loading activity is not covered by MSHA authority. The Act in Section 3(h)(2)(C) defines "coal or other mine" to include "lands . . . used in . . . the work of preparing coal or other minerals." "Preparing" is nowhere defined except in Section 3(i) which defines "work of preparing . . . coal" to include storage and loading. What is true for coal must be likewise true for other minerals. I find nothing in the facts of this case or the interagency agreement indicating that respondent's loading activity falls outside MSHA jurisdiction. The violation occurred and a penalty is warranted.

Petitioner initially proposed a penalty of $18.00 in connection with this citation. The hazard created was potentially serious. If the driver were for some reason unable to stop the truck, he could not have warned other vehicles or people in its path. Injuries resulting from a collision could, of course, be serious. The inspector also testified that he observed many vehicles in the area (Tr. 51). Although the inspector admitted that he did not know why or how long the horn had been inoperative (Tr. 73), the relatively low proposal, in my opinion, suggests that that factor was considered in determining the initial assessment. A penalty of $18.00 will therefore be assessed.

ORDER

Pursuant to the foregoing, it is ORDERED that the penalty proposals for Citations 374685, 374686, and 374687 are affirmed, and that the following penalties shall be paid: for Citation 374685, $40.00; for Citation 374686, $40.00; and for Citation 374687, $ 18.00. It is further ORDERED that respondent shall pay the penalties within 30 days of this order.

John A. Carlson
Administrative Law Judge

Distribution:

Linda Bytof, Esq., Office of the Solicitor, U. S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017 San Francisco, California 94102

Joseph D. Ryan, Esq., Martin & Ryan, Ordway Building, Suite 785, One Kaiser Plaza, Oakland, California 94612

Mr. T. T. Rolleri, Jr., Gallagher & Buck, Incorporated 344 High Street, Oakland, California 94601

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

NOV 25 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-300
v.	)	A/O NO. 35-02479-05001
JOHN PETERSEN, AN INDIVIDUAL, d/b/a TIDE CREEK ROCK PRODUCTS,	)	MINE: Tide Creek Pit
Respondent.	)	

Appearances:

Ernest Scott, Jr., Esq., Office of the Solicitor,
U. S. Department of Labor, 8003 Federal Office Building,
Seattle, Washington 98174
for the Petitioner

Agnes Petersen, Esq., Vannatta and Petersen, Attorneys at Law,
222 South First Street, St. Helens, Oregon 97051
for the Respondent

Before: Administrative Law Judge Virgil E. Vail

DECISION AND ORDER

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 (now called a proposal for penalty, 29 C.F.R. 2700.27) was filed on September 14, 1979 alleging two violations of mandatory safety standards contained in 30 C.F.R. Part 56. The violations were charged in citations issued to the respondent following an inspection of the Tide Creek Pit on March 22, 1979.

Pursuant to notice, a hearing on the merits was held in Portland, Oregon on June 10, 1980. Federal Mine Inspector Robert W. Funk testified on behalf of the petitioner. John Allen Petersen, owner of the Tide Creek Pit Mine, testified for the respondent.

FINDINGS OF FACT AND CONCLUSIONS

Findings of Fact are enumerated 1 through 9.

1. At all times relevant to these proceedings, Respondent operated an open pit rock crushing operation near Deer Island, Oregon (Tract 12).

2. Respondent has not had a significant history of prior violations (Tr. 60).

3. The Respondent's business consists of about 100,000 cubic yards of bulk rock per year. There are two employees besides the owner who works with the employees, and the pit usually operates 8 hours a day, 5 days a week (Tr. 13, 20).

4. The proposed penalties are appropriate for the size of the operator's business and will not affect Respondent's ability to continue in business.

5. The Respondent promptly took steps to abate the citations and demonstrated good faith in achieving rapid compliance with the relevant standards.

Citation Number 347916

This citation alleges a violation of 30 C.F.R. § 56.12-30.[1]

6. The drive motor of the conveyor below the shaker screen did not have a weather head (Tr. 39).

7. There was a danger of the wiring shorting out against the frame, which could cause anyone coming in contact with the frame to be electrocuted (Tr. 43 - 44).

This citation should be vacated. The issue is whether a potentially dangerous condition existed in the wiring running to the electrical motor on the conveyor below the shaker screen. The inspector testified that he could not remember whether the wiring had been insulated with anything, such as tape or rubber (Tr. 40). He testified that, according to the law, a weather head must be installed on the drive motor (Tr. 39). He could not remember the relationship of the wires to the frame (Tr. 40).

The Respondent testified that placing the wires inside a box caused the covering on the wires to rub against the box, due to the shaking of this machine, which would eventually expose the wires and cause an electrical short. He had wrapped the wires coming out of the motor with friction tape and then with rubber from an innertube. The 3 wires were then wrapped again in rubber from an innertube to keep out water (Tr. 22).

1/ 56.12-30 Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

A review of standard 30 C.F.R. 56.12-30 is not particularly helpful in determining what is required in an electrical hookup of the type involved herein. The situation to which the standard is directed does address what potentially could be a very dangerous and possibly a fatal accident. However, the Petitioner has not sustained his burden by proving that the type of electrical attachment used by the Respondent did not satisfy the requirements of the standard. Inspector Funk testified that the electrical hookup should have had a weatherhead installed on the motor, according to the law (Tr. 39). I am unable to determine where the standard that was cited, or other relevant law supports his statement. Therefore, I find that the reason he gave for issuing the citation is unfounded.

Citation Number 34917

This citation alleges a violation of 30 C.F.R. 56.14-01. [2]

8. The tail pulley of the return conveyor to the L J shaker screen did not have a guard (Tr. 45).

9. Persons could come into contact with the tail pulley while cleaning up spillage around the conveyor and could be injured (Tr. 46).

This citation should be affirmed. The Respondent testified that there is a trail or pathway alongside the equipment where the pulley involved herein is located. However, he testified that persons would not walk by the pulley while the plant was operating because they would get splattered with water and mud, and that the plant would normally be shut down if one of the employees was going to clean out around the pulley (Tr. 57, 66).

The standard, 30 C.F.R. 56.14-1, is very explicit in stating that guards are required where moving machine parts may be contacted by persons. I am persuaded by the evidence that the facts in this case present a situation where an employee cleaning up around the pulley, walking by the pulley or a visitor to the plant walking by the pulley could become entangled therein. It is not a sufficient defense to prove that the likelihood of such an accident is remote. Rather, it is important to consider that the risk of such an injury exists, and the seriousness of the consequences are such that guarding is required. In order to abate this citation, a guard was installed on the pulley.

2/ 56.14-1. Mandatory. 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.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding. At all times relevant to this proceeding, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.

The testimony of the Respondent, on questions of his business operations, convinces me that the Respondent does operate a mine titled the Tide Creek Pit and that the products from said mine enter commerce or affect commerce within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 803. The mines subject to the Act are those whose products enter commerce or those whose operations or products affect commerce. This provision is to be given a very broad interpretation. Marshall v. Kraynack 614 F. 2d 231 (3rd. Cir. 1979). Congress has found that health and safety accidents in mines disrupt production and cause loss of income to operators which in turn impedes and burdens commerce. 30 C.F.R. Section 801(f). Accordingly, even if a mine's products remains solely within a state, any disruption of its operations due to safety hazards affects interstate commerce. Marshall v. Kilgore, 478 Supp. 4 (E. D. Tenn 1979); Marshall v. Bosack 463 F. Supp. 800 (E.D. Pa. 1978).

2. Respondent did not violate the standard cited in Citation number 347916.

3. Respondent violated the standard cited in Citation number 347917.

4. Respondent, in its answer to the Petitoner's petition for assessment of penalty, requested a jury trial, attorney fees of $1,000.00 and court costs.

In an analogous situation involving the Occupational Safety and Health Act, which is similar to the Federal Mine Safety and Health Act of 1977, the United States Supreme Court concluded that the Seventh Amendment to the U. S. Constitution, providing for jury trials in certain cases, does not prevent Congress from assigning adjudication of newly created statutory "public rights" to administrative agencies in which jury trials would be incompatible. The Court concluded that, "Congress found the common law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefore, unknown to the common law, and placed their speedy and expert resolution of the issues involved. The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law." Atlas Roofing Company, Inc. v. OSAHRC, 430 U.S. 442 (1977). Further, request for attorney fees and court costs are not warranted in this case.

ORDER

Citation number 347916 is hereby vacated. Based upon the criteria set forth in section 110(i) of the Act, the penalty of $44.00 is determined to be the proper amount for Citation number 347917. It is ordered that the Respondent pay the amount of $44.00 within 30 days of this Decision.

Virgil E. Vail
Administrative Law Judge

Distribution:

Agnes Marie Petersen, Esq.
Vannatta and Petersen
222 South First Street
St. Helens, Oregon 97051

Ernest Scott, Jr., Esq., Office of the Solicitor
U. S. Department of Labor, 8003 Federal Office Building
Seattle, Washington 98174

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

NOV 25 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-365-M
v.	MSHA CASE NO. 42-00890-05001
SALT LAKE COUNTY ROAD DEPARTMENT, Respondent.	MINE: Welby Pit

APPEARANCES:

Robert Bass, Esq., Office of the Solicitor,
United States Department of Labor, Kansas City, Missouri
for the Petitioner

Kevin F. Smith, Esq., Salt Lake County Attorney Office,
Salt Lake City, Utah
for the Respondent

Before: Administrative Law Judge Virgil E. Vail

STATEMENT OF THE CASE

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. [hereinafter referred to as "the Act"]. On March 27, 1979, an official representative of the Mine Safety and Health Administration (MSHA) issued citation number 336350 to the respondent for an alleged violation of mandatory safety standard 30 C.F.R. 56.14-1[1]. The citation charged that the respondent failed to have a feeder pulley guard in place. A penalty of $60.00 was proposed by the MSHA Office of Assessments.

On August 28, 1979, respondent notified the Mine Safety and Health Administration that it wished to contest the alleged violation. Petitioner filed a proposal for penalty and motion to accept late filing of proposal for penalty on December 10, 1979. Petitioner stated that his reason for the delay in filing the proposed penalty was a lack of clerical personnel and a high volumn of cases.

1/ 56.14-1. Mandatory. 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.

On January 11, 1980, respondent filed an "answer" and a motion for summary decision requesting an order dismissing said proposal for penalty by reason of the late filing.

A hearing was held on July 23, 1980 in Salt Lake City, Utah. At that time the parties stipulated to a settlement agreement, as to the penalty assessment for the violation involved herein; subject to a determination of the three issues raised by the respondent in its motion for summary decision.

Issues:

The issues in this case are as follows:

(1) Whether the gravel pit involved herein and operated by Salt Lake County is exempt from regulation under the Federal Mine Safety and Health Act of 1977, (2) whether the inspection was lawfully conducted, and, if so, (3) whether the proposal for penalty should be dismissed due to the late filing thereof.

DISCUSSION

1. Whether the pit in question is under the jurisdiction of the Federal Mine Safety and Health Act of 1977.

The premises involved herein are described as a small "mine" from which sand and gravel are extracted by the respondent, Salt Lake County Highway Department, for use on local roads within the State of Utah. The respondent did not sell its products outside the State of Utah (Tr. 5).

The respondent contends that the Tenth Amendment to the United States Constitution prohibits Congress from exercising authority over integral governmental operations of a state by invoking the commerce clause. More specifically, respondent argues that the building and maintaining of roads is an "integral function" of the state, and free from Congress' power under the commerce clause. As authority, respondent cites the United States Supreme Court case of National League of Cities v. Usery, 426 U.S. 833 (1976). Respondent concedes that not all of a state's proprietary activities are exempt from regulation, but contends that construction and maintenance of public roads, including raw materials needed for such construction and maintenance, are integral governmental services. The petitioner argues that sand and gravel pits operated by the state and local governments are subject to the Act.

In National League of Cities v. Usery, supra, the Supreme Court held as unconstitutional the minimum wage and overtime provisions of the Fair Labor Standards Act, as applied to employees of state governments. The Court held that such provisions take away the state's freedom to structure integral operations in areas of traditional government functions and are not within the authority granted Congress by the commerce clause.

The question here then is whether the respondent's operation of a gravel pit that is used in furnishing materials for maintenance of local roads is a traditional, integral, government service.

The Court in National League of Cities v. Usery, supra, conceded that a state's operation of a railroad would not be exempt from federal regulations. This upheld decisions in two earlier cases, United States v. California, 279 U.S. 182 (1936), and Parden v. Terminal Railroad Company, 377 U.S. 184 (1964) involving state railroads in conjunction with state-owned and operated docks.

A review of a number of federal court decisions considering this issue indicates that each factual situation must be closely scrutinized. In Friends of the Earth v. Carey, 552 F.2d 25 (2nd Cir. 1977), the Court determined that certain provisions of the Federal Clean Air Act could be enforced against the State with regard to traffic control. A different decision was reached in Jordon v. Mills, 473 F. Supp. 13 (E.D. La. 1979) where the Court held that a state run store in the prison was not subject to antitrust statutes, but was a fundamental state function and an integral part of running a prison.

The issue of whether state owned and operated sand and gravel pits are under the jurisdiction of MSHA and whether enforcing the Act against the state violates the Tenth Amendment was previously raised in a Commission proceeding decided by Judge Laurenson in the case of Secretary of Labor, Mine Safety and Health Administration (MSHA) v. New York Department of Transportation, Docket Nos. YORK 79-21-M, WILK 79-102-PM, YORK 80-2-M, (July 3, 1980). This case involved a similar factual situation, wherein the state extracted and stored sand for highway maintenance. In addressing the proposition that the Tenth Amendment prevented MSHA from enforcing the Act against state operations, Judge Laurenson concluded "(T)hat mining sand and gravel is not a traditional governmental function; maintaining roads is such a function. cf., Friends of the Earth, supra. Comparing the facts in this case with the federal decisions, mining is not an integral or essential part of the state function."

In a Commission proceeding involving the same question of whether a pit operated by a political subdivision of the State of Washington was exempt from MSHA regulation, Judge Morris held that mining was not an integral governmental function. He stated as follows: "The maintenance of county roads is an essential and traditional service of local governments. The operation of a mine is not . . . . The operation of a sand and gravel pit is not an activity that is necessary to the separate and independent existence of a state." Secretary of Labor, Mine and Safety and Health Administration, (MSHA) v. Island County Highway Department, DOCKET No. WEST 79-372-M. (November, 1980) I agree with the conclusion reached in these two cases.

The operation of a sand and gravel pit is not necessarily a typical or required function of the states or their political subdivisions. The products used from such operations, although required in the construction and maintenance of roads, is usually available from other sources in the

state. I find an analogy here with the decision in United States v. California, supra, relating to the railroads and their relationship to the state owned docks. I find that the respondent's operation of a gravel pit is not an integral governmental function and that such pit is therefore subject to MSHA regulation.

2. Whether the inspection herein was lawfully conducted

The respondent argues that a judicially sanctioned permit was required before the Secretary's inspector could lawfully enter the mine premises. As authority for this position, respondent cites Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). I find that the established law is to the contrary. In Marshall v. Nolichuckey Sand Company, Inc., 606 F. 2d 693 (6th Cir. 1979), cert. denied, 100 S.Ct. 1835 (1980), a warrantless inspection of a sand and gravel "mine" under the Act was upheld. The Court in that case stated that the enforcement needs of the mining industry made provisions for warrantless inspections reasonable. Further, in Marshall v. Stoudts Ferry Preparation Company, 602 F. 2d 589 (3rd Cir. 1979), a warrantless inspection of the company's sand and gravel preparation plant was found to have satisfied the reasonableness standard as set forth in Marshall v. Barlow's, Inc., supra.

3. Whether the proposal for penalty should be dismissed due to the late filing thereof.

The respondent argues that the proposal for penalty should be dismissed on the grounds that it was untimely filed and is in violation of the law and regulations, particularly as to the time limits for bringing a case, as set forth in Title 29 of the Code of Federal Regulations. Respondent asserts that the time limits set out in 29 C.F.R. 2700.27 [2] are mandatory and should apply equally to all parties.

The Petitioner concedes that he did not file the required proposal for penalty within the 45 day limit prescribed by Commission Rule 27. However, the Petitioner argues that good cause existed for the untimely filing due to an extraordinarily high case load and lack of clerical personnel to operate a word processing machine to accomplish necessary typing. He cites 29 C.F.R. 2700.9 [3] of the Commission Rules as providing broad discretion for extending time for late filing.

2/ 2700.27 Proposal for a penalty. (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

3/ Section 2700.0 Extension of Time. The time for filing or serving any document may be extended for good cause shown. A request for an extension of time shall be filed 5 days before the expiration of the time allowed for the filing or serving of the document.

A review of past decisions of the Federal Mine Safety and Health Review Commission confirms Petitioner's statement that this issue has not yet been decided by the Commission. However, the same factual situation under a similar Act was addressed in Jensen Construction Company of Oklahoma, Inc. v. OSAHRC and Marshall, 597 F. 2d 246 (10th Cir. 1979) wherein the Secretary failed to file a formal complaint within 20 days after receiving notice that Jensen was contesting the issued citations. The Secretary's formal complaint was not filed until 48 days after the Secretary received the notice of contest. The particular rules governing the time within which the Secretary shall file a complaint with the Commission under the Occupational Safety and Health Review Commission's rules of procedure are as follows:

> "29 C.F.R. 2200.33 (a)(1).
>
> The Secretary shall file a complaint with the Commission no later than 20 days after his receipt of the notice of contest.
>
> 29 C.F.R. 2200.5
>
> Requests for extensions of time for the filing of any pleading or document must be received in advance of the date on which the pleading is due to be filed."

The Secretary's excuse, in that case, for the untimely filing of his complaint was an extraordinarily large caseload. The Tenth Circuit Court of Appeals upheld the Administrative Law Judge's finding that there was no demonstrated prejudice to Jensen. The Court stated that the regulations vest broad discretion in the Commission or the Administrative Law Judge concerning the consequences to be suffered in the event of a failure to timely file any pleading permitted by such regulations. The Administrative Law Judge in that instance found no "demonstrated prejudice" and under such circumstances was disinclined to impose the extreme sanction of vacating the citation.

I find the above decision analagous to the issue here. The respondent has shown no demonstrated prejudice resulting from the late filing of the proposal for a penalty.

A review of the legislative history of the Federal Mine Safety and Health Act of 1977 reveals that the Senate Committee, when considering procedures for enforcement of the Act, considered the possibility that circumstances such as this might arise and stated as follows:

> Enforcement Procedure
>
> The procedure for enforcement of the Act is based upon the procedure under the Coal Act. After an inspection, the Secretary shall within

a reasonable time serve the operator by certified mail with the proposed penalty to be assessed for any violations. The bill requires that the miners at the mine also be served with the penalty proposal. To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however ,that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. 717, 95th Cong., p. 622. (Emphasis added).

The purpose of the time limit should not be treated lightly. However, unless the respondent shows that he was prejudiced by the late filing, the parties should proceed to a hearing on the merits of the case. I find in this case that the respondent was not prejudiced by the late filing herein.

CONCLUSIONS OF LAW

Salt Lake County Road Department, in its capacity as a mine operator of the Welby Pit, is subject to the 1977 Mine Safety Act, that the warrantless inspection was legal; and that the respondent was not prejudiced by the late filing of the proposal for penalty.

ORDER

Based on the foregoing findings of fact and conclusions of law and the stipulation entered into by the parties, I enter the following order: Citation No. 336350 together with a penalty assessment of $60.00 is hereby affirmed. Respondent shall pay the affirmed penalty within 30 days of the date of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

Distribution:

Robert S. Bass, Esq., Office of Tedrick A. Housh, Jr., Regional Solicitor
United States Department of Labor, Room 2106, 911 Walnut Street
Kansas City, Missouri 64106

Kevan F. Smith, Esq., Deputy County Attorney,
Office of Ted Cannon, Salt Lake County Attorney
Building 4 - Box 29, 151 East 2100 South, Salt Lake City, Utah 84115

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

NOV 25 1980

FEDERAL AMERICAN PARTNERS, Contestant,	NOTICE OF CONTEST DOCKET NO. WEST 80-219-RM Order No. 339455, 1/21/80
v.	DOCKET NO. WEST 80-220-RM Citation No. 339456, 1/22/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	MINE: Open Pit Mine

DECISION

APPEARANCES:

Steven M. Avery, Esq., 420 E. Washington, Riverton, Wyoming 82501,
for the Contestant

James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294,
for the Respondent

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978), the Contestant filed its notice of contest to the issuance of a citation on January 22, 1980, which alleged a violation of 30 C.F.R. 55.7-5. The pertinent part of that regulation states as follows: "Mandatory. Drill crews and others shall stay clear of augers or drill stems that are in motion. . . ."

The Respondent alleges that the citation was properly issued pursuant to Section 104(a) of the Act. Counsel for both parties agreed that all issues raised would be tried under Docket No. WEST 80-220-RM and that Docket No. WEST 80-219-RM should be dismissed. Two cases had been docketed in this instance, one for the citation in issue and one for the withdrawal order issued under section 103(k) of the Act. Accordingly, Case No. WEST 80-219-RM was dismissed of record prior to the commencement of the hearing.

FINDINGS OF FACT

1. On January 21, 1980, Contestant was operating a truck mounted drill rig at a location approximately 50 miles east of Riverton, Wyoming.

2. The drill rig was being used to drill holes in order to explore for uranium.

3. In connection with the rig, the driller's platform and the platform of the driller's helper measure approximately 18" x 24" and are located at the back of the flatbed truck. The two platforms are about 14" apart and are approximately one foot above ground level.

4. The boom of the truck mounted rig is approximately 38 feet high. The drill stem, and kelly which encircles it, is located along the facing edge, in between the two work platforms.

5. While the driller and driller's helper are standing on their work platforms during the normal operation of the rig, they are approximately one foot from the locating drill stem.

6. The controls for operating the rig are located in front of the driller's work platform.

7. When the driller steps from his platform to the helper's platform he passes within approximately 6" of the rotating drill stem and kelly.

8. On January 21, 1980, while standing on the driller's platform and operating rig, an employee of Contestant reached behind the kelly in order to determine the source of a leak. The protuding bolt heads on the kelly caught his sleeve and pulled him into the rotating drill stem. The employee sustained serious injuries.

DISCUSSION AND CONCLUSIONS

Counsel for the Respondent argued that the violation of the regulation occurred by the admission of employees of Contestant that drillers and drillers' helpers crossed from one work platform to the other during the course of their work, and thus exposed themselves to moving parts and to the drill stem (Tr. 51). In addition, the MSHA inspector stated in the modified citation that "[t]he practice of employees passing directly in front of a rotating stem and kelly must immediately cease. Employees may be allowed in the proximity of the rotating drill stem and kelly only during periods when drill stems are being added or taken out." (Exhibit C-1).

Neither the argument of Respondent's counsel nor the statement of the MSHA inspector are persuasive in support of a finding that the cited regulation was violated. The accident did not occur because the driller crossed over from one work platform to the other. Even when the driller is standing on his platform in front of the controls he is always within a few inches of the drill stem and kelly which are in motion. It cannot be assumed that since the driller and driller's helper crossed from one work platform to the other that they failed to stay clear of drill stems that are in motion.

The driller was standing on his platform and the accident occurred because he reached behind the drill stem and came into contact with the kelly, which pulled him into the rotating drill stem. The driller obviously failed to "stay clear" of the drill stem that was in motion since his injuries were caused by direct contact with it. On this basis there was a violation of 30 C.F.R. 55.7-5, as alleged.

ORDER

Citation No. 339456 is hereby AFFIRMED.

Jon D. Boltz
Administrative Law Judge

Distribution:

James H. Barkley, Esq.,
Office of the Solicitor
U. S. Department of Labor,
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

Steven M. Avery, Esq.
White, Avery & Howard
420 East Washington
Riverton, Wyoming

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 25 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. KENT 80-203
	:	A.O. No. 15-11645-03008
v.	:	
	:	Docket No. KENT 80-194
LITTLE BILL COAL CO., INC., Respondent	:	A.O. No. 15-11645-03007 T
	:	Docket No. KENT 80-261
	:	A.O. No. 15-11645-03009
	:	
	:	Mine No. 4
	:	
	:	Docket No. KENT 80-262
	:	A.O. No. 15-11838-03001
	:	
	:	Docket No. KENT 80-263
	:	A.O. No. 11-11838-03002
	:	
	:	Mine No. 5
	:	
	:	Docket No. KENT 80-193
	:	A.O. No. 15-10394-03012
	:	
	:	Mine No. 6

ORDER ASSESSING DEFAULT PENALTY

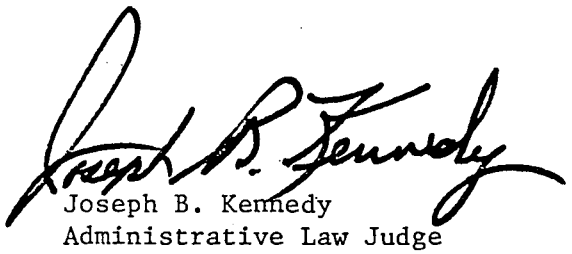
The pretrial order of September 2, 1980, in the captioned matters, required compliance by both parties with Part A thereof on or before October 17, 1980, and compliance with Part B on or before November 17, 1980. The pretrial order required inter alia that "it is expected that respondent will cooperate in furnishing [specified information] to counsel for the Secretary," and further stated 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."

On September 5, 1980, counsel for the Secretary sent a letter to counsel for respondent in which he requested the information required by the order. No response has ever been made to this letter. When respondent failed to comply with the requirements of Part A of the pretrial order, an order issued on October 22, 1980, directing respondent to show cause why it should not be held in default. In response to the show cause

order, respondent stated that it had not yet been able to prepare its defenses, and that "efforts are now being made to comply." Over a month has elapsed since then, and respondent has failed to cure its deliquency with respect to Part A of the pretrial order, or to comply with the requirements of Part B. I should further note that this respondent has a history of failure to comply with the orders of the trial judge. See Little Bill Coal Co., KENT 79-261 (June 30, 1980) review denied (August 26, 1980). Such course of conduct cannot be condoned.

Accordingly, respondent having (1) failed to cooperate with counsel for the Secretary as required by the pretrial order, (2) failed to cure its delinquency with regard to Part A of the order, (3) failed to make any response to Part B of the order, and (4) failed to request a reasonable amount of time in which to effect compliance; it is ORDERED that respondent be, and hereby is, declared in DEFAULT.

It is FURTHER ORDERED that pursuant to Rule 63 of the Commission's rules the proposed penalty of $1,774 be, and hereby is, ASSESSED as a FINAL ORDER of the Commission. Finally, it is ORDERED that respondent pay the amount finally assessed, $1,774, on or before Monday, December 15, 1980.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

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

Herman W. Lester, Esq., Combs & Lester, 207 Caroline Ave., Drawer 551, Pikeville, KY 41501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 25 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. YORK 80-46-M
	:	A.O. No. 19-00306-05003
v.	:	
	:	F & G Sand & Gravel Co.
F & G SAND AND GRAVEL CO., INC., Respondent	:	

ORDER ASSESSING DEFAULT PENALTY

The operator having failed to comply with the requirements of the pretrial order of August 1, 1980, in the captioned matter, an order to show cause why it should not be declared in default issued on October 16, 1980. On the return date of the order, October 29, 1980, respondent contacted this office telephonically and stated that it was interested in complying but that it was unclear as to the specific requirements of the pretrial order. The operator was given detailed instructions, and was informed that pursuant to Rule 8(b) of the Commission's Rules respondent had five days in which to file its response. A month has elapsed and respondent has failed to comply, and has failed to request a reasonable extension of time in which to comply. Accordingly, it is ORDERED that the operator be, and hereby is, declared in DEFAULT.

It is FURTHER ORDERED that pursuant to Rule 63 of the Commission's rules the proposed penalty of $763 be, and hereby is, ASSESSED as a FINAL ORDER of the Commission. Finally, it is ORDERED that respondent pay the amount finally assessed, $763, on or before Monday, December 15, 1980.

Joseph B. Kennedy
Asministrative Law Judge

Distribution:

Albert H. Ross, Esq., David Baskin, Esq., U.S. Department of Labor, Office of the Solicitor, JFK Federal Bldg., Govt. Center, Boston, MA 02203 (Certified Mail)

Peter Barsoum, Jr., Corporation Clerk, F&G Sand & Gravel Co., Inc., 140 N. Quinsingamond Ave., Shrewsbury, MA 91545 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

[illegible]

NOV 2 1 1980

LOCAL UNION 781, DISTRICT 17, UMWA,	:	Complaint for Compensation
Applicants	:	Docket No. WEVA 80-473
v.	:	
	:	Wharton No. 4 Mine
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	

DECISION

On September 23, 1980, Respondent, Eastern Associated Coal Corporation, filed a motion for summary decision in the subject proceeding. On October 7, 1980, Applicant filed a cross-motion for summary decision. Local Union 781, UMWA, represents coal miners at Respondent's Wharton No. 4 Mine.

The record indicates the following undisputed facts: On March 19, 1980, at about 1:30 a.m., a miner was fatally injured at Respondent's Wharton No. 4 Mine; at about 2:30 a.m., Applicants withdrew from the mine to observe a 24-hour memorial period under Article XXII, section (k) of the National Bituminous Coal Wage Agreement of 1978. 1/ Under the contract, the miners were not entitled to compensation for their absence during the memorial period.

At 6:19 a.m. on March 19, 1980, federal inspector Joseph LonCavish issued an investigative order of withdrawal under section 103(k) of the Federal Mine Safety and Health Act of 1977, which provides in part: "In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine * * *."

After an investigation, the section 103(k) order of withdrawal was terminated at 3:13 p.m. on March 20, 1980.

1/ This contract provision, binding on the Applicants and the Respondent, reads in part: "* * * work shall cease at any mine on any shift during which a fatal accident occurs, and the mine shall remain closed on all succeeding shifts until the starting time of the next regularly scheduled work of the shift on which the fatality occurred."

On June 17, 1980, Applicants filed a complaint for compensation under section 111 of the Mine Act. Applicants allege that as a direct result of the 103(k) order of withdrawal, all miners working during the midnight shift (midnight to 8 a.m.) on March 19, 1980, were idled for the last 1.68 hours of their shift and that all miners scheduled to work the day shift (8 a.m. to 4 p.m.) on March 19, 1980, were idled for their entire shift. Applicants seek compensation for 1.68 hours of the midnight shift and 4 hours of the day shift on March 19, 1980.

The basic issue is whether Applicants were idled by the section 103(k) order of withdrawal within the meaning of section 111 of the Act. Section 111 provides in part:

> If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, 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.

The legislative history includes the following explanation by the drafters of section 111:

> [T]he bill provides that miners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision, drawn from the Coal Act, is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside their control. It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law. [S. Rpt. No. 95-181, 95th Cong., 1st Sess. 46-47 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 634-635 (1978).]

The issue raised by this case appears to be one of first impression.

Respondent asserts that Applicants can recover under section 111 only if they were idled directly by the section 103(k) investigative order of withdrawal and can show that they would have worked but for the withdrawal order.

Applicants dispute this, and rely on decisions of the Commission, and of the (predecessor) Interior Department Board of Mine Operations

Appeals, holding that an order of withdrawal is effective for purposes of the Act's compensation provision even though no miners were working when the order was issued.

The cases cited by Applicants are distinguishable because they involved miners who would have gone back to work but for the withdrawal order. In the instant case, the withdrawal order was both issued and terminated during a non-compensatory memorial period. On the facts of this case, the miners would not have gone back to work, and would not have been compensated, during the memorial regardless of the issuance or non-issuance of the Government's section 103(k) order.

I conclude that the plain meaning of section 111, as well as its legislative history and recent Commission decisions, dictates denying compensation on the facts presented. In Youngstown Mines Corporation, 1 FMSHRC 990, 992 (August 15, 1979), the Commission upheld an award of compensation on the ground that the miners would have worked and received compensation "but for" the withdrawal order. In Kanawha Coal Company, 1 FMSHRC 1299 (September 4, 1979), the Commission affirmed a decision that held:

> The essential element that must be satisfied to receive compensation under the statute is that a miner was unable to perform his regular duties as a result of a withdrawal order, e.g., that he was "idle" when he otherwise should have been working. Therefore, in order for an applicant to be successful in his claim for compensation, a causal relationship must exist between the issuance of the withdrawal order and the miners not working. "In order for the miners to recover under section [111], the order of withdrawal must be the reason the miners were idled." Local No. 6025, District 29, United Mine Workers of America v. Bishop Coal Company, HOPE 73-550 (December 3, 1973). [Kanawha Coal Company, Docket No. HOPE 77-193 (February 24, 1978)].

The record shows there is no genuine dispute as to a material fact. I conclude that Respondent is entitled to a summary decision as a matter of law.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent's motion for summary decision is GRANTED.

2. Applicants' motion for summary decision is DENIED.

3. The subject proceeding is DISMISSED.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

Sally S. Rock, Esq., Eastern Associated Coal Corp., 1728 Koppers Building, Pittsburgh, PA 14219

Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, NW, Washington, DC 20005

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 2 8 1980

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. WEVA 79-115-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 813952 April 20, 1979 Loveridge Mine
UNITED MINE WORKERS OF AMERICA, Intervenor	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-26 A/O No. 46-01433-03054V
v.	:	Loveridge Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: David E. Street, Esq., and Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Mine Safety and Health Administration; Rowland Burns, Esq., and Samuel P. Skeen, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Cook

The above-captioned application for review proceeding was filed by Consolidation Coal Company (Consol) on May 9, 1979, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act). Answers were filed by the United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) on May 10, 1979, and May 24, 1979, respectively.

The above-captioned civil penalty proceeding was filed by MSHA on November 23, 1979, pursuant to section 110(a) of the 1977 Mine Act. Consol filed an answer on November 28, 1979.

Both proceedings address Order No. 813952, issued at Consol's Loveridge Mine on April 20, 1979, pursuant to section 104(d)(2) of the 1977 Mine Act. The order cites Consol for an alleged violation of 30 C.F.R. § 75.400 as follows:

> An excessive accumulation of float coal dust (black to dark gray in color) was allowed to accumulate on top of rock dusted surfaces located on the roof, ribs and floors of the crosscuts and entries Nos. 5 and 6. Starting 200 feet outby the last open crosscut at spad No. 6/46 a distance to 6/34 of about 1,260 feet. Located in the 7 North, 9 Left Section (017). Mining was being done on the left split of air at the time of the order. Samples were collected at 6/43 and 6/40 station Nos. to show the float coal dust was present on top of rock dust.

On March 18, 1980, the cases were consolidated for hearing and decision. Notices of hearing were issued at various stages of the proceedings which ultimately scheduled both the above-captioned cases, and several additional cases involving MSHA and Consol, for hearing on the merits beginning at 9:30 a.m., on June 17, 1980, in Washington, Pennsylvania.

The above-captioned cases were called for hearing on June 18, 1980, in Washington, Pennsylvania, with representatives of MSHA and Consol present and participating. MSHA thereupon made an oral motion in Docket No. WEVA 80-26 for approval of settlement in the amount of $500. The Office of Assessments had proposed a civil penalty in the amount of $2,000. In view of both the significant reduction proposed and the state of the record at that time, MSHA was requested to file a written settlement motion and to submit certain additional information necessary to properly evaluate the proposed settlement.

It should be noted that a copy of the inspector's statement, describing the alleged violation in terms of negligence, gravity and good faith, was attached to the proposal for a penalty filed by MSHA on November 23, 1979. As relates to the issue of operator negligence, the inspector indicated: (1) that the condition cited should have been known to the mine operator because the "immediate right return is part of the active working section and is to be examined;" (2) that the condition cited was known by the mine operator and should have been corrected because "300 feet was drug outby the last open crosscut;" and (3) that "Jimmy Woods, union fireboss, examined the (said) area on [April 19, 1979] at 10:20 a.m." As relates to gravity, the inspector classified the occurrence of the event against which the cited standard is directed as "probable" because the "float coal dust, if ignited, could cause a mine explosion or mine fire," and identified the fact that the "section is very dry and liberates methane" as a condition or circumstance which might have increased the likelihood or severity of the event. The inspector's statement indicated that the injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be (1) lost workdays or restricted duty, or (2) permanently disabling; and

that seven or more miners would be affected if the event were to occur. Counsel for MSHA was informed that an affidavit would have to be obtained from the inspector changing these statements before a $500 settlement could be approved.

On July 10, 1980, MSHA filed its written motion requesting approval of the $500 settlement and dismissal of the proceeding. MSHA advanced the following reasons in support of the proposed settlement:

* * * * * * *

3. A reduction from the original assessment is warranted under the unique circumstances of this case.

This case involves a 104(d)(2) order issued for a violation of 30 CFR 75.400. Further investigation into the facts surrounding issuance of this order discloses that the order should not have been issued under Section [104](d) of the Act. The Secretary is unable to prove an unwarrantable failure in this case. However, a violation does exist. The inspector who issued the subject order agrees with this analysis and has modified the 104(d)(2) to a 104(a) citation. A copy of the modification is attached hereto. Also, attached is the affidavit of coal mine inspector David Workman. This affidavit verifies the facts of the violation and the fact that the condition does not constitute an unwarrantable failure.

A $500 penalty is appropriate for this violation. The operator's negligence was considerably less than originally calculated. The Office of Assessments viewed this condition as an unwarrantable failure. As is evidenced by the "Narrative Findings for a Special Assessment" form which is attached hereto, the Assessment Office believed that the operator could easily see the accumulations. Mr. Workman's affidavit clarifies that the area of accumulations was not visible from traveled areas of the mine. Moreover, it was in an area which was required to be inspected only one time per week. The Secretary does contend that the operator has a duty to see that there is compliance with the clean-up plan. However, in this particular situation, the operator's negligence is rather slight. The probability of occurrence is also not large as there were no ignition sources in the area of accumulation. There was no methane found. Therefore the probability of a spontaneous ignition is also low. For all of the above stated reasons, in conjunction with the operator's prior history and the size of the operator, the Secretary urges the Administrative Law Judge to find that $500 is a reasonable penalty for this violation. Consolidation Coal Company is a wholly owned subsidiary of Conoco, Inc. The size of the company is 34,945,989 production tons or man hours per year.

This tonnage includes all of Conoco's operations with the exception of one uranium mine, the Conquita Mine. The annual man hours of this mine is 1,000,000. The size of the Loveridge Mine is 1,241,697 production tons or man hours per year.

The "affidavit" referred to is acutally a memorandum dated July 3, 1980, from Federal mine inspector David E. Workman characterizing the alleged violation as follows:

> On April 20, 1979, I issued violation No. 013952 [sic]. At that time I observed accumulations of float coal dust in the immediate return air course of the 7 North 9 Left section. This area is one, that is required to be examined weekly for hazardous conditions. The (said) area was not visible from a regular traveled area of the mine or working section. The area inby the float coal dust accumulation had been drug (mixed coal dust and rock dust); however, the float coal dust accumulation could not be seen from the last open crosscut.
>
> I believe the operators [sic] negligence is low, also the probability of the occurrence is moderate.
>
> There was no methane present and no ignition source present in the immediate (said) area of the violation.

On August 4, 1980, the motion to approve settlement was denied because the information submitted was insufficient for the purpose of determining that approval of the proposed settlement would protect the public interest, and a notice of hearing was issued scheduling the cases for hearing on the merits beginning at 9:30 a.m., on September 18, 1980, in Washington, Pennsylvania.

On August 14, 1980, Consol filed a petition for interlocutory review with the Federal Mine Safety and Health Review Commission (Commission) pursuant to 29 C.F.R. § 2700.74 (1979), contending: (1) that it was adversely affected and aggrieved by the undersigned's August 4, 1980, determination; (2) that the undersigned erred in denying the motion to approve settlement and in finding that insufficient information had been furnished to permit approval of the proposed settlement; and (3) that immediate review of the ruling might materially advance final disposition of the proceedings and establish guiding principles to facilitate settlement in future cases. On September 3, 1980, the Commission denied Consol's petition for interlocutory review.

The hearing convened as scheduled on September 18, 1980, in Washington, Pennsylvania, with representatives of MSHA and Consol present and participating. Counsel for MSHA made an oral motion for approval of settlement which is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Settlement	Assessment
813952	4/20/79	75.400	$750	$2,000

The following discussion took place on the record:

[MR. STREET:] Now, at the time the motion for decision and order approving settlement was submitted, the parties had agreed on a penalty of $500. Since the time this motion has been submitted, I have had discussions with attorneys for Consolidation Coal, and I have learned that Consolidation is agreeable to paying a penalty of $750 in this case.

I have learned that Consolidation is prepared to have witnesses testify who would call into dispute the length of the accumulations which were referred to in the order of withdrawal, and the witnesses for Consolidation also would be disputing the color of the accumulations which is evidence of their depth.

In summary, Your Honor, I believe with the representations that already have been set forth in the earlier motion to approve settlement, when you combine those representations with the fact that a conflict as to the evidence of the violation, itself, would be expected if the case were heard, I believe that it would be appropriate that this case be resolved for a penalty of $750.

THE COURT: Is there anything that you wanted to say?

MR. BURNS: Well, there are a couple things I want to add. I would certainly not dispute anything that Mr. Street has said, but not only when the area in question was inspected, not only was there no appreciable methane found, there was also a ventilation check of the area and the ventilation was, I believe, at 21,600 feet per minute which, I have had represented to me, is a fairly good ventilation.

I also have a witness present today who would be in a position to testify that as the fireboss who checked the return in question the day before the citation in question was issued, or the order that was later modified to a citation, the area in question was completely clear of coal dust accumulation, and that was his check in accordance with the one-week check regulation that Mr. Street cited in part, I believe, [30 C.F.R. § 75.305].

Those two additional facts I would add in support of the motion for settlement and the penalty of $750.

THE COURT: You see, Mr. Burns, that is the very point which created one of the serious problems about settlement in this case, because here we have all these statements by MSHA saying this didn't have to be examined more than once a week. Was that right?

MR. STREET: That's right.

THE COURT: Here we have a man who saw it the day before and that was the whole point about negligence, this large amount of dust as stated in the record at this moment. That was the whole point as to why a settlement couldn't be approved. It was obviously seen by your people the day before, yet all the way through this case, the real -- one of the biggest reasons why a settlement has been proposed was that you didn't have to examine it more than once a week, and here you had examined it the day before. Now, I cannot really comment very much more about this, because I don't really know what the facts are. I understand some of these things that you people have set forth as proposals of what might be presented, but I am more concerned about what the real facts are from the witnesses in this case at this point, because at this point with the information that is in the record now, it still is a serious matter.

As I say, I don't know what the facts will produce in the event of a hearing. It may be that the facts will convince me that this is not as serious as it appears to be on the record at the moment. But I am afraid that what you are presenting to me at this stage is not -- has not really changed the picture from what it was the last time this settlement was proposed at $500, and $750 is hardly much of a change in view of the seriousness of what appears in the record at this moment.

As I say, I have no idea what the evidence ultimately will produce, and I might agree with you that that is a proper figure if I hear all the evidence. But at this stage, I do not approve a settlement of that type.

MR. BURNS: Can we go off the record for just a second, Your Honor?

THE COURT: Yes, certainly.

(Discussion off the record.)

(Recess taken.)

THE COURT: The hearing will come to order. Now, Mr. Street, I believe that you have had a chance to consult with your witnesses, and you wanted to make a statement at this time as to some of the facts that you feel should be applied to consideration of a settlement in these cases.

MR. STREET: Yes, Your Honor, we do. Your Honor, while we were off the record, I spoke with the union fireboss, who examined the area in question in this case. That is the area which is referred to in the order of withdrawal on 813952 which was later modified by the inspector to be a section 104(a) citation. When the union fireboss examined the area in question 24 hours prior to the issuance of the order in this case, he found that the area was well rockdusted and that there were no accumulations of float dust in that area.

The inspector was conducting the weekly inspection required by 30 CFR Section 75.305. When the inspector returned to the area 24 hours later he found -- when the inspector went to the area 24 hours after the area had been examined by the union pre-shift examiner, he found that there were float coal dust accumulations in the No. 6 entry and to a lesser extent in the No. 5 entry. Now, to provide Your Honor with a graphic, which would be of assistance in your evaluation of [the] motion to approve settlement, I have a drawing of the section where the violation occurred. The drawing was made by Inspector David Workman yesterday, and I would, with the consent of the operator's counsel, move this drawing into evidence. I would submit it as part of the record.

THE COURT: Just make it M-1.

(Thereupon, Exhibit M-1 was marked.)

MR. STREET: And as Your Honor can see from looking at the exhibit, there was a gas well on the right side of the section just outby the third crosscut outby the face. And the gas well blocked the view of the area which the section foreman otherwise would have had. And the presence of the gas well blocked his view of the area. He was not able to see that there were violative conditions outby the gas well. The area from the gas well to the face in the No. 6 entry was well rockdusted, was white in color and in fact, all areas which were inby the tail piece in the section, all areas in all entries were properly rockdusted.

The section which is depicted in M-1, and which, of course, includes the area of the violation was a very heavily ventilated section. We are informed that 26,000 cubic feet -- over 26,000 cubic feet per minute of air was ventilated through that section. It is our belief that it is entirely possible that the float dust had accumulated during the 24-hour period between the time that the union fireboss conducted his required weekly examination of the area and the time of the inspection in this case.

There were no ignition sources in the Nos. 5 or 6 entry where the violation occurred, and as is indicated in the earlier motion to approve settlement, there were no accumulations of methane in that area or in any area in the section.

At the time the violation was cited, mining was taking place in the area which is depicted in the upper left-hand corner of the graphic. That would be in entry No. 1. Rowland? Anything more?

MR. BURNS: I wish I could think of something.

MR. STREET: So, Your Honor, these are the additional facts which we would like to -- which we have put forward. They are all the facts that we can think of that would relate to our proposal to settle this case for $750.

THE COURT: All right. Now, are you saying that you, yourself, as representative of MSHA subscribe to the statements that were made to you by the pre-shift examiner as to what he observed the day before?

MR. STREET: Yes, Your Honor. I spoke with the man and I am convinced he is telling the truth.

THE COURT: All right. Now, how large an area, though, was actually black as opposed to gray?

MR. STREET: Your Honor, this morning I spoke with an employee who would be our witness if this case were tried, and he informed me that there was an area approximately 200 feet long that was black in color. The remaining areas were gray in color. And to be truthful, I can't remember whether he told me whether they ranged from light gray to dark gray, what gradations of gray they were, but the remaining areas were gray in color.

THE COURT: Can you give me an idea where this 200 feet of black area was?

MR. STREET: Your Honor, the area which was black was the area immediately -- just a moment, please -- the area which was black was -- began to the left of the gas well which is depicted in Exhibit M-1, and it extended back down entry No. 6 behind the gas well and down the entry.

THE COURT: Now, was there some remark during the discussion before we went back on the record about some automatic rockdusting equipment? Can you tell us something about what that is, how this area is rockdusted?

MR. STREET: As I understand it, and as the inspector understands it, when the area is ventilated, when the section is ventilated, normally rockdust is added -- okay. When the section is ventilated, Your Honor, there is an attachment to the fan which contains rockdust, and which introduces rockdust into the stream of ventilation so that as the coal dust is ventilated out the return entries, rockdust also is mixed in with the coal dust and ventilated back through the mine. There is some speculation on our part, although we don't know it, but there is some speculation that this rockdusting system was not working, but we don't know that.

THE COURT: At what place is the rockdust actually introduced? Is it introduced near the face area?

MR. WORKMAN: At the last open crosscut, Your Honor, where the last open crosscut is considered to be, the last row of crosscuts connected to the cross. So we are looking at the extreme right entry where the little line is, where the fan sits, normally down in that entry.

THE COURT: Perhaps you should identify that gentleman.

MR. STREET: The gentleman who just spoke was the inspector, David Workman.

THE COURT: Now, do you happen to know anything about the fan, this system, how this thing works?

MR. BURNS: Absolutely nothing.

THE COURT: Could you ask some of your people? I am just curious about what they know about where this fan, and where the rockdust is introduced.

MR. BURNS: This is Dick Turner, who is our chief safety inspector at the mine.

MR. TURNER: Your Honor, normally the normal procedure, the rockdust is introduced into the airstream. We have rubber tired exhaust fans that we use to ventilate the working face where the miner is extracting coal from. On these fans we have what we call a trickle duster. It is a separate piece of machinery that is mounted onto the back of the exhaust fan. We normally keep them full of rockdust, and on the bottom of each one of these, we have a plate that works back and forth on a cam or what have you, and as it works back and forth, it discharges a slow amount of rockdust that is picked up from the air exhaust from the exhaust fan. It, in turn, puts it into suspension in the air right at the discharge end of our exhaust fans and it, in turn, mixes with the coal float dust and is carried down the entry.

THE COURT: And where would that be located if you are looking at this M-1 that's been put in evidence? Can you tell us where it would be?

MR. TURNER: Normally it would be -- if we were mining on the right side going down that entry, it would be at the top right-hand part. If you will notice, there is one line of full blocks going straight across. It would be just outby the No. 6 entry down there so that the air would exhaust down our main returns.

THE COURT: Do you get enough rockdust from that procedure to solve normally your problem?

MR. TURNER: Yes, we do. It is one of the best ones that we have found. We just started using it approximately two years ago in our mines and they are doing one heck of a job for us.

THE COURT: Apparently where you have got a gas well, there are problems?

MR. TURNER: Well, Your Honor, in projecting around gas wells we are required to leave 100 feet from the gas well in all directions. In order to go around these wells we have to project our mine around these gas wells to maintain our ventilation.

THE COURT: What I am saying, though, apparently you have got some problem about whether it is being done adequately, where you do have something which cuts into the entry, isn't that true? Do you have any idea why the rockdusting just wasn't working well this day?

MR. TURNER: I have no idea why it shouldn't be working. Of course, that's our normal procedure that when we do go on a section, my men and myself, we always check ventilation, rockdusting before we go on the sections, and their orders are if they aren't working that we use other corrective measures to take care of it.

THE COURT: Well, it seems to me, gentlemen, that when you have got a problem of this kind with obstruction in an entry, that this system -- perhaps the Secretary, perhaps MSHA should require more often examinations of those returns so you don't have a problem like this developing this badly, if it happened in one day. If they didn't examine it for five days later, let's say, there would be a tremendous amount of float coal, apparently. In fact, I would assume it would be about as bad as you would ever find, if it kept on like this for, say, five days of this blocking up.

MR. TURNER: Your Honor, if I might add one other thing. I wasn't in the area when the citation or the order was written, but it is policy that the safety supervisor, whenever you have a 104(d)(2) order or any type of order that we visit that area before anything is done to it. One thing I can say about the area is that it was damp and wet in spots. You can take rockdust and even though it is white in color when it is dry, if you wet it or it is on a wet surface, without any coal float dust on top of it, it will turn a gray color.

So depending on the conditions, whether it is wet or dry will have a lot of bearing on the color of it.

THE COURT: True, excepting, of course, now as I understand it there were samples taken in this case, weren't there?

MR. STREET: Yes, sir.

THE COURT: Do you have any idea how those samples -- what they showed as to content?

MR. STREET: They showed, Your Honor -- the samples were taken for the purpose of demonstrating that there was float dust on top of rockdust, and they showed that the first sample was 95 percent incombustible material. The second sample showed as 87 percent incombustible material. So in one instance we had 5 percent combustible and the other 13 percent combustible, but they were taken to show that there was combustible material on top of rockdust.

THE COURT: What is the required percentage? What is the regulation? What does the regulation say?

MR. STREET: The regulation, which you are speaking of, Your Honor, talks -- I believe addresses itself to rockdust which has been mixed with float dust. In this instance, there was float dust on top of rockdust, but that's, what? 65 percent? It says 80 percent has to be incombustible in the return areas.

THE COURT: All right. So actually, your tests, though, did not give us then the combined figure? Is that what you are saying? That this test was only for the surface?

MR. STREET: Go ahead and explain how you took it.

MR. WORKMAN: No, Your Honor. You want me to state my name.

THE COURT: You have already said what your name is. Your are Mr. Workman, right?

MR. WORKMAN: The samples were collected purely not to state that the rockdusting in the return was not adequate; the samples were collected to show that float coal dust was present on top of rockdust in the immediate return.

THE COURT: But not to claim that the percentages were --

MR. WORKMAN: -- inadequate.

THE COURT: Inadequate?

MR. WORKMAN: Right.

THE COURT: So now, of course, this regulation which is [30 C.F.R. § 75.403] talks about the combined -- the incombustible content of the combined coal dust, rockdust and other dust shall be not less than 65, or 80 percent in the return. Now, did you have a test of combined coal dust, rockdust and other dust?

MR. WORKMAN: Yes, sir.

THE COURT: And it actually didn't show that it was less than 80 percent incombustible, did it?

MR. WORKMAN: No, sir.

THE COURT: So that regulation certainly wasn't violated?

MR. WORKMAN: No, that regulation wasn't cited.

THE COURT: I understand that. And I think that's pretty significant in this situation. Now, the only thing that I do want to say about this is that I think that MSHA has a responsibility to look at situations like this and determine whether, in fact -- I am not saying, because I don't honestly know all the facts, because we haven't taken all the testimony here, but if, in fact, this kind of problem of a gas well creates a problem so that the rockdusting system is not really doing the job properly, and I am not saying it wasn't, I just don't know, but assume for the sake of argument that it is not doing it properly, and that this violation just occurred inside of

one day, I think that the Secretary of Labor has a duty to see if under those circumstances more [frequent] examinations should be required instead of just once a week.

I think, Mr. Street, you have got an obligation to go back to MSHA and mention this.

MR. STREET: Yes, sir.

THE COURT: Because if it really was a concentration as it appeared on the citation, it should not be permitted to go unnoticed that long. Now, in view of all the facts that have been set forth here at this point, and particularly this one about the samples, and I won't just base it upon that, but on the entire picture here, particularly also the statements which have been made about the pre-shift inspector's knowledge the day before, I will approve the settlement of $750 in this case.

MR. STREET: Thank you, Your Honor.

MR. BURNS: Thank you, Your Honor.

(Transcript of September 18, 1980, proceedings, pgs. 6-22).

The oral determination made during the hearing on September 18, 1980, approving the proposed $750 settlement in Docket No. WEVA 80-26 will be affirmed.

On October 1, 1980, Consol filed a motion to withdraw in Docket No. WEVA 79-115-R stating as follows:

COMES NOW, the Applicant, Consolidation Coal Company, and moves the Court to permit it to withdraw its Notice of Contest heretofore filed herein pursuant to 29 C.F.R. § 2700.11.

WHEREFORE, Applicant prays that its Motion be granted and that its Notice of Contest be withdrawn and this case be dismissed.

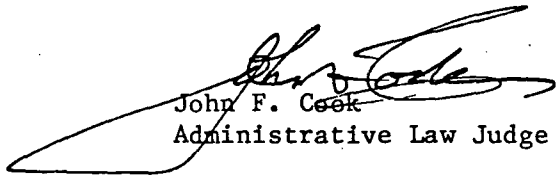
The motion will be granted.

ORDER

IT IS ORDERED that the determination of September 18, 1980, approving the proposed settlement of $750 in Docket No. WEVA 80-26 be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that Consol pay a civil penalty in the agreed-upon amount of $750 within 30 days of the date of this decision.

IT IS FURTHER ORDERED that Consol's motion to withdraw in Docket No. WEVA 79-115-R be, and hereby is, GRANTED, and that such application for review proceeding be, and hereby is, DISMISSED.



John F. Cook
Administrative Law Judge

Distribution:

David E. Street, Esq., Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Rowland Burns, Esq., and Samuel P. Skeen, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 2 8 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-67-M
	:	Assessment Control No. 44-00109-05003F
v.	:	
LONE STAR INDUSTRIES, INC., Respondent	:	Jack Plant

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner;
William I. Althen, Esq., and Barry M. Hartman, Esq., Smith, Heenan, Althen & Zanolli, Washington, D.C., for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued July 11, 1980, a hearing in the above-entitled proceeding was held on August 12, 1980, in Falls Church, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

At the conclusion of the hearing, counsel for the parties indicated that they would like to file simultaneous posthearing briefs before a decision was rendered. Counsel for petitioner filed a Post Trial Brief on October 14, 1980, and counsel for respondent submitted on October 16, 1980, a document which consists of a preliminary statement, findings of fact, and conclusions of law. I shall hereinafter refer to the filings by both parties as "briefs." Since I shall provide page numbers for any references I make to each party's "brief," neither party will have any difficulty in finding a portion of his or her brief which is being cited.

Issues

The parties' briefs raise the normal issues which are generally involved in civil penalty cases, that is, whether a violation of a mandatory health or safety standard occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Before considering the parties' arguments, I shall make some findings of fact on which my decision will be based.

Findings of Fact

1. Lone Star Industries, Inc., operates the Jack Plant which is located near Petersburg, Virginia. The plant prepares stone products for sale. The stone is hauled away from the plant in trucks or in railway cars, depending upon the mode of transportation desired by Lone Star's customers (Tr. 146). Operation of the Jack Plant involves about 152,196 man hours per year and operation of the company as a whole involves approximately 6,124,273 man hours per year (Tr. 5). Lone Star's counsel stipulated at the hearing that it is a large company, that it operates a mine within the meaning of the Federal Mine Safety and Health Act of 1977, and that it is subject to the jurisdiction of the Commission (Tr. 4; 6).

2. Exhibit No. 6 shows that Lone Star has paid penalties for 347 alleged violations during the 24 months preceding August 13, 1979, the date on which the violation of 30 C.F.R. § 56.9-41 alleged in this proceeding, was cited. Lone Star has not been cited for a previous violation of section 56.9-41 (Tr. 7).

3. Inspector Ronald J. Baril, Sr., was a duly authorized representative of the Secretary of Labor and the Mine Safety and Health Administration on August 11, 1979. On that day, he was asked by his supervisor to go to Lone Star's Jack Plant for the purpose of investigating an accident which had occurred at the plant about 3:45 p.m. on August 10, 1979 (Tr. 9; Exh. 5, p. 1). Other MSHA inspectors, a State inspector, and several company officials participated in the investigation (Tr. 10-11; Exh. 5).

4. The Jack Plant has two locations where railroad cars may be loaded. The normal loading site is at a place which is referred to as the crusher and rewash bins which are located about the middle of the plant near the main railroad tracks of the Norfolk & Western Railway Company. An alternate loading site is at a loading ramp situated near some stockpiles which are about 1,000 feet east of the normal loading bins (Tr. 14; 158; Exhs. 5 and C).

5. On August 10, 1979, the day the accident occurred, a water pump had broken which had the result of preventing the loading of railroad cars at the bin area (Tr. 152). Four 70-ton hopper-type railway cars were situated in the bin area when the pump ceased to work (Tr. 14). Two of the cars had already been loaded from the bins and two of them were empty (Tr. 153). All four of the cars had been coupled together for purposes of loading and all four were pushed eastward to the stockpile loading ramp, or alternate loading area. The operator of the pushing vehicle, whose name is Mr. James A. Mays, stated that the drawhead on the front car was open when he pushed it to the loading ramp (Tr. 160). The loaded weight of hopper cars is approximately 84-1/2 tons (Tr. 14; 77).

6. Loaded railroad cars are kept at a site located at the extreme western part of the Jack Plant (Tr. 13; 114; Exhs. 5, p. 3, and C). The cars are given a push with an end loader or a dump truck to get them started

and then they are allowed to drift down a .6 of 1 percent grade to the storage area for loaded cars (Tr. 15; 119; 150-151; Exhs. K and L). Each railroad car has a manually operated brake at one end of the car (Tr. 115). The manual brake is tightened or loosened by means of a wheel which is located on the end of the car (Exhs. 5, p. 2, and G). The person who operates the brake must stand on a small platform just below the braking wheel (Tr. 40; 70-74; 192-193; Exhs. E, G and H). The person who operates the manual brake is called a brakeman or "car dropper" because he controls the brake while the cars are being "dropped" from the loading area to the place where the loaded cars are stored until such time as the loaded cars are pulled away by a locomotive owned by the railway company (Tr. 16; 68; 126; 128; 140; 180).

7. On August 10, 1979, after the four railway cars mentioned in Finding No. 5 above had been loaded, Mr. Mays pushed the cars in a westerly direction for coupling with the 13 other loaded cars which had already been "dropped" to the storage area for loaded cars. Mr. Mays could not push the cars farther than 400 feet because some switches were located 400 feet west of the loading ramp and Mr. Mays did not want to drive his pushing vehicle over the switches. It was Mr. Mays' duty, however, to be present at the loaded-car area when the cars being dropped arrived at that area. Therefore, Mr. Mays drove his pushing vehicle along a road parallel to the railroad track to the loaded-car area. Since Mr. Mays could drive faster than the loaded cars could be dropped, he was able to arrive at the loaded-car area and be in a position to watch the coupling of the four cars with the 13 which were already present in the loaded-car storage area (Tr. 117; 154; 157; 158-160; 165; 183).

8. A person was assigned the responsibility of being the "car dropper" in each instance (Tr. 174). On August 10, 1979, Mr. James M. Brown, who was the operator of the rewash plant, assigned himself the job of being the car dropper for the four cars which had just been loaded (Tr. 154). Mr. Brown gave Mr. Mays the signal to start pushing the cars and Mr. Mays pushed them in a normal fashion. Mr. Mays, as indicated above, then drove his pushing vehicle to the loaded-car storage area. Mr. Mays was watching Mr. Brown as he approached the coupling point. Since Mr. Brown was standing on the front of the four cars being dropped to the loaded-car storage area, Mr. Mays could observe Mr. Brown just before the front car made impact with the rear of the 13th car located in the storage area. Mr. Mays looked down at the drawhead just prior to the time when the front car was ready to hit the 13th car and noted that the drawhead was closed on the car being ridden by Mr. Brown (Tr. 160-165).

9. Mr. Mays was only 15 or 20 feet from Mr. Brown at the time of the impact and Mr. Mays stated that the closed drawhead on the front car bypassed the drawhead on the 13th car so as to allow the front car to come into contact with the rear of the 13th car (Tr. 160; 163). The front car and the 13th car came together with so much force that the brake wheel on the car ridden by Mr. Brown made an imprint on the rear of the 13th car (Tr. 94). The force of the impact is further illustrated by the fact

that the 13 loaded cars were moved for a distance of from 12 to 14 feet and the cars being ridden by Mr. Brown rebounded after the impact for a distance of 8 feet (Tr. 23; 88; 93). Additionally, the force of the impact was so great that the wheels on the front car on which Mr. Brown was riding were derailed (Tr. 91). The wheels on the remaining three cars being dropped remained on the tracks (Tr. 19; 95; Exh. 5, p. 4).

10. Since Mr. Brown was on the front of the front car when it ran against the rear of the 13th car, Mr. Brown's body was crushed between the two cars as they came together (Tr. 166). Although Mr. Brown was alive immediately after the accident occurred, he died that same day at about 5:30 p.m. in the Petersburg General Hospital (Exh. 5, p. 4).

11. Mr. Mays, who observed the accident, is also an experienced car dropper. He stated that it is the duty of the car dropper to examine the drawhead on the front car and make sure that it is open so that it will couple with the drawhead on the rear car in the loaded-car storage area (Tr. 180). Although Mr. Brown stood just above the closed drawhead throughout the trip from the loading ramp to the point of impact with the 13th car, he failed to note that the drawhead was in a closed position (Tr. 99). Mr. Mays says he has also, on a few occasions, failed to make sure that the drawhead was open before the cars he was dropping came into contact with the cars in the storage area (Tr. 173). At such times, nothing happened other than that the cars failed to couple (Tr. 171). Mr. Mays stated that the rate of speed the "dropped" cars are traveling affects the amount of bounce which occurs if coupling fails to take place (Tr. 177). On the occasions when Mr. Mays' cars did not couple because of his failure to open the drawhead, the rebound of the cars he was riding was only 2 feet (Tr. 177).

12. After Inspector Baril had obtained all or most of the facts described above, he wrote on August 13, 1979, Citation No. 305912 alleging that Lone Star had violated 30 C.F.R. § 56.9-41 which provides "[o]nly authorized persons shall be permitted to ride on trains or locomotives and they shall ride in a safe position" (Tr. 11; Exh. 1).

13. Citation No. 305912 gives the following description of the conditions which caused the inspector to believe that respondent had violated section 56.9-41: "[A] brakeman was fatally injured while he was dropping 4 loaded railroad cars. The victim was operating the brakes which [were] forward of the front car. The 4 cars he was dropping collided with the first of the 13 parked railroad cars in the plant storage area. The victim was standing on the brake platform in front of the lead car, when the two drawbars failed to couple, the car the victim was riding derailed and then collided with the first parked railroad car crushing the victim. The victim was not working in a safe position" (Exh. 1).

14. Mr. George Bishop, another car dropper, testified that if he were to read a regulation which stated that a car dropper should ride in a safe position, he would consider that he could comply with such a regulation and still ride on the front of a car which is being dropped to the storage

area (Tr. 192). Some reasons advanced by Lone Star's witnesses in support of their belief that riding the front car is safe are (1) that riding on the front enables the car dropper to observe the track in front of him at all times so as to be on the alert for people who may be working on switches or crossing the tracks (Tr. 168), (2) that riding on the front enables the car dropper to be on the lookout for any of the 1,200 trucks which cross the tracks each day (Tr. 118), (3) that riding on the front enables the car dropper to be aware of materials which may build up at the truck crossing so as to cause derailment (Tr. 144-145), and (4) that riding on the front permits the car dropper to have the best possible vision of the coupling area at times when the weather is inclement so as to impair or obscure visibility (Tr. 35; 53; 62-64; 142).

15. Lone Star's South Atlantic Division (which does not include the Jack Plant here involved) had a written safety regulation in effect on August 10, 1979, the date of the accident, which provides "7. Unless absolutely necessary, never ride leading car down grade end. Ride in between the cars or the trailing end" (Exh. 4). Lone Star's Regional Safety Director, Mr. Roger Vaughan, testified that the reason the South Atlantic Division had the above safety regulation was that the employees in the South Atlantic Division do not wear safety belts and they recognized that if they are riding on the front car without safety belts and should happen to fall, they would be more likely to be run over by the car's wheels than if they ride between cars or on the rear car (Tr. 130-131).

16. Lone Star's Chesapeake Division (which does include the Jack Plant here involved) has 42 basic safety rules which all employees are required to follow. No. 12 of those rules provides that "[a]ny person required to ride moving railroad cars will wear safety belt hooked to car at all times when cars are in motion" (Exh. D). Mr. Vaughan stated that since the employees at the Jack Plant are required to wear safety belts, they do not need to follow the South Atlantic Division's Rule No. 7 prohibiting riding of the front car because the wearing of safety belts at the Jack Plant prevents car droppers from falling under the wheels of the front car in case they should slip (Tr. 131).

17. Mr. Mays, one of Lone Star's witnesses, noted that a car dropper who is riding on the rear of the last car being dropped could fall and be run over by the pushing vehicle (Tr. 171). In view of the foregoing possibility, the employees in Lone Star's South Atlantic Division, where the wearing of safety belts is apparently not required, are riding in an unsafe position when they ride on the rear of one or more cars. Employees in the Jack Plant would not be exposed to the hazard of falling under the wheels of the pushing vehicle because of their practice of wearing safety belts (Tr. 195).

18. South Atlantic Division's Rule No. 5 provides that "[a]ny time three or more cars are dropped down the track there should be two people braking the cars" (Exh. 4). Only Mr. Brown was braking the four cars being dropped at the Jack Plant on August 10, 1979, but Mr. Vaughan did

not explain why it would not have been good policy for the employees at the Jack Plant to have followed the South Atlantic Division's Rule No. 5. The safety rules adopted for the Jack Plant after Mr. Brown was killed prohibit riding on the front of any car being dropped and also prohibit the dropping of more than three loaded cars at one time (Exh. I).

19. It was the inspector's opinion that a car dropper is not complying with the provisions of section 56.9-41 if he is riding on the front of a car being dropped (Tr. 20; 84). He said that the car dropper should ride on the rear of one car being dropped, or between cars or on the rear of the last car, if more than one is being dropped (Tr. 21; 40; 76; 80; 97). Lone Star's safety manager agreed that Mr. Brown would have been likely to escape serious injury on the day of the accident if he had been riding between cars (Tr. 143).

20. Although Lone Star's witnesses discussed the possibility that a car dropper might be pinched when he is riding between cars, no one was able to cite an occasion on which such an injury has ever occurred (Tr. 133; 169). One of Lone Star's witnesses, Mr. Mays, referred to a time when a malfunctioning switch caused the wheels on one car to go in one direction while the wheels on another car went in a different direction (Tr. 169). Mr. Mays said that he was glad no one was riding between cars when that event occurred, but he could not say for certain that anyone would have been killed on that occasion if he had been riding between the effected cars (Tr. 170).

21. Exhibit A in this proceeding consists of a two-page memorandum written by the Secretary of Labor's Office of the Solicitor. The writer of that memorandum discusses 30 C.F.R. § 77.1607(v) which contains language similar to that set forth in section 56.9-41 which is quoted in Finding No. 12 above. The writer of Exhibit A expresses the opinion that there might be circumstances in which an operator could be cited for a violation of section 77.1607(v) if a car dropper were observed to be riding on the front of cars which are about to be coupled. Exhibit A also expresses the opinion that if MSHA is going to adopt a general policy under which operators will be cited for violations of section 77.1607(v) any time a car dropper is observed riding on the front of a car, advance warning of that policy should be given before such an enforcement policy is instituted (Tr. 45-46; Exh. A). Inspector Baril had never seen or heard of the above-described memorandum prior to the hearing held on August 12, 1980 (Tr. 46).

22. Empty railroad cars are delivered to Lone Star's Jack Plant by the railway company. The location of the manually operated brake wheels varies from car to car, so that when the cars are dropped after being loaded, the brake wheel may be on the front of one car and on the rear of the adjacent car. Lone Star has no facilities for turning the cars so as to cause the brake wheels to be uniformly located on the rear of all cars (Tr. 89-90). For that reason, if a single car needs to be dropped to the storage area, and the brake-control wheel is on the front of that single car, Lone Star would find it impossible to comply with section 56.9-41 if

that section is interpreted to prohibit the car droppers from riding on the front of the car (Tr. 58). After Citation No. 305912 was written, Lone Star prepared some new safety rules pertaining to the loading and dropping of railroad cars. Rule No. 5 of those regulations provides "[n]ever ride one loaded or empty car. Brake will be set and car will be pushed all way from loading to parking area". [Emphasis is part of Rule No. 5.] (Exh. I; Tr. 127; 139).

23. Cars being dropped from the loading area to the storage area have the right-of-way over vehicular traffic. The car droppers rarely see any persons walking in the vicinity of the track (Tr. 197). Since the accident on August 10, 1980, the car droppers have been riding on the rear car or between cars and they have had no difficulties in dropping cars from those positions (Tr. 128; 196). The employee who is pushing the cars can see down the track on one side of the cars being dropped, while the car dropper looks down the track on the other side of the cars. If either employee sees any hazard in front of the cars being dropped, he can notify the other person of the fact so that the car dropper can decrease the rate of speed or stop the cars being dropped (Tr. 196-197).

Consideration of Parties' Arguments

The Parties' Proposed Findings

Respondent's brief (pp. 5-13) contains 50 proposed findings of fact. While the subjects discussed in respondent's 50 findings of fact may be found in the record on the pages and in the exhibits to which the findings of fact refer, I believe that the 23 findings of fact set forth above in this decision are preferable to those proposed by respondent because I have organized my findings of fact so as to make them a composite of the credible testimony of all witnesses on a given subject. As such, I believe they faithfully reflect all the facts on which my decision should be based.

Petitioner's brief (pp. 3-8) contains a statement of facts. Here again, I prefer to rely upon the 23 findings of fact set forth above. I have provided more transcript and exhibit references in support of my findings than have been given in petitioner's brief. Some of the statements on pages three to eight of petitioner's brief contain ambiguities which could be misleading to the Commission if my decision should become the subject of the Commission's granting of a petition for discretionary review. For example, petitioner's counsel seems to be saying in the upper part of page six of her brief that the Jack Plant involved in this proceeding is located in Lone Star's South Atlantic Division. If that is what is being stated on page six, it would be contrary to the evidence which shows that the Jack Plant here involved is located in the Chesapeake Division (Finding No. 15 and 16, supra). Also on the lower part of page six of petitioner's brief, a statement appears to the effect that when cars fail to couple, the knuckles "always" override. Mr. Mays testified that he had had the cars being dropped fail to couple on about a dozen occasions, but he said that the cars bounced back 2 feet and that nothing unusual occurred at the speed the cars were being dropped on those occasions. The testimony cited in petitioner's brief on pages six and seven fails to support a finding that the knuckles "always" override when cars fail to couple.

Occurrence of Violation

The primary issue raised in this proceeding is whether a violation of 30 C.F.R. § 56.9-41 occurred. Respondent's brief (p. 4) states that it has contested this case because it does not believe that a violation occurred. If a violation, in respondent's opinion, had occurred, respondent would not have made an issue about payment of the civil penalty of $1,500 proposed by the Assessment Office.

Respondent's brief (p. 2) quotes the language of section 56.9-41 which provides that "[o]nly authorized persons shall be permitted to ride on trains or locomotives and they shall ride in a safe position". Respondent states that no question exists as to whether the person who was riding on the railway cars involved in this case was authorized to ride on the cars. Therefore, respondent concludes that the only question at issue in this case is whether the person who was fatally injured while riding on the front of the four railway cars being dropped to the loaded-car storage area was riding "in a safe position" within the meaning of section 56.9-41.

Respondent's brief (p. 2) explores the areas which might be considered safe for riding on railway cars. Respondent states that many riding places would obviously be unsafe, such as riding on couplings or clinging to ladders while the cars are in motion. Respondent points out that transporting men between cars is not only unsafe, but is specifically prohibited by section 56.9-40(d) of the mandatory safety standards (Tr. 96). Respondent also argues that riding on the rear of a single car or group of cars would significantly obscure the forward vision of a car dropper riding in that position (Finding Nos. 6 and 14, supra).

On the basis of the foregoing discussion, respondent's brief (p. 2) concludes that on any given railway car, only one place appears to be safe for riding and that is the brake platform specifically provided by the car manufacturer for that purpose (Finding No. 6, supra). Respondent observes that the brake platform provides the car dropper with a definite place to stand where he has good footing and direct control over the braking mechanism.

Respondent's brief (p. 3) continues its argument by observing that while the brake platform provides the car dropper with a safe place to ride, that safe location is subject to certain disadvantages over which the car dropper has no control. Among those disadvantages, respondent notes, is the fact that the railway cars are constructed so that the brake platform and manual wheel for controlling the brakes are located on only one end of a given car. The railway company delivers the cars without giving any consideration to the direction of travel on respondent's premises and respondent has no facilities for turning the cars around or otherwise arranging them so that all of the brake platforms will be uniformly located on the opposite end from the direction of travel. The result is that the car dropper may find that the brake platform and braking wheel are on the front of a single car, or on the front of the first of a group of cars, at the time the loaded cars need to be dropped to the loaded-car storage area (Finding No. 22, supra).

Respondent's brief (p. 3) concludes from the above discussion that dangers are inherent in the dropping of railway cars and that the car dropper can never find an absolutely safe place to ride. Respondent argues that the inspector in this instance was under pressure because of the death of the car dropper to cite a violation of some mandatory health or safety standard. Respondent says that if the car dropper had been riding between cars and he or some person had been injured or killed in an accident, that the inspector investigating that accident would either have cited a violation of section 56.9-40(d), which prohibits the transportation of persons between cars, or of some other section of the regulations.

Respondent's brief (p. 4) states that it has been given no guidance from the Secretary of Labor or the Mine Safety and Health Administration as to how car dropping can best be accomplished. Respondent's brief claims that it has not ignored the problems involved in dropping cars and that it has variations in its instructions as between operating divisions within respondent's total organization (Finding Nos. 15 and 16, supra). Respondent's brief states that since the occurrence of the accident involved in this case car droppers at the Jack Plant have been riding between cars or on the rear of cars and will continue to do so, but respondent argues that the fact that the car droppers will ride between cars or on the rear of cars means only that they will be riding in a different, but not necessarily safer, position than the position on the front of the car where the car dropper was riding when the accident here involved occurred.

At first impression, the arguments in respondent's brief appear to have a great deal of merit. The question which has troubled me from the beginning of this case is whether an operator should be expected to know from reading the provisions of section 56.9-41 that his employees are prohibited by the language in that section from riding on the front of railway cars being dropped to the loaded-car storage area of his plant. For all practical purposes, section 56.9-41 boils down to six words, namely, car droppers "shall ride in a safe position".

When I read section 56.9-41 prior to the hearing, I was certain that I would not have known that the six words quoted above prohibited a car dropper from riding on the front of the car or cars being dropped. After I had heard the testimony of the inspector and respondent's three witnesses, however, I had an entirely different perspective upon which to base my response to the exhortation that car droppers "shall ride in a safe position." Therefore, section 56.9-41 must be interpreted on the basis of the 23 findings of fact set forth above in my decision.

One should begin his initiation into the business of car dropping by examining Exhibit E which shows a car dropper standing on the brake platform on the front of a loaded car which is about to be dropped to the loaded-car storage area. The car dropper appears to be "in a safe position" because he has his left hand free to grasp a handhold on the front of the car and he is wearing a safety belt which will prevent him from falling to the ground if he should slip. If one then looks at Exhibit F he will see the expanse

of track which separates the car dropper from the other loaded cars onto which the car dropper expects to couple the car or group of cars on the front of which he is riding. The above-described pictures show the car dropper on a clear day and show an unobstructed track area in front of him. There is nothing about those two pictures which should cause anyone to conclude that the car dropper is riding in other than "a safe position".

When one begins to add the facts revealed by the record in this case to the serenity reflected by Exhibits E and F, however, he begins to understand why the car dropper is not riding "in a safe position". First of all, in this case, the car dropper was riding on the front of four loaded cars. The empty weight of each car is 70 tons and its loaded weight is about 84-1/2 tons. The car dropper, therefore, began his trip to the loaded-car storage area with 338 tons of weight riding behind him (Finding No. 5, supra). The car dropper's momentum is supplied initially by the pushing force of a truck or rubber-tired dozer. After the 338 tons of cars and materials start their journey, they can be stopped or slowed down only by application of a single manual brake on one of the four cars. No one knows the exact speed which the four cars were traveling on the day of the accident involved in this case, but the force of the impact of the cars being dropped against the 13 loaded cars in the storage area was so great that the 13 cars were pushed a distance of from 12 to 14 feet and the four cars being dropped rebounded a distance of 8 feet even though the front car was derailed by the collision. Moreover, the front car hit the rear of the 13th car with such force that the brake wheel on the front car being dropped left an imprint in the rear of the 13th car (Finding Nos. 9 and 10, supra). The operator of the Jack Plant has been dropping cars for 20 years and knows how much they weigh and how hard they are to slow down or stop even when they are moving at a low rate of speed.

The evidence in this case also reveals that the car dropper has the obligation of making sure that the drawhead on the front of the car being dropped is open so that it will couple with the loaded cars in the storage area. The success of the coupling operation depends upon the drawheads being in an open position. The only eyewitness to the accident stated unequivocally that the car dropper who was fatally injured on the date of the accident involved in this proceeding failed to check the drawhead of the front car before he got on it for the dropping operation. The eyewitness who was situated within 15 feet of the point of impact, stated that he looked down at the drawhead a few seconds prior to the impact and observed that the drawhead was closed. The fact that the drawhead was closed prevented the cars from coupling. If the drawheads had properly meshed, the action of coupling would have kept the front car separated from the rear of the 13th car by about 3 feet, or the length of the two drawheads. The fact that the drawhead on the front car being dropped was closed caused the two drawheads to bypass each other and permitted the cars to come together so as to crush the body of the car dropper (Finding Nos. 9-10 and 13, supra).

The eyewitness to the fatal accident testified that he had on about a dozen occasions failed to open the drawheads before dropping cars and that the cars had failed to couple on those occasions. No damage to the cars or injuries to the car dropper occurred on those occasions because the cars

being dropped were traveling slowly and the cars rebounded only 2 feet, as compared with the rebound of 8 feet in the case of the accident involved in this proceeding (Finding Nos. 10 and 11, supra). The operator of the Jack Plant must be held to have knowledge of the fact that the cars don't always couple and that the car droppers had been careless about making certain that the drawheads were open at the time the cars were started on their journey to the loaded-car storage area.

The operator's witnesses in this proceeding gave several reasons for preferring that the car dropper ride on the front of the car or cars being dropped (Finding No. 14, supra). Those reasons primarily stressed the fact that when the car dropper rides on the front car, he has an unobstructed view of the track area which separates him from the loaded cars to which he intends to couple. The operator's safety manager emphasized the fact that trucks make 1,200 trips per day across the railroad tracks used for dropping cars. The presumption to be drawn from the operator's arguments about the need for the car dropper to have an unobstructed view of the railroad tracks is that the car dropper would have an opportunity to stop the cars being dropped if a vehicle or person should stop on the tracks while the loaded cars are being dropped. The difficulty with that argument is that the cars are difficult to stop after the pushing vehicle has started them to rolling. If an object does get on the tracks and the car dropper should be unsuccessful in stopping the cars being dropped at a time when the car dropper is riding on the front car, the car dropper runs the risk of being crushed against any vehicle which may stop on the tracks. Moreover, as one of the operator's witnesses pointed out, persons seldom, if ever, walk in the vicinity of the tracks so as to be hit by moving cars. Additionally, the car dropper's view of the tracks in front of the car or cars being dropped is not greatly impaired in any event if he rides on the rear of the last car being dropped because the operator of the pushing vehicle can see the track area from one side of the cars being pushed while the car dropper is able to observe the track area from the other side of the cars being pushed (Finding No. 23, supra).

Respondent's brief (p. 4) correctly notes that the car-dropping rules adopted by its various divisions are inconsistent. For example, the rules respondent's South Atlantic Division, of which the Jack Plant is not a part, specifically state that "[u]nless absolutely necessary, never ride leading car down grade end. Ride in between the cars or the trailing end" (Finding No. 15, supra). Respondent's safety manager explained that the reason the South Atlantic Division had a rule prohibiting the car droppers from riding on the front of a car is that the employees in the South Atlantic division do not wear safety belts and they felt that they should stay off the front of the cars lest they slip and fall under the wheels of the front car. The safety manager stated that since the car droppers at the Jack Plant wear safety belts, there was no reason for the Jack Plant to adopt a rule prohibiting the riding of the front car because the car droppers at the Jack Plant are protected by their safety belts from falling under the wheels of the front car.

The safety manager's justification for not having a rule prohibiting the riding of the front car at the Jack Plant was neutralized by the testimony of one of respondent's other witnesses who stated that riding on the rear car is dangerous because the car dropper may slip and fall under the wheels of the vehicle used to push the cars (Finding No. 17, supra). While the safety belts worn by the car droppers at the Jack Plant would protect them from falling under the wheels of the pushing vehicle, the employees in respondent's South Atlantic Division would not be protected from falling in front of the pushing vehicle because of their practice of failing to wear safety belts. The fact that the employees in any of respondent's various divisions have recognized the hazards inherent in riding on the front car or group of cars being dropped shows that respondent's management is aware of the hazards involved in riding on the front car.

Although some of respondent's witnesses referred to the fact that it might be possible for a car dropper to be injured while he is riding between cars, the testimony of those witnesses stops short of being able to state that anyone riding between cars has been so injured and respondent's safety manager conceded that if Mr. Brown had been riding between cars on the day of the accident, he would, at most, have been exposed to a bruise or some other minor injury if he had been riding between cars when they failed to couple (Finding Nos. 19 and 20, supra).

A legal memorandum (Exhibit A) written by a person in the Secretary of Labor's Office of the Solicitor discussed section 77.1607(v), which contains language similar to that in section 56.9-41 here at issue, and concluded that the language in that section, depending on the circumstances involved in a given situation, would support the writing of a citation for a violation of that section if a car dropper were to be observed riding on the front of a car or group of cars being dropped. I believe that the facts which I have discussed above would warrant the writing of the inspector's citation in this proceeding. Therefore, I do not believe that my finding of a violation of section 56.9-41 in this case is inconsistent with the legal opinion expressed by the Solicitor's Office in Exhibit A.

I agree with the arguments advanced by the Secretary's counsel in her brief (pp. 8-13). On those pages, the Secretary's counsel notes that the definition of "safe", among other things, means to be free from damage, danger, or injury. The Secretary's counsel agrees with respondent that car dropping is a hazardous enterprise at best, but she points out that the hazardous nature of the work makes it essential that respondent require the car droppers to ride in the safest place available. She correctly contends that riding on the front of a car or the front car in a group of cars being dropped is the most dangerous place of all, that is, riding the front is more dangerous than riding between cars or on the rear of a group of cars (Finding No. 19, supra). Therefore, she concludes that respondent cannot permit the car droppers, as it was doing prior to the accident here involved, to ride wherever they determine is the most convenient position.

I believe that the inspector satisfactorily explained why it is not inconsistent for section 56.6-40(d) to prohibit the transportation of persons between railway cars while section 56.9-41 is interpreted as requiring that

persons working with moving cars be prohibited from riding on the front of moving cars in order for them to be considered as riding "in a safe position". The inspector, when asked about that apparent inconsistency, stated that his recommendation that a car dropper ride between cars or on the rear of cars being dropped refers to a person who is performing a function related to production. The car dropper's job requires him to move railroad cars from one point to another. In doing that job, the car dropper's safest position must be found and that is between cars or on the rear of cars, but if people are going to be transported from one place to another as passengers on trains, the safe position for them to ride, or be transported, is inside railroad cars rather than between the cars (Tr. 95-96).

I adopt the inspector's interpretation of section 56.9-40(d) and find that respondent improperly refers to section 56.9-40(d) in its brief (p. 3) as if that section prohibits a car dropper from riding between cars which are being dropped to the loaded-car storage area.

For the reasons given above, I find that respondent on August 10, 1979, the day of the accident, was in possession of knowledge pertaining to the hazards of allowing car droppers to ride on the front of a car or group of cars being dropped. An operator, having such a background of knowledge and experience as has been discussed above, should have known that allowing its car droppers to ride on the front car or group of cars was not in compliance with section 56.9-41 because a car dropper riding the front car is not "in a safe position".

Assessment of Penalty

Having found above that a violation of section 56.9-41 occurred, I shall now consider the six criteria set forth in section 110(i) of the Act for the purpose of assessing a penalty.

It was stipulated by the parties that respondent is a large operator. Therefore, any penalty assessed should be in an upper range of magnitude insofar as it is determined on the basis of the criterion of the size of respondent's business (Finding No. 1, supra).

Respondent presented no evidence pertaining to its financial condition. Therefore, in the absence of any facts to the contrary, I find as to a second criterion that payment of penalties will not cause respondent to discontinue in business (Buffalo Mining Co., 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 614 (1974)).

Although respondent has a history of previous violations showing that respondent has paid penalties for 347 prior violations during the 24-month period preceding the issuance of Citation No. 305912, it has been my practice to increase a penalty under the criterion of history of previous violations only when the violation before me has been violated on one or more prior occasions. Inasmuch as respondent has not previously been cited for a violation of section 56.9-41, the criterion of history of previous violations will not be used either to increase or decrease the penalty assessable under the other five criteria (Finding No. 2, supra).

Respondent demonstrated a very good faith effort to achieve rapid compliance after Citation No. 305912 was written because the citation was terminated within the time originally provided for in the inspector's citation. The evidence shows that the new rules adopted by respondent, among other things, prohibit riding on the front of cars being dropped, prohibit the dropping of more than three loaded cars at one time, require the checking of the drawhead to make sure the coupling is open before cars are dropped, and caution that pushing be done at a slow speed at all times (Finding No. 18, supra; Exh. I). The inspector's subsequent action sheet states that the company's new rules would probably have been enforced even sooner than they were had not all production been stopped on August 14, 1979, so that respondent's employees could attend funeral services for the person who was killed in the accident on August 10 (Exh. 2). Therefore, respondent will be given full credit for having shown very good faith in achieving rapid compliance.

As to the criterion of negligence, counsel for the Secretary argues in her brief (pp. 13-14) that respondent was "excessively negligent" for several reasons. She claims that respondent had a regional policy prohibiting the riding of the front car, but that respondent failed to invoke that rule at the Jack Plant. She also notes that respondent had no formal training program for car droppers and allowed them to learn how to drop cars by watching "experienced" car droppers who habitually rode on the front of cars being dropped. She argues that respondent's failure to publish any guidelines for the dropping of cars at the Jack Plant left the car droppers free to follow procedures which were unsafe, such as allowing cars to be dropped at excessive speeds and without properly checking to see that the drawheads were open prior to dropping.

There is some merit to the claims in the Secretary's brief to the effect that respondent was "excessively negligent", but the record does show that respondent is a safety-minded company in many respects. For example, each employee in respondent's Chesapeake Division, which includes the Jack Plant, was required to read and sign a list of 42 safety rules and certify that he or she had read the rules and had agreed to follow them so as "* * * to perform my job in the manner that is the safest for me, my fellow employees, and my equipment" (Exh. I; Finding No. 16, supra). Among the rules which the employees at the Jack Plant are required to follow is a requirement that employees wear safety belts at all times if they ride on moving railroad cars. Employees are also prohibited from getting on and off of moving equipment at any time. Employees are advised in Rule No. 42 of the list of safety rules that violation of any of the safety rules will be cause for disciplinary action.

Consequently, while respondent did not at the Jack Plant enforce a rule prohibiting the riding on the front of cars being dropped while such a rule was in force in its South Atlantic Division (Finding No. 15, supra), it cannot be said that respondent was completely indifferent about operating its plant in a safe manner. The most negligent aspect of respondent's actions was its failure to publish any specific written rules with respect to the dropping of cars (Tr. 142). Also respondent's management did not pay enough attention to the careless manner in which the cars were being dropped by

Mr. Brown who was fatally injured on August 10. That employee not only failed to make sure the drawhead was open before the cars were started on their trip to the loaded-car storage area, but also dropped the cars at an excessive speed. The foregoing conclusion is supported by the fact that the front car derailed and all of the cars rebounded a distance of 8 feet, whereas when cars are traveling at a slow speed and fail to couple, they rebound for a distance of only 2 feet (Finding Nos. 9 and 11, supra). Therefore, I find that the violation was accompanied by a relatively high degree of negligence.

As to the criterion of gravity, the Secretary's brief (pp. 15-16) contends that the violation was very serious. In support of that contention, the Secretary's counsel argues that the probability of occurrence of a serious accident was very high because it repeatedly happens at the Jack Plant that the front car fails to couple with the loaded cars in the storage area because of the car dropper's oversight in opening the drawhead before the cars are dropped. She argues that the great weight of the cars being dropped, the fact that the cars on August 10 were being dropped at an excessive speed, the lack of a training program, and the riding of car droppers on the front car, all contributed to the likelihood of occurrence of a serious accident and made the riding of the front car a very serious act. On the basis of the reasoning set forth above, the Secretary's counsel recommends assessment of a maximum penalty of $10,000.

There is merit to the arguments advanced by the Secretary's counsel in support of her claim that the violation was very serious. The fact that Mr. Brown was riding in an unsafe position when he was fatally injured demonstrates beyond any doubt that the violation was serious. As has been mentioned above, all the witnesses agreed that dropping cars is a hazardous type of work. The evidence supports a finding that riding on the front car is the most unsafe position that a car dropper can assume. Yet all of the car droppers were habitually riding on the front of the first car where they were more likely to be crushed if the cars failed to couple than if they had been riding between cars or on the back of the last car, and the cars had failed to couple. Therefore, I find that the violation was very serious.

Considering that a large operator is involved, that there was a very good faith effort to achieve rapid compliance, that respondent has no history of a previous violation of section 56.9-41, that payment of penalties will not cause respondent to discontinue in business, that the violation was accompanied by a relatively high degree of negligence, and that the violation was very serious, I find that a penalty of $6,000 should be assessed.

WHEREFORE, it is ordered:

Lone Star Industries, Inc., within 30 days from the date of this decision, shall pay a civil penalty of $6,000.00 for the violation of 30 C.F.R. § 56.9-41 charged in Citation No. 305912 dated August 13, 1979.

Richard C. Steffey

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

Distribution:

Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

William I. Althen, Esq., and Barry M. Hartman, Esq., Attorneys for Lone Star Industries, Inc., Smith, Heenan, Althen & Zanolli, 1730 Rhode Island Avenue, NW., Washington, DC 20036 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

30 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-140
	:	A.O. No. 46-01576-03032
v.	:	Itmann No. 3A Mine
ITMANN COAL COMPANY, Respondent	:	

DECISION AND ORDER

After a careful review of the parties' prehearing submissions and a lengthy prehearing conference call on June 12, 1980, the trial judge, upon inquiry of the parties, expressed the view that the two citations for inadequate preshift examinations, 30 C.F.R. 75.303, were underassessed because of testimony given in a proceeding, WEVA 80-230, relating to one of the conditions involved in the failure to adequately preshift. Upon further inquiry, the trial judge informed the parties he would approve a settlement of Citation 657220 in the amount of $700 and Citation 657564 in the amount of $300. 1/

1/ The amounts initially assessed were $130 and $114 respectively. The operator suggested the settlement discussion because of the disproportion between the expense of a full-scale trial-type hearing, approximately $2,000, and the amounts involved in the violations cited. This I believe is highly commendable. The trial judge has repeatedly suggested that under its de novo authority to "assess" penalties (section 110(i)) and to "approve" proposals to "compromise, mitigate, or settle" penalties (section 110(k)), the Commission encourage the use of informal pretrial procedures to effect just, speedy and inexpensive dispositions of cases or violations where the amount involved does not warrant the convening of a trial-type hearing or there is no genuine dispute of material adjudicative fact. The Commission, however, apparently believes, I think wrongly, that upon a notice of contest an operator has an absolute right to a full blown testamentary hearing regardless of whether the amount involved is $40 or $4,000. See, Peabody Coal Company, 2 FMSHRC 1035 (1980).

Settlement at the amount initially assessed was denied early on because the trial judge perceived an issue which he believed deserved further ventilation. 2/ This ventilation occurred in the course of the parties' pretrial preparation and as a result of the availability of the transcript in the related proceeding.

As a result of the prehearing conference call, the parties have moved for approval of a settlement in the amounts suggested by the trial judge.

Since I find the settlement proposed is in accord with the purposes and policy of the Act, it is ORDERED, that the motion to approve settlement be, and hereby is GRANTED. It is FURTHER ORDERED that on or before Friday, July 18, 1980, the operator pay the penalty agreed upon, $1,000, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

2/ There obviously are cases where regardless of the low amount of the initial assessment and the parties' desire to settle the judge is warranted in requiring further explanation before deciding a trial-type proceeding is unnecessary. And there are also cases where an operator may, because of the repetitive nature of a condition which it believes is not subject to citation, be able to justify a trial-type hearing even though the amount involved in the test case is relatively insignificant. These are matters best left for determination on a case-by-case basis subject to review only for an abuse of discretion.

Distribution:

Barbara Kaufmann, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Karl T. Skrypak, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Rd., Pittsburgh, PA 15241 (Certified Mail)

☆U.S. GOVERNMENT PRINTING OFFICE: 1980-341-638/3462