

DECEMBER 1979

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

Secretary of Labor, MSHA v. Island Creek Coal Co., KENT 79-129;
(Judge Moore, November 29, 1979).

Maben Energy Corp. v. Secretary of Labor, MSHA, WEVA 79-123-R;
(Judge Melick, November 30, 1979).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 10, 1979

MAGMA COPPER COMPANY :
 :
 :
 v. :
 :
 SECRETARY OF LABOR, : Docket No. DENV 78-533-M
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 :
 and :
 :
 UNITED STEELWORKERS OF AMERICA :

DECISION

The question in this case is whether a mine operator is required to pay only one representative of miners for time spent accompanying an inspector when the inspection is divided into two or more parties to simultaneously inspect different parts of a mine. For the reasons that follow, we find that one miners' representative in each inspection party must be paid for time spent accompanying an inspector who is engaged in an inspection of the mine "in its entirety" under 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et. seq. ["the 1977 Act"].

Magma Copper Company operates a large copper mine complex near San Manuel, Arizona. The complex includes an underground copper mine and milling facilities. On July 26, 1978, two inspectors from the Department of Labor's Mine Safety and Health Administration arrived at the complex to continue an inspection of the milling facilities that had begun the previous week under section 103(a) of the 1977 Act. That section requires that each surface mine be inspected in its entirety at least two times a year and that each underground mine be inspected in its entirety at least four times a year.

Magma's milling facilities consist of several buildings and other structures. The milling operation includes a receiving bin, a crushing facility, a concentrator building, a molybdenum plant, and a filter plant. One building is three floors high and a quarter mile long. The structures in the complex are as much as seven miles apart.

To expedite inspection of the milling facilities, the inspectors formed two inspection parties to visit different work sites. They told Magma officials that they would like a miners' representative to accompany each of them. Magma officials agreed to assign two miners' representatives to accompany the inspectors but they stated that Magma would pay only one of them. Only one miners' representative accompanied an inspector.

79-12-3

The other inspector was not accompanied by a miners' representative because the inspectors were reluctant to ask a miner to accompany them without a guarantee that he would suffer no loss of pay.

The inspectors examined different milling facilities. Their activities took them about 6 to 7 miles apart, and consumed several hours. They did not see each other again until they returned to one of Magma's offices to perform some post-inspection paperwork.

Because of Magma's refusal to pay two miners' representatives for time spent accompanying the inspectors, a citation under section 104(a) of the 1977 Act that alleged a violation of section 103(f) was issued. When Magma again declined to pay two miners' representatives, one of the inspectors issued a withdrawal order for failure to abate under section 104(b). The order did not require the withdrawal of any miners from mining operations. Magma then filed a notice of contest under section 105(d) of both the citation and the withdrawal order.

Administrative Law Judge Lasher conducted a hearing and decided that because of the language of section 103(f), 1/ only one miners' representative was entitled to be paid for participating in the inspection.

1/ Section 103(f) of the 1977 Act reads as follows:

[1] Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. [2] Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. [3] Such representative of miners who is an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. [4] To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. [5] However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. [6] Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. [Sentence numbers and emphasis added.]

Specifically, he held:

Where a single regular "entire mine" inspection is being conducted pursuant to section 103(a) of the [1977] Act by two or more inspectors, only one representative of miners is entitled to participate in the inspection without loss of pay even though the group conducting the inspection is divided into two or more parties to simultaneously inspect different parts of the mine.

Judge Lasher believed that this interpretation of the walkaround pay provision was necessary because section 103(f) provides in part that "only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation . . ." He consequently vacated the citation and withdrawal order. On April 11, 1979, the Commission granted petitions for discretionary review filed by the Secretary of Labor and the United Steelworkers of America. On July 31, 1979, we heard oral argument.

We do not think it is enough to rely, as the administrative law judge did, only upon the literal language of section 103(f). The literal words of a statute may not be the best guide to the legislative purpose when they appear to conflict with the congressional purpose for creating a right or produce a result that is illogical. See Central Hanover Bank & Trust Co. v. Commissioners 159 F.2d 167, 169 (2d. Cir. 1947) (per L. Hand, J.); United States v. American Trucking Associations, 310 U.S. 534, 543 (1940). 2/

2/ In our view, the legislative history does not specifically address the question before us. Magma disputes this. It claims that a statement made by Senator Javits on the Senate floor directly addresses this issue and authoritatively resolves it in Magma's favor. We disagree.

During the Senate debate on the bill from which the 1977 Act was largely derived, Senator Helms introduced an amendment to strike out the third and fifth sentences of what is now section 103(f), and thereby eliminate the right to walkaround pay. 1977 Legis. Hist. at 809, 812. Senator Javits, speaking in opposition to the amendment on behalf of the bill's managers, gave several reasons why the amendment should be defeated. Id. at 1054-1056. During his lengthy remarks, he commented that the bill required that only one miners' representative be paid. Id. at 1055-1056. Magma believes that Senator Javits' comment shows that section 103(f) was designed with multiple inspection parties in mind. We do not. Although Senator Helms had briefly mentioned multiple inspection parties, Senator Javits' extemporaneous remarks neither bear upon nor mention multiple parties. The Senator seems to have spoken only to the common and simple situation of one or more inspectors forming only one inspection party. We therefore conclude that the legislative history does not speak directly to the issue before us.

The language of section 103(f) conveys the impression that Congress expected that one inspection party will visit all parts of the mine and one paid miners' representative will therefore fully participate in the inspection. The walkaround pay limitation appears designed to minimize the operator's economic burden by requiring him to pay only one miner who is in that one inspection party.

However, several inspectors are often sent into large mines to expedite inspection of the entire mine. ^{3/} Providing walkaround pay only to one miners' representative when several inspection parties are inspecting the entire mine would make the right to walkaround pay dependent on the number of inspectors sent to the mine. We agree with the Secretary that it is doubtful that Congress intended this illogical result. This operator has made no showing in this case that the presence of two inspection parties prejudiced him.

In our view, the Congressional purpose for limiting walkaround pay would not be frustrated by requiring that one miner in each inspection party be paid. We share the Secretary's judgment that the cost to an operator of walkaround pay when two inspection parties are formed should roughly approximate the cost when only a single party is formed because the number of hours spent by paid miners' representatives in the inspection should be about the same in both cases. We also believe that the construction of 103(f) urged by Magma would frustrate the purposes for which Congress granted a right to walkaround pay. Walkaround pay was designed to improve the thoroughness of mine inspections and the level of miner safety consciousness. The first sentence of section 103(f) expressly states that the purpose of the right to accompany inspectors is to aid the inspection. The Senate committee report on S. 717, 95th Cong., 1st Sess. (1977), the bill from which section 103(f) is derived, explained that the purpose of the right to accompany an inspector is to assist him in performing a "full" inspection, and "enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-617 (1978) ["1977 Legis. Hist."]. The purpose of the right to walkaround

^{3/} A report by the National Coal Association and the Bituminous Coal Operators Association that was submitted to the Labor Standards Subcommittee of the House Committee on Education and Labor states:

Some coal mines are very large: one mine, for instance, is the size of the island of Manhattan underground. That mine, along with many others, employs several hundred miners who work in separate geographic underground areas at many diverse tasks under varying degrees of supervision. It is common for miners to have to travel an hour or more underground just to get to their work areas from the mine entrance. Thus, a "complete inspection" of an entire mine can take a very long time.

NCA, BCOA, "Federal Coal Mine Health and Safety Act 1969: A Constructive Analysis with Recommendations for Improvements", at 30 (1977).

pay granted by section 103(f) is also clear: to encourage miners to exercise their right to accompany inspectors. Id. 4/

It was Congress' judgment that a failure to pay miners' representatives to accompany inspectors would discourage miners from exercising their walk-around rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners. If only one of the inspectors would be assured of receiving the assistance of a miners' representative when conducting a 103(a) inspection of the mine, only a part of the mine would be likely to receive the kind of inspection that Congress expected the walkaround pay right to help assure. By providing a more efficient deployment of inspectors through multiple inspection parties, the Secretary should not be denied the assistance of the miner. Neither should the miner be denied the right to participate in such inspection with pay.

4/ The Senate committee report states:
Section 104(e) [103(f) in the final bill] contains a provision based on that in the Coal Act, requiring that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection The opportunity to participate in pre-or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties

Accordingly, the judge's decision is reversed, and the citation and withdrawal order are affirmed.

Jerome R. Waldie

Jerome R. Waldie, Chairman

Richard V. Backley

Richard V. Backley, Commissioner

Frank J. Jestrab

Frank J. Jestrab, Commissioner

A. E. Lawson

A. E. Lawson, Commissioner

Marian Pearlman Nease

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1979

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. VINC 74-11
 : IBMA 75-52
OLD BEN COAL COMPANY :

DECISION

This proceeding arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) ["the 1969 Act"], and involves the interpretation of sections 304(a) and 104(c)(2) of that Act. For the reasons discussed below, we hold that a violation of section 304(a) occurs when an accumulation of combustible materials exists in active workings, and that Old Ben unwarrantably failed to comply with the standard in this case.

On July 13, 1973, a Mining Enforcement and Safety Administration (MESA) inspector issued a withdrawal order pursuant to section 104(c)(2) for an alleged violation of 30 CFR §75.400. That regulation, which is identical to section 304(a) of the 1969 Act, provides:

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. 1/

The withdrawal order alleged in part:

Accumulations of loose coal and coal dust were observed from the 8 south belt drive to 20 feet outby the 710 survey mark, a distance of approximately 925 feet. The accumulations of loose coal and coal dust ranged in depth of from 2 to 14 inches on the east side of the belt and from 2 to 6 inches on the west side. 2/

The order was terminated on July 16, 1973, after the conditions cited were abated.

1/ Section 304(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq. (1978) ["the 1977 Act"], is identical.

2/ The order also stated that "the violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard," and that the cited violation "is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 1 M.C. on October 26, 1972, and no inspection of the mine has been made since such date which disclosed no similar violation."

79-12-4

Old Ben filed an application for review of the withdrawal order. In his decision of March 19, 1975, Administrative Law Judge Rampton vacated the order. He held that: (1) MESA failed to prove all of the elements of a violation of 30 CFR §75.400; (2) the "conditions upon which the Order is premised were not such as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard"; and (3) there was no unwarrantable failure to comply with the standard. MESA appealed the judge's decision to the Interior Department's Board of Mine Operations Appeals, contesting all three of these holdings.

On August 17, 1977, the Board affirmed the judge's decision. 8 IBMA 98. It held that the elements of a violation of 30 CFR §75.400 are: (1) an accumulation of combustible materials, (2) the operator's knowledge, actual or constructive, that such accumulations existed, and (3) the failure of the operator to clean up or undertake to clean up such accumulations "within a reasonable time after discovery, or, within a reasonable time after discovery should have been made." *Id.* at 114-115. It held, as had the judge, that MESA had proven only the first of these three elements. Therefore, it affirmed the judge's vacation of the order because MESA had not established the underlying violation. The Board did not reach the "significant and substantial" or unwarrantable failure issues because "disposition of the first issue obviates the necessity of reaching the other ... issues...." *Id.* at 106-107. The Board denied MESA's motion for reconsideration. 8 IBMA 196 (1977).

On September 20, 1977, the United Mine Workers of America filed a petition for review of the Board's decision with the Court of Appeals for the District of Columbia Circuit (No. 77-1840). On November 9, 1977, Congress passed the 1977 Act. It transferred enforcement functions from the Secretary of Interior to the Secretary of Labor effective March 9, 1978. The Secretary of Labor then successfully moved to substitute himself for the Secretary of Interior as respondent, and filed a brief urging reversal of the Board's decision and remand to the Commission. Old Ben did not file a brief. In an order issued on January 16, 1979, the Court observed that no party supported the Board's decision. Without deciding the merits, it remanded the case to the Commission "for further proceedings."

The issues before us are:

- (1) What are the elements of a violation of 30 CFR §75.400?
- (2) Did Old Ben violate the standard?

(3) If Old Ben violated the standard, was the violation "caused by an unwarrantable failure" to comply with such standard?

(4) If Old Ben violated the standard, is a finding that the violation was "of such a nature as could significantly and substantially contribute to the cause or effect of a mine safety or health hazard" required to issue a withdrawal order under section 104(c)(2) of the 1969 Act?

The elements of a violation of 30 CFR §75.400

The Board concluded that the standard was intended "to minimize, rather than eliminate, accumulations of combustible materials so that they would simply be less likely to present a safety hazard source." 8 IBMA at 108-109. The "presence or existence of an accumulation of combustible materials in active workings is [not] sufficient by itself, to establish a violation," because "the crux of the violation" is the operator's "failure to clean up, or undertake to clean up, an accumulation of combustible material which is already in existence." Id. at 112. The Board held, therefore, that there were three elements necessary to prove a violation of 30 CFR §75.400: (1) an accumulation of combustible materials; (2) the operator's actual or constructive knowledge of the accumulations; and (3) the operator's failure to undertake cleanup within a reasonable time. Id. at 114-115.

In applying the standard it had fashioned to the facts of this case, the Board concluded that:

[t]he evidence ... conclusively established that although most of the combustible materials did exist in the subject mine as alleged in the order ..., as soon as the operator became aware of the cited conditions, enough employees were promptly dispatched to abate the conditions within a reasonable time. The evidence further clearly established that the operator was following a regular procedure reasonably calculated to alert its personnel to the hazards posed by accumulations of combustible materials. Consequently, there was no permitting of an accumulation by the operator and no violation of the subject standard. [Id. at 119.]

We disagree with the Board's interpretation of the standard. The language of the standard, its legislative history, and the general purposes of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exists.

One of the primary purposes of Congress in passing the Act was to prevent the loss of life and serious injuries arising from explosions and fires in underground mines. A precipitating factor in consideration and passage of the 1969 Act was the tragic mine explosion at Farmington, West Virginia on November 20, 1968, that killed 78 miners. 3/ Congress

3/ S. Rep. 91-411, 91st Cong., 1st Sess., 6-7, 8 (1969), and H. Rep. 91-563, 91st Cong., 1st Sess., 1-2, 6 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I, at 132-133, 134, 1031-1032, 1036 (1975) ["Legis. Hist."].

recognized that "ignitions and explosions have been among the major causes of death and injury to coal miners." ^{4/} To achieve its goal, Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. Section 304(a) is one of those standards.

Section 304(a) of the 1969 Act adopted the language of section 304(a) of H.R. 13950. ^{5/} The House Report stated that the standard

requires that coal dust, float coal dust, loose coal, and other materials be cleaned up so that it will not accumulate in active underground workings or on electric equipment. [H. Rep. 91-563, 91st Cong., 1st Sess., 65; Legis. Hist. at 1077 (emphasis added).]

The Conference Committee agreed to the language in the House bill. H. Rep. 91-761, 91st Cong., 1st Sess., 32 (1969); Legis. Hist. at 1476. The legislative history demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated. ^{6/}

The language of section 304(a) also furnishes no support for the Board's view that accumulations of combustible materials may be tolerated for a "reasonable time." Rather, the language of the standard makes accumulations impermissible. Even if, however, the Board's interpretation were arguably consistent with the language of the standard, it was hardly compelled by it. Inasmuch as our interpretation of section 304(a) is also consistent with its language, and would further the congressional purpose of preventing coal mine explosions and fires, we adopt it here. "Should a conflict develop between a statutory interpretation that would

^{4/} S. Rep. 91-411, 25; Legis. Hist. at 151.

^{5/} H.R. 13950, 91st Cong., 1st Sess., 70-71 (1969); Legis. Hist. at 983-984.

^{6/} The forerunner of the House language for section 304(a), as adopted, was section 205(a) of S. 2917, which provided in part:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall not be permitted to accumulate in active underground workings or on electric equipment therein. S. 2917, 91st Cong., 1st Sess., 47 (1969); Legis. Hist. at 49.

The Senate Report stated:

Tests, as well as experience, have proved that inadequately inerted coal dust, float coal dust, loose coal, or any combustible material when placed in suspension will enter into and propagate an explosion. The presence of such coal dust and loose coal must be kept to a minimum through a regular program of cleaning up such dust and coal. S. Rep. 91-411, 65; Legis. Hist. at 191 (emphasis added).

The report does not state, as the Board apparently read it, that "accumulations ... must be kept to a minimum...." Fairly read, this language can be interpreted to mean that if the presence of loose coal and coal dust is kept to a minimum, accumulations will not occur.

promote safety and an interpretation that would serve another purpose at a possible compromise to safety the first should be preferred." UMWA v. Kleppe, 562 F.2d 1260, 1265 (D.C. Cir. 1977).

We hold that a violation of section 304(a) and 30 CFR §75.400 occurs when an accumulation of combustible materials exists. 7/

Did Old Ben violate the standard in this case?

We accept that some spillage of combustible materials may be inevitable in mining operations. Whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount. There is no doubt, however, that an accumulation of combustible materials was present here. The Board found that "most of the combustible materials did exist in the ... mine as alleged in the order...." 8 IBMA at 119. Indeed, the Board noted that "witnesses for the operator did not dispute the testimony of the inspector pertaining to the existence of accumulations of loose coal and coal dust along the 8 south beltline for a distance of approximately 925 feet." 8 IBMA at 116 (emphasis in original). We need not precisely define an accumulation in this case, for we agree with the Board's finding that here the vast spillage cited by the inspector clearly constituted an accumulation. 8/ Therefore, we conclude that Old Ben violated 30 CFR §75.400.

Was the violation "caused by an unwarrantable failure to comply with such standard"?

The judge held that there was no unwarrantable failure by Old Ben to comply with a mandatory standard. In Zeigler Coal Co., 6 IBMA 182 (1976), the Board stated that "a section 104(c)(2) order must ... be based on a violation of a mandatory health or safety standard caused by an operator's unwarrantable failure to comply" with the standard. 6 IBMA at 190. 9/ We need not examine this question here, for we hold that the judge erred and that the violation was caused by an unwarrantable failure to comply.

7/ The matters referred to in the second and third elements of the Board's interpretation are, we believe, appropriately considered in determining an appropriate penalty, not in determining whether a violation of this standard occurred.

8/ We note that the Secretary does not contend "that the merest deposit of combustible material constitutes a violation of the standard."

9/ As we have noted, the judge held that Old Ben had not violated 30 CFR §75.400. His additional holding of no unwarrantable failure was apparently made to provide an alternative basis for vacating the withdrawal order. Although the Board did not reach this issue, it did accept the judge's findings on this issue when it discussed its third element of proof for establishing a violation of the standard. 8 IBMA at 118, 119.

The judge found that the accumulations had occurred mostly during the latter part of the previous shift; that the operator "could not reasonably have been expected to know of the presence of the materials until the beginning of the second shift, when the second-shift mine manager should review the midnight shift examiner's report (based on inspections between 4:00 a.m. and 7:00 a.m.)..."; 10/ and that the operator "first gained actual knowledge of the materials when the mine manager and [section foreman] reviewed the mine examiner's report and when [the section foreman] walked the belt when he arrived at the section shortly before the inspection began." The judge concluded that there was no unwarrantable failure to comply with the standard "because as soon as the operator became aware of the cited conditions enough employees were promptly assigned to abate the conditions within a reasonable time," and because Old Ben "was following established procedures reasonably calculated to alert [it] to hazardous conditions within a reasonable period of time."

We disagree with the judge's conclusion. He found as a fact that the accumulations were reported in the midnight shift examiner's report, made between 4 a.m. and 7 a.m. Sections 303(d)(1) and 303(e) of the Act required the examination made by the midnight shift examiner. Such examinations must be made by "certified persons designated by the operator." Section 303(e) required in addition that any "hazardous conditions ... shall be corrected immediately." We impute to Old Ben the midnight shift examiner's knowledge that the accumulations existed sometime during the midnight shift. Cf. Pocahontas Fuel Company v. Andrus, 590 F.2d 95 (4th Cir. 1979). Compliance did not begin, however, until after the 8 a.m. shift began. Thus, contrary to the judge's holding, the operator did not promptly begin to eliminate the conditions "as soon as [he] became aware of the cited conditions." This constituted an unwarrantable failure on the part of Old Ben under the facts of this case. 11/

Is a "significant and substantial" finding required
for the issuance of a section 104(c)(2) order?

Finally, the judge concluded, as a third basis for vacating the order, that the "conditions upon which the Order is premised were not such as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." 12/ It is unnecessary for us to review this conclusion because, after the judge's decision, the Board held that a "significant and substantial" finding (see section 104(c)(1)) is not required for the issuance of a withdrawal order under section 104(c)(2). Zeigler Coal Co., supra, 6 IBMA at 189-190. See also, UMWA v. Kleppe, supra, 532 F.2d at 1407. We concur in this interpretation of section 104(c)(2). Consequently, the judge's finding that the "significant and substantial" criterion was not met here was immaterial.

10/ The judge found that the second shift began at 8 a.m.

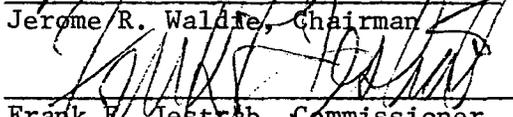
11/ We need not consider in this case whether the "operator" is chargeable with knowledge, if any, gained by other persons at an even earlier time. Nor need we determine in this case under what circumstances constructive knowledge is deemed to exist, nor to what extent knowledge, actual or constructive, is necessary to a finding of unwarrantable failure.

12/ The Board found it unnecessary to decide this issue. See note 5, supra.

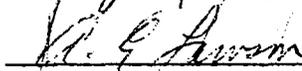
Accordingly, we reverse the decision of the judge and reinstate the withdrawal order.



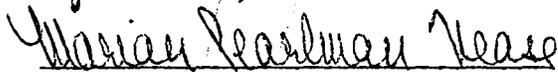
Jerome R. Waldie, Chairman



Frank V. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

Commissioner Backley did not participate in the decision of this case.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

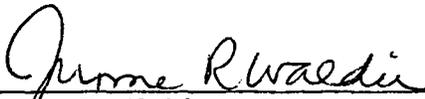
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December 12, 1979

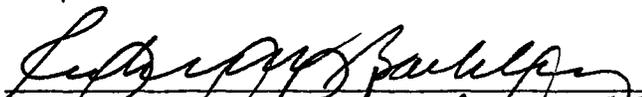
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :
v. : Docket No. VINC 78-395-P
FREEMAN UNITED COAL MINING :
COMPANY :
Respondent :

DECISION

The decision of the administrative law judge is reversed insofar as he dismissed the Secretary of Labor's petition for assessment of a penalty for an alleged violation of 30 CFR §75.400. The case is remanded for further proceedings consistent with our opinion in Old Ben Coal Co., No. VINC 74-11 (December 12, 1979).



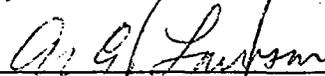
Jerome R. Waldie, Chairman



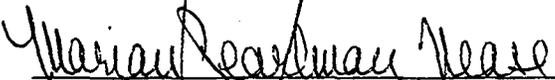
Richard V. Backley, Commissioner



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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December 12, 1979

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

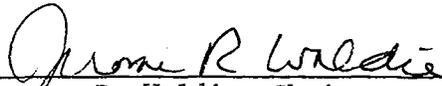
v.

PEABODY COAL COMPANY,
Respondent

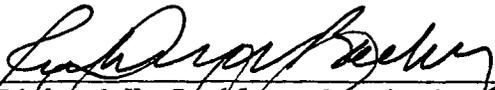
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: Docket No. VINC 77-91
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DECISION

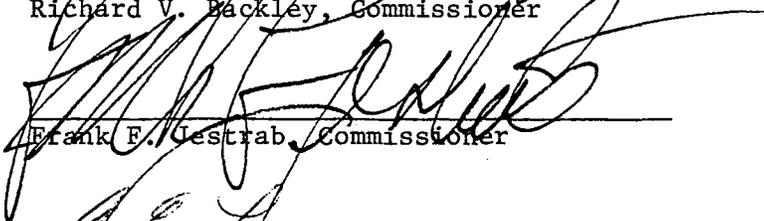
The decision of the administrative law judge is reversed. The case is remanded for further proceedings consistent with our opinion in Old Ben Coal Co., No. VINC 74-11 (December 12, 1979).



Jerome R. Waldie, Chairman



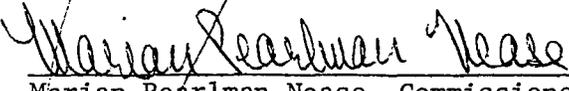
Richard V. Backley, Commissioner



Frank F. Gestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

79-12-5

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20005

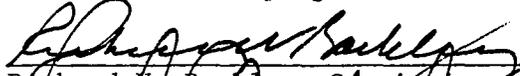
December 31, 1979

RAY MARSHALL, SECRETARY OF LABOR, :
ex rel. RODNEY D. McCOY :
v. : Docket No. KENT 79-263-D
ORA MAE COAL COMPANY :

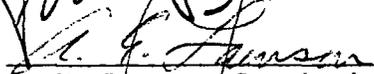
ORDER

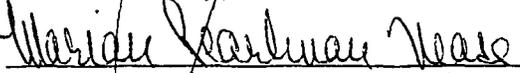
The Secretary of Labor has filed a petition for interlocutory review of a judge's ruling that he must produce documents that allegedly contain statements by miners to Mine Safety and Health Administration (MSHA) personnel concerning a discrimination complaint. The documents include the report of an MSHA investigator. The Secretary moved before the judge to strike those portions of Ora Mae Coal Company's motion for production that requested those documents. The motion to strike claimed that production would violate 29 CFR §2700.59, which bars a judge from disclosing the names of miner-informants except in extraordinary circumstances. The judge ordered deletion of the names of miner-informants before production of the documents containing their statements. The Secretary claims in his petition for interlocutory review that the judge erred in not reviewing all the documents in camera to determine whether the statements, even with the names deleted, might reveal to the operator the identity of the miner-informants. As to the MSHA investigator's report, the Secretary claims executive privilege as well.

Inasmuch as the Secretary in his motion to strike did not invoke the claim of executive privilege, did not argue to the judge that the statements themselves might reveal the identity of informants, and did not request an in camera inspection by the judge, we consider interlocutory review to be inappropriate at this time. These matters should have been presented to the judge first. The petition for interlocutory review is accordingly denied without prejudice.


Richard N. Backley, Commissioner


Frank W. Jastrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 1 - 31, 1979

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 3, 1979

CLEVELAND CLIFFS IRON COMPANY, : Contest of Order
Applicant :
v. : Docket No. VINC 79-68-M
: :
SECRETARY OF LABOR, : Order No. 286223
MINE SAFETY AND HEALTH : October 30, 1978
ADMINISTRATION (MSHA), :
Respondent :
: :
UNITED STEELWORKERS OF AMERICA, :
Representative of the Miners :
: :
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VINC 79-240-PM
Petitioner :
v. :
: Humboldt Mill
CLEVELAND CLIFFS IRON COMPANY, :
Respondent :

DECISION

Appearances: Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, Ishpeming, Michigan, for Applicant in Docket No. VINC 79-68-M and Respondent in Docket No. VINC 79-240-PM;
William B. Moran, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent in Docket No. VINC 79-68-M and Petitioner in Docket No. VINC 79-240-PM;
Mr. Bruce Chapman, Safety Committee Chairman, and Mr. Ernest Ronn, Subdistrict Director, United Steelworkers of America, for the Representative of the Miners.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Applicant (CCI) seeks review of an order of withdrawal issued on October 30, 1978, under section 104(b) of the Federal Mine Safety and

Health Act of 1977, 30 U.S.C. § 814(b). The order was issued because of the failure of Applicant to abate the violation alleged in a citation issued August 23, 1978, and modified October 5, 1978, charging a violation of the mandatory safety standard contained in 30 CFR 55.9-22, which requires berms or guards to be installed on the outer bank of elevated roadways. Petitioner (MSHA) filed a civil penalty proceeding seeking a penalty for the violation alleged in the citation. The two proceedings were consolidated for the purposes of hearing and decision since they involved the same facts. Pursuant to notice, a hearing was held on the merits in Marquette, Michigan, on August 7 and 8, 1979. Frank Gerovac and William Carlson testified on behalf of MSHA. Max Woelffer, Joseph Crites, Gordon Miner, and Robert Neil testified on behalf of CCI. No witnesses were called by the Representative of the Miners (USWA). At the request of the parties, I viewed the cited areas on August 8, 1979, accompanied by representatives of the three parties. Following this, I stated on the record what I had observed. Posthearing briefs were filed by CCI and MSHA. To the extent that the proposed findings and conclusions are not incorporated in this decision, they are rejected.

REGULATION

30 CFR 55.9-22 provides as follows: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

ISSUES

1. Whether the roads covered by the citation and order involved in this case were subject to the mandatory standard in 30 CFR 55.9-22?

(a) Whether the roadways in question were elevated?

(b) Whether the portions of the roadway involved herein are covered by the phrase "the outer bank?"

(c) Whether the standard applies only to roadways used for loading, hauling and dumping?

(d) If the previous question is answered affirmatively, whether the roadways in question here were used for loading, hauling or dumping?

2. If a violation of the standard has been established, what is the appropriate penalty?

FINDINGS OF FACT

1. CCI, in October 1978, and prior thereto, was the operator of the Humboldt Mill, a mill and iron ore pelletizing plant in Marquette County, Michigan.

2. CCI is a large operator. In October 1978, the Humboldt Mill employed approximately 111 people and operated three shifts daily, 7 days a week.

3. From the effective date of the 1977 Act until August 23, 1978, three violations of the mandatory standard contained in 30 CFR 55.9-22 were assessed and paid. Mr. Carlson, the supervisor of MSHA's Marquette Field Office, testified that approximately 26 "berm citations" were issued to CCI between 1974 and 1979. Since there was no evidence as to the number of such citations that were paid, this does not establish a history of prior violations. I conclude that the history is not such that penalties should be increased because of it.

4. On August 23, 1978, Federal mine inspector Frank Gerovac, during a regular inspection of CCI's Humboldt Mill, issued Citation No. 286849 charging a violation of 30 CFR 55.9-22 for a failure to provide berms on a 1,500-foot stretch of land on the western side of the road to the M-95 lift station and on a 35-foot stretch of land on the road leading to the pit pump station.

5. On October 5, 1978, William Carlson, supervisory mining engineer for MSHA's Marquette Field Office, modified the citation based upon a reinspection of the area. The modified citation included an additional area: a 200-foot section on the eastern side of the M-95 lift station road. The abatement time was extended to October 12, 1978.

6. On October 30, 1978, Federal mine inspector Richard Breazeal issued a 104(b) closure order because of the failure to abate the condition cited.

The M-95 Lift Station Roadway

7. The M-95 lift station roadway, also called the tailings dike road, is a rough gravel road along the crest of an impoundment dike, which is itself constructed of gravel and rock. The road is wide enough for two-way travel, although it is normally used by only one vehicle at a time.

8. The distance between the edge of the road and outer edge of the dike varies from 6 to 10 feet.

9. The roadway itself slants slightly to the inner side of the dike (away from highway M-95). The slant varies from 6 inches to a foot in some places.

10. The side of the dike road toward M-95 has a drop-off increasing in steepness as the road approaches the pumps. The road also narrows as it approaches the pumps. The angle of the slope is

up to 45 degrees. The slope from the roadway to the bottom measured up to approximately 75 feet. The vertical differential in height from top to bottom was approximately 35 feet.

11. There are many large rocks and boulders on the slope down to the bottom. At the bottom of the slope, there are many large trees and a large area covered by water or swamp.

12. The other side of the dike road toward the tailings basin is less steep--the drop-off is from 5 to 8 feet or less. There are some boulders along the side forming a natural barrier on this bank. The tailings basin is presently grown over with vegetation.

13. The road is used as an access to the M-95 lift pump station. The purpose of the pump station is to raise the water in a stream, which was blocked by the dike, up over the dike to its original course further downstream. Two operating pumps are in the pumphouse, and a third is there for use when needed.

14. At least once a day on the day shift, a supervisory employee drives a pickup truck on the road to check the pumps and the water level. On many days, the afternoon and night shift supervisors also drive down to check the pumps and the water level.

15. In the winter the pumps do not run continuously. Therefore, trips are made to the lift pump station to turn the pumps off and to restart them. When the pumps are turned off, the pipeline must be drained and two or more men are taken to the pumps for this task.

16. If mechanical problems develop with a pump, a 1-ton flat-bed truck brings a replacement pump, and the faulty one is taken back to the shop for repairs.

17. In the spring of the year, it is ordinarily necessary to bring in and install a fourth pump because of the large amount of water. After the water has subsided, it is necessary to drive a truck down to the station and remove the fourth pump.

18. In the winter time, it is necessary to plow the road of snow to maintain access to the pumps. I can safely take official notice that a considerable amount of snow normally falls in the winter months in Marquette County, Michigan.

19. The road has minimal maintenance, but occasionally it is necessary to use a front-end loader to fill chuckholes and patch rough areas.

20. The pit pump station has a submerged pump in the pit water and draws cold water from 60 feet down for use in the concentrating process in the mill. The water is pumped out to the mill.

21. The road to the pit pump station is narrow--only wide enough for single-lane traffic for most of its course, but widening out in the area closer to the station. As the road approaches the station, there is a wider turn around area, or parking area, below which is an overflow pipe which crosses the road and prevents vehicles from going further.

22. The composition of the road to the pit pump station is similar to that of the lift station road.

23. There are boulders forming a berm along the edge of the roadway northeast of the area covered by the citation. This apparently is a remnant of a bermed roadway used when the pit was being mined.

24. There is a drop-off of about 12 feet to a flat area 20 or 30 feet wide. Beyond that, there is a further drop-off to an area covered by water.

25. The pump is checked each shift by a supervisor who ordinarily drives to the station in a pickup truck. Periodic maintenance is required as was the case for the pumps in the lift station.

DISCUSSION AND CONCLUSIONS OF LAW

Elevated Roadway

There is little dispute that the roadways in question are elevated. The roadway to the M-95 lift station is 35 to 40 feet above the adjacent terrain and the slope toward M-95 is at a 45-degree angle. The other edge of the road in the cited area is 5 to 8 feet above the adjacent terrain. The cited area on the pit pump station road has a 10- to 12-foot drop-off to a ledge and a further drop-off of 12 feet to a water-filled area. Both areas are of sufficient height above the adjacent terrain to create a hazard in the event a vehicle ran off the roadway. Therefore, they are elevated.

Outer Bank

The standard applies to "the outer bank" (singular) of an elevated roadway. GCI argues that it is intended to cover roadways having a single bank as is typically the case on a haulage road from a pit or on the side of a mountain. No compelling reason having to do with safety was advanced for so limiting the standard. Two Administrative Law Judge decisions are in point. In MESA v. Peabody Coal Company, Docket No. VINC 77-102-P, issued December 13, 1977, Judge

Koutras considered the berm standard for coal mines contained in 30 CFR 77.1605(k). The standards are in identical language. Judge Koutras held that the regulation applies only to a single outside bank of the road and vacated the citation because it was directed to the inner bank of the roadway in question over which an employee drove in a fatal accident. In Cleveland Cliffs Iron Company v. MSHA, Docket No. VINC 78-300-M, issued September 8, 1978, Judge Moore interpreted the language in 30 CFR 55.9-22 as follows:

Inasmuch as it is the elevation which creates the hazard that berms are designed to alleviate, the intent of the regulation must be to require those berms wherever there is a hazard created by the elevation. Therefore, the term 'outer bank' means whichever bank is hazardous because of the elevation, and if both sides of a road present a hazard of rolling down a steep embankment, then both sides of the road are required to have berms.

The safety standard is meant to protect drivers of vehicles from injuries caused by going over embankments. It would be anomalous if the standard were limited to one side of the road when the hazard is on the other side or on both sides. With no reason other than the use of the singular term "the outer bank," I would find it impossible to accept such a construction. The use of the singular may be explained by reference to the direction of travel: the outer bank may be interpreted as the bank on the right of the driver. Therefore, on roads carrying traffic both ways, both banks are "the outer bank." I conclude that the standard requires berms for both banks of elevated roadways.

Loading, Hauling and Dumping

30 CFR 55.9 (of which 30 CFR 55.9-22 is a part) is a heading or title for the entire section. It reads: "Loading, hauling, dumping." It explains or defines the purpose and scope of the section, and therefore, in my opinion, limits the applicability of the safety standards set out in the subsections. See Cleveland Cliffs Iron Company v. MSHA, supra. I conclude that the berm standard applies only to roadways involved in loading, hauling and dumping. It remains to consider whether the activities on the road in question come within those terms.

CCI contends that the berm standard applies only "to typical load haul and dump movements associated with open pit activities, the most obvious of which is the loading, hauling and dumping of overburden and ore." This restricted interpretation was rejected in the case of Cleveland Cliffs Iron Company v. MSHA, supra, which held that trucks building a pipeline road were involved in hauling. Under the coal mine standard, Judge Michels held that the berm standard was applicable on roads used for the transportation of personnel. MESA v.

Consolidation Coal Company, Docket No. VINC 77-87, issued July 13, 1977. In the case of MESA v. Peabody, supra, Judge Koutras held that the standard applied to all roads on mine property used to transport coal, equipment or men.

As is shown in findings of fact numbers 13 through 19 and finding of fact 25, the roads in question here are used regularly, ordinarily three times a day and on some days more often. Their primary use is as access roads to the pump stations. They are not used for hauling ore or any mine product. The vehicles using the road are normally pickup trucks and 1-ton flatbed trucks. Ordinarily, the driver is alone, but occasionally men are transported. A number of times each year, the roads are used to haul pumps to and from the stations. Thus, men, equipment and tools are transported along these roads on a regular though limited basis. Is this hauling? A technical dictionary ^{1/} defines "hauling" as "the drawing or conveying of the product of the mine from the working places to the bottom of the hoisting shaft or slope." This definition seems to limit the term to underground mining and is therefore not helpful. The same dictionary defines "haulage" as "the drawing or conveying, in cars or otherwise, or movement of men, supplies, ore and waste both underground and on the surface." This definition would seem to include the activities on the roads in question. MSHA and its predecessor agency have in a more or less formal way interpreted the standard as applicable to all active roadways. The interpretation by the agency responsible for the regulation is of course entitled to great weight. However, it is not clear whether this interpretation is based upon the conclusion (which I reject) that the terms "loading, hauling and dumping" do not limit the applicability of the standard or upon the position that hauling occurs on all active roadways.

Having in mind the purpose of the regulation, which is to guard the safety of miners who travel on elevated roadways, I conclude that the routine, systematic usage of the roadways shown by this record constitutes hauling. Therefore, I conclude that berms are required on the areas of the roadways covered by the citations and order involved herein.

Penalty

I conclude that the citation as modified properly charged a violation of 30 CFR 55.9-22 and that a violation has been established by the evidence. CCI does not dispute that berms were not provided in the areas covered by the citation.

1/ A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968), pp. 530-531.

I have previously found that CCI is a large operator, and that its history of prior violations is not significant. There is no evidence that a penalty imposed herein will have any effect on CCI's ability to continue in business, and therefore, I find that it will not.

The gravity of a safety violation must be measured by (1) the likelihood that it will result in injuries, (2) the number of workers potentially exposed to such injuries, and (3) the severity of potential injuries. The evidence establishes in this case that injuries are not likely. The roadways are wide and the chances of going over the bank are not great. However, the hazard may be increased by weather conditions, such as fog or rain or snow. The number of workers exposed is not great, since the roadways are used relatively infrequently. However, should a vehicle go over the bank, the likelihood of severe injuries is very high because of the steep, rocky terrain. I conclude the violation was moderately severe.

CCI's failure to provide berms was intentional, in keeping with its (good faith) position that the standard did not apply to the roadways in question. For the purpose of the assessment of a civil penalty, I treat this as the equivalent of ordinary negligence.

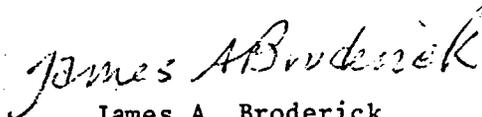
CCI did not demonstrate good faith in attempting to achieve rapid compliance, since it did not make any attempt to comply, and a closure order was issued. Although CCI was in good faith relying on its interpretation of the standard, I cannot credit it in the penalty proceeding with attempting to achieve rapid compliance.

Based on the testimony and other evidence introduced at the hearing and my viewing the site, and considering the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$880 should be imposed for the violation found to have occurred.

ORDER

Therefore, IT IS ORDERED that in Docket No. VINC 79-68-M, Order of Withdrawal No. 286223 issued October 30, 1978, is AFFIRMED and the contest of the order is DENIED.

IT IS FURTHER ORDERED that in Docket No. VINC 79-240-PM, Respondent CCI is ordered to pay the sum of \$880 within 30 days of the date of this decision as a civil penalty for the violation of 30 CFR 55.9-22.



James A. Broderick
Chief Administrative Law Judge

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-272-P
Petitioner : A.O. No. 15-02502-03007V
v. :
: No. 18 Mine
SHAMROCK COAL COMPANY, :
Respondent :

DECISION

Appearances: George Drumming, Jr., Attorney, U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee, for the
petitioner;
Neville Smith, Esquire, Manchester, Kentucky, for the
respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), on January 31, 1979, charging the respondent with one alleged violation of the provisions of 30 CFR 75.604. The alleged violation was cited on May 25, 1978, by an MSHA inspector in Citation No. 132945, which states as follows:

The electrical connections or splice in the conductors of the low medium voltage 550 volt AC 3 phase, roof bolter cable on the "G" section was not mechanically or electrically efficient. The splice was made by twist connection of the cable conductors. Section foreman stated knowledge of such type splice being in the cable and that other splices are made in the same manner.

The inspector cited a violation of 30 CFR 75.514 and fixed May 26, 1978, as the abatement date, but extended that date to June 30, 1978, at which time he modified the citation on May 26, 1978, by stating as follows:

A new cable was installed for the roof bolter. The new cable did not contain any splices. This citation is hereby modified to terminate the violation within the cable. However, this citation is also modified to remain in effect until all electrical repairmen, which perform cable splicing are properly retrained in correct cable splicing techniques. MSHA shall be notified as to the time and place of such retraining.

The inspector terminated the citation on June 2, 1978, and the termination notice states: "A new cable was installed for the roof bolter and all maintenance men were retrained on the proper way to make a splice in a power cable."

On June 9, 1978, the inspector modified his original citation of May 25, 1978, as follows: "Change part and section of violation from 75.0514 to 75.0604. The type splice was made within a trailing cable to the roof bolter."

Respondent filed an answer contesting the citation on the following grounds:

(1) The proposed penalty of \$1,000 is not based upon and in compliance with the six statutory criteria.

(2) The annual company production for the year 1977 was not 2,424,628 tons and was substantially less than that amount.

(3) No violation occurred in that 30 CFR 75.604 does not require that a "suitable connector" be used as required for abatement of the amended citation.

(4) A square knot had been placed in the splice area in the manner usually and customarily done for many years at the mine, and such connection complies with the requirements of 30 CFR 75.604. Such connection had repeatedly been inspected and approved by other MESA and MSHA inspectors over a period of years and had been found acceptable, proper, and not in violation of the cited regulation or any other regulations.

A hearing was held in Lexington, Kentucky, on August 27, 1979, and the parties waived the filing of posthearing proposed findings and conclusions (Tr. 147).

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty

filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

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

Discussion

Stipulations

The parties stipulated to the following (Tr. 6-9):

1. This proceeding is governed by the Federal Mine Safety and Health Act of 1977 and the standards and regulations promulgated thereunder.
2. The Administrative Law Judge has jurisdiction over this proceeding.
3. Shamrock Coal Company is the operator of the No. 18 Mine, and, as such, is subject to the jurisdiction of the above Act.
4. The No. 18 Mine currently employs 262 persons; 164 in underground mining, 44 on the surface, 46 in the preparation plant, 4 in a surface mining site, and 6 in the mine office.
5. Respondent's ability to continue in business will not be affected by any civil penalty assessed in this matter.
6. The MSHA inspector who issued the notice and order in this matter was a duly authorized representative of the Secretary of Labor, and copies of the notice and order which are the subject of this hearing were properly served upon a representative of the operator.

7. The No. 18 Mine's history of previous violations paid prior to the issuance of this order or notice is from January 1, 1970, to April 8, 1974. Total violations paid were 113. Total amount paid \$6,623. From January 1, 1970, to May 1, 1977, the total violations paid were 249 and the total amount paid was \$17,117.

8. Shamrock Coal Company is controlled by B. Ray Thompson, Jr., who also controls Greenwood Land and Mining Company, Clover Coal Company and Freedom Coal Company which are currently in production. The total coal production of Shamrock Coal Company for the year 1977 was approximately 1.3 million tons. The total coal production of Shamrock, together with the above-referenced coal companies controlled by B. Ray Thompson, Jr., for the year 1977 was approximately 1.4 million tons.

During the course of the hearing, respondent asserted that the total coal production for the respondent was somewhat less than that shown by the petitioner's documentation which initially indicated production to be in excess of 2 million tons. In any event, the parties further stipulated and agreed that for purposes of any civil penalty assessment, respondent should be considered to be a medium-sized operator (Tr. 9).

DISCUSSION

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Paul L. Scall testified that he is an electrical engineer with 21 years' experience, 6 of which were in the mining business. He confirmed that he inspected the mine on May 25, 1978, for the purpose of checking on some previous citations and while there he observed a damaged trailing cable on a roof bolter. While looking at the damaged cable area, he also noted that a splice in the cable was made by twisting the connectors and tying them in a square knot. He determined that this was not a proper electrical connection because such a splice does not have a complete cross-sectional area of the two conductors in connection with each other and therefore there is no total current-carrying capability in that conductor. This will cause a "hot spot" to develop and will tend to heat up and further damage the stranded conductors (Tr. 10-13).

Inspector Scall testified that he initially cited section 75.514, a general standard, and then modified the citation to reflect a violation of section 75.604, which specifically deals with trailing cables. The standard has three requirements and it is intended to prevent persons from coming in contact with live exposed conductors. The mechanical strength of a square knot, as opposed to a splice made in conformity with the manufacturer's specification as to how the splice should be made, is questionable. A "pull test" would have to be made to determine whether a square knotted splice is as strong as the approved method of using a splice ring (Tr. 14-15).

Mr. Scall stated that permanent splices must be made in accordance with a manufacturer's specifications or a manufacturer's splice kit

approved by MSHA, and to his knowledge there is no manufacturer's specifications for permanent splicing which specifies that a square knot may be used. The respondent should purchase an MSHA approved kit which contains the specifications (Tr. 16).

If a person touched an unprotected 550-volt cable, electrocution and death could be expected, and the person that touched it would be the one exposed to such a hazard. The respondent was aware of the condition cited because he discussed the splice with section foreman Cecil Hooker who admitted he was aware of the splice being made with a square knot and acknowledged its use throughout the Shamrock mines. He cited the violation at 10:30 and fixed 8 a.m. the next morning as the abatement time, and respondent cooperated in achieving compliance by replacing the trailing cable in question with a new cable without a splice in it (Tr. 16-18).

Mr. Scall stated that the violation could have proceeded under section 75.514 without being changed to section 75.604, but he amended it because he believed the permanent splice should be made to a manufacturer's exact specifications. Section 75.514 was a general electrical standard, and section 75.604 deals with a specific standard for trailing cables. In achieving compliance, in addition to replacing or repairing the splice, he allowed the roof bolter to be put back into service provided the respondent retrained its personnel as to the method for making the splice and that MSHA be notified as to the time and place of the retraining. MSHA was so notified, an MSHA representative attended the retraining classes and the citation was subsequently terminated (Tr. 19-20).

On cross-examination, Mr. Scall testified that he was not aware of any MSHA guidelines regarding the use of square knots while making a permanent splice, but he did refer to a November 1973 MESA Guideline and Instructions for electrical inspectors, or manual, and specifically, page 17 (Tr. 26-27). He had previously inspected the mine in question, but the question of the use of square knots had not previously arisen, and none of his fellow inspectors ever advised him that they found nothing wrong with the use of square knots (Tr. 29). He did discuss with his supervisor Henry Standafer the question of whether section 75.514 or 75.604 should be cited, and Mr. Standafer advised him that in his enforcement of the standard he did not permit the use of square knots (Tr. 30).

Mr. Scall testified that the MSHA Manual referred to does make reference to manufacturer's specifications, and while he could not specify any specific one for the kind of cable in question, he did make reference to kits manufactured by Raychen, CSI, and 3-M and stated that they all call for the use of splice rings (Tr. 32-33). He has never conducted any splice tests or examinations to confirm that a reduction in voltage occurs through the use of a square knot as compared to the use of splice rings, and he has conducted no tests regarding the "hot spots" previously mentioned (Tr. 34). He was not aware that square knots were used generally in the industry for many years (Tr. 34). He indicated that a slip ring would provide uniformity, while the size of a square knot would depend on the person making it

(Tr. 35). Any moisture seal and vulcanization would be the same insofar as splices made with square knots or splice rings are concerned, and the difference in the two methods is in connection with the splice being mechanically strong, adequate conductivity, and flexibility (Tr. 36).

On redirect, Mr. Scall stated that the splice kits previously referred to have been approved by MSHA, and they are some of the major splice kits manufactured (Tr. 38). He described the method for making a square knot, and stated that the conductivity is not as adequate or as good as a splice made with a ring. A ring encircles both conductors which are being spliced by pressure and it mechanically joins the two conductors, but the square knotted splice is joined only by the knot arrangement. The strength of the two types of splices can only be determined after they are subjected to a pull test. The square knot also develops heat because of the voltage drop across the knot due to a smaller cross-sectional area of the conductors being in contact with each other. Although a square knot is more convenient to make, it does not provide long lasting protection as does the splice ring (Tr. 39-40).

On recross, Inspector Scall confirmed that he relied on the 1973 Electrical Inspector's manual, page 17, in interpreting section 75.514 and the use of square knots, and he read the pertinent provision into the record as follows (Tr. 41-42):

Electrical Connections or Splices Suitability. This section requires that all splices and current carrying conductors be made with clamps, connectors, track bonds or other suitable connectors to provide good electrical connections. Tape such as rubber, tar, impregnated glass, asbestos or plastic will be accepted as insulation. Friction tape alone is not acceptable but can be used over other tapes to provide mechanical protection. Spliced conductors in all multiple conductor cables shall be re-insulated individually and an outer jacket compatible to that covering the remainder of the cable shall be placed around the complete splice. Splices made by twisting conductors together or by tying knots in conductors, splices that have bare or exposed conductors, splices that heat or are under load or splices in multiple conductor cables that do not have the outerjacket replaced shall constitute noncompliance.

Inspector Scall also read into the record the following pertinent excerpt from page 27 of the Manual concerning the interpretation of section 75.604 (Tr. 43-44):

Materials used by the Bureau approval and testing section as flame resistant for use in making permanent splices in trailing cables shall be used in complete accordance with manufacturers' instructions. Splice insulating kits shall be applied without any substitution or alteration of parts

in order to duplicate the conditions under which the materials were tested and accepted. Any deviation would require additional evaluation or testing by the Bureau and if used without such evaluation, would constitute noncompliance with this provision.

In response to bench questions, Mr. Scall stated he holds a B.S. degree in electrical engineering from the University of Kentucky. He confirmed that the gist of the alleged violation lies in the fact that in permanently splicing the trailing cable the respondent used a square knot rather than making the splice with a mechanical device such as a connector and a ring. Although he conceded that section 75.514 would cover a situation where a splice is made without the use of a connector, he cited section 75.604 because of a November 20, 1974, MESA memorandum addressed to District Managers from MESA Assistant Administrator John W. Crawford (Tr. 45-49). The thrust of the violation also lies in the fact that he did not believe that the square knot was mechanically strong and it did not provide efficient electrical conductivity (Tr. 49-50).

Mr. Scall conceded that no pull or stress test had ever been conducted with the square knot and the reason MSHA insists on the use of approved manufacturer's splice kits lies in the assumption that splices have been tested by the manufacturer (Tr. 51). He made reference to an April 6, 1973, MESA memorandum dealing with sections 75.604 and 77.602, and pertinent portions were read into the record by me as follows (Tr. 52-53):

JUDGE KOUTRAS: Let the record show that the inspector just handed me a memo, April 6, 1973, which is addressed to all inspection personnel. The subject is Section 75.604 and 77.602, Permanent Splicing of Trailing Cables.

Let me just read the first paragraph gentlemen. And this memo, again, is signed by John W. Crawford and it says: [Reading] "It has come to the attention of this office," then he's got in brackets, visual examination, "that the adequacy of permanent splices in trailing cables leaves a lot to be desired. Many of these so-called permanent splices are being accepted by inspection personnel, when, in fact, many of the splices are poor excuses for temporary splices."

"All splices shall be inspected to ascertain whether they are effectively insulated and sealed so as to exclude moisture. Particular attention should be paid to splices which are made with lapped tape to ensure compliance with the above-mentioned sections."

"If the splices, regardless of who the manufacturer may be or what has been printed in the industry literature, do not conform to the requirements of Section 76.604 and

77.602, a notice of violation shall be issued. All inspection personnel to pay particular attention to the requirements as set forth above."

Mr. Scall testified that the trailing cable splice in question was not well insulated or sealed so as to exclude moisture in that the outer jacket was "ragged where I could see the inner conductors" and it was not sealed to prevent moisture. He required that the splice be opened so that he could inspect it and he could see it was square knotted because of the bulk of the conductors. The splice was made and then an attempt was made to reinsulate it but the moisture seals were damaged because they were ragged and split (Tr. 54-56). The condition of the cable led him to require that it be opened up and inspected, and since MSHA does not require all permanent splices to be opened up unless they are damaged, for all he knows square knots could still be used, and if they are small, vulcanized, and well insulated, he would not know the difference (Tr. 56). A square knot may be electrically efficient and good when it is first made, but it will deteriorate over a period of time and a lesser degree of electrical continuity will result due to the heating effect (Tr. 59).

The roof bolter was energized at the time of the inspection, and it was shut down so that the section repairman could open the splice for his examination. The bolter was taken out of service and a new cable was brought in to correct the cited condition. He did not attend the retraining and did not know the type of splicing presently used at the mine. He confirmed that he discovered the square knotted splice while at the mine to abate previous citations concerning low voltage monitors on the cables, and this required the inspection of the cable which disclosed the faulty splice in question. He discovered no similar violations on the section (Tr. 59-62).

Inspector Scall testified that the operator could have selected the proper kit to use in splicing the cable in question, but other than the November 1973 MSHA guideline, he was not aware of any current publications which may have informed the respondent of the proper splicing as of the time of the citation in 1978 (Tr. 66-67). The MSHA district office had no procedure for advising operators as to the requirements of section 75.604. He did not know when the splice in question was made (Tr. 67). The respondent exercised excellent good faith abatement (Tr. 69). The previous citations did not concern defective splices, and at the time of the inspection coal was not being cut or loaded. The power center conditions were dry and the cable in question was rolled up on the reel but was taken off in order to allow him to inspect it. The cable was 500 feet long and only one place was defective. The electrical equipment is required to be inspected weekly, he did not check the preshift books, and did not know when the cable was last inspected. With the cable on the reel, it is reasonable to conclude that someone walking by and visually inspecting the cable would not be able to detect the condition cited unless the cable was reeled out and examined (Tr. 73-80).

On further recross, Inspector Scall stated that there was no problem with the cable moisture seal or vulcanization, and his concern was with the fact that respondent was using a square knot to make the splice (Tr. 81-82).

Respondent's Testimony

Gordon Couch, respondent's safety director, testified that prior to his employment with the respondent during the past 2 years, he was employed by the Bureau of Mines at Barbourville, Kentucky as a Federal coal mine inspector and worked in that capacity, as well as a supervisory inspector, from 1969 to 1977 (Tr. 92). He and inspector Scalls discussed the citation in question during the inspection closeout conference, and he was not present during the actual inspection when the defective splice was discovered (Tr. 96). In his view, the only mandatory requirements for the use of manufacturer's specifications in splicing is in regard to the requirements of Part 800 of the regulations dealing with high voltage cables rather than low voltage equipment, and nothing in section 75.604 mentions manufacturer's specifications (Tr. 98). Respondent uses thermo-fit splice kits on their trailing cables and follows the manufacturer's recommendations in all regards (Tr. 98). He confirmed that square knots were used on shuttle car and roof bolter cables, and that they have been using them on cables such as the one in issue since 1957. Connectors are used on larger sized cables because they are not flexible enough to bend to facilitate the use of a square knot (Tr. 99).

Mr. Couch stated that prior to the citation issued by inspector Scall, MSHA inspectors had never complained about the square knot splices, they were used prior to his employment with the respondent, and in his view they satisfactorily comply with sections 75.604 and 75.514. Square knotted splices provide adequate current-carrying capacity and provide adequate strength. Splice rings presented problems on small cables since they tended to cut and break the cable at the point where it entered the splice ring (Tr. 100-101). At the present time, the square knot is still used, but the splice ring is placed over the square knot and MSHA district supervisor Henry Standafer approved of this practice and that is the way the men were "re-trained" to make the splice (Tr. 102).

Mr. Couch testified that the use of a square knot is 60 percent better in terms of mechanical strength, conductivity, and flexibility than the use of a splice ring or a connector on a small cable, and in his experience, he has encountered no problems with overheating or decreased conductivity (Tr. 103). After the inspection, respondent used both methods, i.e., square knot and splice ring (Tr. 104). He has never encountered any problems with the use of a square knot, but problems have been encountered with regard to the use of splice rings, particularly with regard to slippage and flexibility (Tr. 105-106). Splices are usually made on the section by a repairman, and he does not believe there was an unwarrantable failure because the respondent was not trying to hide anything and was following what it believed was an acceptable practice since 1957 and no one had previously questioned it (Tr. 109). Respondent is very safety conscious and that was the case even when he was employed as an MSHA inspector (Tr. 110).

On cross-examination, Mr. Couch testified that he did not recall inspecting the Shamrock Coal Company operations while he was an MSHA inspector. He was aware of the MSHA manual referred to by inspector Scalls, and was familiar with the information dealing with sections 75.514 and 75.604, and he was aware of violations issued under those sections while he was employed as an MSHA supervisory inspector (Tr. 111-114). A square knotted cable splice would only be checked if there were visible signs of damage such as poor outer jacket bonding or peeling, and there are no procedures for inspecting cables splices (Tr. 117). A square knot splice could be subjected to a tremendous amount of pulling and tension without deterioration, he has never heard of such deterioration occurring, and has not conducted any pull tests with regard to the square knot (Tr. 118). At the present time all cable repair personnel make the same square knot splice as was made prior to the inspection (Tr. 119). Mr. Couch conceded that the use of the splice ring in conjunction with the square knot provides an added safety feature (Tr. 133).

Findings and Conclusions

The original citation as issued by the inspector charged the respondent with a violation of section 75.514, which reads as follows: "All electrical connections or splices in conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire.

The citation was subsequently modified to change the section cited from 75.514 to 75.604, which reads as follows:

When permanent splices in trailing cables are made, they shall be:

(a) Mechanically strong with adequate electrical conductivity and flexibility;

(b) Effectively insulated and sealed so as to exclude moisture; and

(c) Vulcanized or otherwise treated with suitable materials to provide flame-resistant qualities and good bonding to the outer jacket.

The condition or practice described on the face of the citation alleges that the permanent cable splice in question was not mechanically efficient, in that the splice was made by "twist connection of the cable conductors." The inspector's written statement made at the time the citation issued (Exh. P-10), reflects that the splice was made with "twist connections" and the inspector observed that the "cable could be pulled apart at splice which would expose energized power wires." The narrative statement prepared by the assessment officer containing his recommendations as to a proposed civil

penalty (Exa. P-6) contains the conclusions that the splice was made by "twisting the wire ends together" and that a cable fire could result "due to high resistance from the improper connections." Abatement was achieved by installing a new cable, and as part of the abatement process, MSHA required the respondent to retrain its personnel as to the "proper way" to make a splice.

There is no dispute as to whether the splice in question was in fact tied in a square knot. As a matter of fact, the testimony and evidence adduced establishes that respondent readily acknowledged the use of square knots throughout the mine in the past. Further, the evidence also establishes that square knots are still used in the making of permanent splices and MSHA has approved of the practice provided a spliced ring is added as an additional safety feature. In short, the square knot, which MSHA has previously condemned, is presently in use in the mine, as long as a ring is attached over the square-knotted splice to keep it secure.

The square knotted splice in this case was detected by the inspector during the course of his inspection of a previously cited violation dealing with an unrelated condition. During his inspection to determine whether the previous violation had been abated, he detected a damaged trailing cable on a roof bolter. Upon further examination of the cable, and after it was opened, he observed that the conductors had been square knotted and that no splice ring was installed. Were it not for the fact that the cable was damaged, he would never have known that the conductors inside the cable were tied in a square knot. The inspector was initially prompted to open the cable and check the splice after detecting damaged cables on other pieces of equipment, and that damage was unconnected with the manner in which the splice in question was made (Tr. 62). After observing the damaged cable in question, he ordered the equipment shut down and taken out of service because the cable failed to meet the requirements of section 75.514 (Tr. 65). The previous citations which were being checked for abatement had nothing to do with the use of a square knot to make the splice (Tr. 73). The defective splice was only on one location on the entire 500 feet of cable (Tr. 77).

The citation here was not issued because of the damaged cable. The inspector testified that his concern was with the fact that the use of a square knot was not a proper method for splicing an electrical connection because he believed that such a splicing method resulted in an incomplete cross-sectional connection which somehow detracted from the total current-carrying capability of the conductors, thereby resulting in a possible "hot spot" in the cable. In addition, he obviously believed that the use of a square knot, rather than an MSHA-approved splicing kit, could result in the separation of the conductors, thereby leading to a possible exposure of energized wires. Although the inspector did testify as to the condition of the cable, his testimony in this regard is somewhat confusing and contradictory. For example, at one point in his testimony he stated that the splice was not well-insulated or sealed so as to exclude moisture and that it was in a "very ragged" condition (Tr. 55). He also indicated that

the moisture seals were damaged because they were split in such a fashion as to expose the inner conductors (Tr. 56). His earlier testimony was that the factors of moisture seal and vulcanization with respect to a square-knotted splice remain constant and that the only issue presented is whether the splice in question was mechanically strong so as to insure adequate conductivity and flexibility (Tr. 36). When asked to clarify his testimony concerning the requirements of subsection (a) of section 75.604 dealing with the mechanical strength of the cable, subsection (b) dealing with effective insulation and seals to exclude moisture, and subsection (c) dealing with vulcanization so as to provide a flame-resistant quality for the cable, the inspector conceded that he had previously stated that there was no problems with the requirements of subsections (b) and (c) dealing with moisture seals and vulcanization and that he issued the citation charging a violation of section 75.604 because he believed that the use of a square knot did not insure adequate cable conductivity and flexibility (Tr. 81, 82).

Based on the evidence adduced in this case, it seems clear that the inspector and MSHA have never conducted any tests or studies to determine the mechanical and electrical efficiency of square knots on a cable splice, notwithstanding the fact that respondent's testimony here indicates that the use of such square knots has been an ongoing past and present practice in the mine and possibly throughout the industry for a number of years. He also testified that the question concerning the relative mechanical strength of a splice made with a square knot and one made with a splicing ring can only be determined by means of a "pull-test." In these circumstances, I conclude that the thrust of the alleged violation is the inspector's belief that the use of the square knot rendered the splice inefficient because over a period of time it would deteriorate the electrical conductivity of the cable (Tr. 52). Petitioner's counsel conceded that the issue is the use of the square knot as a method for splicing the cable in question (Tr. 80). In order to sustain its burden of proof with respect to the alleged violation, the petitioner must establish by a preponderance of credible evidence that the use of the square knot in making the splices in question in fact rendered the splice mechanically or electrically inefficient. After careful analysis and review of the evidence in support of its case, I conclude that the petitioner has failed to establish that the use of a square knot, per se rendered the splice in question mechanically or electrically inefficient, and my reasons for this conclusion follow.

In MSHA v. Empire Energy Company, DENV 78-422-P, decided by me on December 8, 1978, I sustained a citation for a violation of the provisions of 30 CFR 75.603, and found that a temporary splice in a trailing cable of a water pump was not made in a "workmanlike manner" or "mechanically strong" because it was made by the use of a square knot rather than a splicing ring. Section 75.603 requires that a temporary "splice," which is defined by that section as "the mechanical joining of one or more conductors that have been severed," be made in a workmanlike manner and be mechanically strong. My finding of a violation in Empire Energy was based

on the facts of that case, and MSHA there sustained its burden of proof when it established that a splice made by use of a square knot resulting in a splice three times the size of a normal splice made with a splicing ring was not one which is mechanically strong or made in a workmanlike manner. In that case, contrary to the position taken by the respondent in this case, Empire conceded that the use of square knots in a splice was not an acceptable practice in its mine. Further, in that case, MSHA took the position that the critical issue presented was not whether Empire used a square knot, but rather, whether the requirements of section 75.603 were violated.

In the instant case, respondent is charged with a violation of section 75.604, which is a statutory provision. That section does not contain a definition of a permanent "splice" as does section 75.603, nor is there any requirement that a permanent splice be made in a "workmanlike manner." The only requirement relied on by MSHA to support the citation is the requirement contained in clause (a) of section 75.604 that the splice be mechanically strong with adequate electrical conductivity and flexibility. In issuing the citation, the inspector relied in part on an MSHA manual which mentions the use of splice insulation kits, and he believes that the use of any method for making splices short of those kits does not comply with the requirements of section 75.604, notwithstanding the fact that the manual section quoted specifically states that "any deviation from the use of a splice kit would require additional evaluation or testing by the Bureau and if used without such evaluation, would constitute noncompliance with this provision." This manual language, if taken at face value, means that any deviation from the use of a splicing kit in making a permanent splice would subject an operator to a citation for violation of section 75.604 even though the inspector is oblivious of the fact that and MSHA testing had been done on that splice. In short, it seems obvious here that the inspector treated the manual reference as part and parcel of the mandatory requirements of section 75.604. In addition, he was also obviously influenced by the interpretive memorandums alluded to during his testimony. The problem with this is that such manual references and internal memorandums are clearly not mandatory requirements binding on a mine operator, and the manual clearly does not have the status of mandatory Secretarial regulations, Kaiser Steel Corporation, 3 IBMA 489, 498 (1974).

The testimony adduced in this case reflects that a splice made by means of a square knot cannot readily be discovered by casual visual observation, unless of course it is so large or damaged so as to call one's attention to it. In this case, the inspector discovered the square knot when he opened the splice up while in the process of looking at other damage. Further, as indicated earlier, square knots are presently still in use in the mine with MSHA's blessing, with the stipulation that a splice ring also be used. The point is, that the inspector, on the facts presented here, believes that the use of a square knot for making a permanent splice is per se a violation because a square knotted splice is not mechanically strong and does not provide adequate electrical conductivity and flexibility. However, these are unsupported conclusions by the inspector. As such, they

may not legally support the citation, and for that reason I conclude that MSHA has failed to prove a violation and the citation is VACATED. It seems to me that if MSHA believes that the use of approved splicing kits is a tested and proven method for insuring the mechanical and electrical integrity of a splice, then it should take steps to promulgate a clear and concise regulatory standard requiring the use of such splice kits, rather than relying on some nebulous and general statutory language which puts the inspector in the position of legislating as to what the standard should be, and leaves a mine operator in the vulnerable position of not knowing what its responsibilities may be in terms of compliance. The promulgation of a regulatory mandatory standard which directly requires the use of an MSHA splicing kit, or the amendment of MSHA's Schedule 2G, Part 18, Title 30, Code of Federal Regulations, will go a long way clearing up what I consider to be a recurring problem with respect to the enforcement of mandatory safety standards containing broad and general language which leaves much to the imagination. The citation is VACATED.

ORDER

On the basis of the foregoing findings and conclusions, Citation No. 0132945, May 25, 1978, citing an alleged violation of 30 CFR 75.604 is VACATED and this case is DISMISSED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 79-66-M
Petitioner : A.C. No. 35-00533-05002 R
v. :
 : M.F. Pit and Plant
READYMIX SAND & GRAVEL COMPANY, :
INC., :
Respondent :

DECISION

Appearances: Marshall Salzman, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Alex M. Byler, Esq., Pendleton, Oregon, for Respondent.

Before: Administrative Law Judge Michels

This matter is before me for hearing and decision on the petition for assessment of civil penalty filed by the Petitioner on May 14, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (the Act). The Respondent, Readymix Sand & Gravel Company, Inc., filed a timely answer to the petition denying the charges and contending that no fine should be assessed. A hearing was held in Pendleton, Oregon on August 30, 1979, and the parties appeared through counsel. Posthearing briefs were filed by both sides and Respondent filed a reply brief.

This action concerns a charge of a refusal to allow inspectors to enter Respondent's mine for the purpose of inspection. The issue arose on November 29, 1978, when Jim Busch, President of the Respondent, refused to grant inspectors entry to the operator's crushing and cleaning plant.^{1/} The Respondent was charged with a violation of section 103(a) of the Act for this refusal.

^{1/} Inspector Darwin Chambers issued a citation to the Respondent on November 29, 1978, in which the condition or practice is described as follows:

"On November 29, 1978, Jim Busch, President, refused to allow Darwin G. Chambers and John M. Moore authorized representatives of the Secretary, entry to the crushing and screening plant of the M F Pit and Plant, for the

The Respondent has raised two defenses: (a) that a statute allowing a warrantless administrative search is invalid and (b) that the crushing and screening plant involved, located separate from the pit, is not a plant used at, and in connection with, an excavation or mine so as to come within the definition of "mill" in 30 CFR 55.2. For these reasons, Respondent asks that the proceeding be dismissed.

(a) Non-consensual Search

Respondent's first argument concerns the warrantless search. In contending that the statute in allowing a warrantless administrative search is invalid it cites Marshall v. Barlow's Inc., 436 U.S. 307 (1978). Respondent also cites a recent decision in U.S. District Court for the District of New Mexico, Valley Transit Mix, Inc. v. Marshall (cited in 1 MSHC 2081 (1979)).

Petitioner has submitted, however, the recent decision of the Sixth Circuit in Marshall v. Nolicheckey Sand Company, Inc., (No. 79-1111, decided October 5, 1979), in which the court concluded that the enforcement needs in the mining industry make a provision for warrantless search reasonable and that a warrant is not needed for periodic inspections of "active workings" of sand and gravel "mines." Likewise the Third Circuit in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589, 593 (1979) held that "the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard asserted in Barlow's."

In light of these direct Federal Circuit Court precedents, Respondent's contention on warrantless search is rejected.

(b) Jurisdiction Over the "Mill"

Facts

There are no serious disputes about the facts. On November 29, 1978, inspectors Darwin G. Chambers and John M. Moore, arrived at the M. F. Pit and Plant facility for the purpose of inspection of the Respondent. James Busch, President of the company, informed the inspectors that he would not permit them to conduct an inspection of the crushing and cleaning plant until he had consulted his lawyer. Mr. Busch did not deny access to the actual gravel mining area, i.e., the pit. He drew a distinction between the pit where the material was excavated and the plant where crushing,

fn. 1 (continued)

purpose of conducting an inspection of the crushing and screening operations of the mine pursuant to Section 103(a) of the Act. Mr. Busch stated that federal inspectors could not enter his mine to conduct an inspection of the crushing and screening plant. Mr. Busch was advised that this operation was covered by the 'Act'."

mixing and other processing takes place and believed that the latter was not subject to MSHA's jurisdiction. The plant and the pit are separated by a small distance, a matter to be discussed below in further detail (Tr. 5-6, 17-20).

The inspectors discussed the Act and regulations with Mr. Busch and asserted they did have jurisdiction. In the course of these discussions, Mr. Busch called his lawyer who affirmed to him that he was not subject to the regulations under the Act. On that day, November 29, 1978, Inspector Chambers issued a citation. The following day, the same inspectors returned and they were then permitted to conduct an inspection. The refusal to permit inspection covered a period of less than 24 hours. In the period between visits of the inspectors on November 29, Mr. Busch, according to his testimony, was advised that he was subject to heavy fines and possibly a prison term if he refused entry. He thought of this as a "mighty big club" and so he allowed entry when the inspectors returned the following day. No warrant was shown (Tr. 6-7, 18-20).

The locations of the two facilities in question, the plant and the pit, are shown on a map received as Respondent's Exhibit R-1. They are separated by a distance of approximately 460 feet (Tr. 28).

The Respondent basically deals in rock products. It excavates sand and gravel from open pits. This material is processed by crushing, screening and washing. Some is sold as crushed rock and some is manufactured into asphaltic concrete, ready mix concrete and concrete masonry units (Tr. 11). The company has several sites from which it extracts sand and gravel. One is designated the Milton-Freewater (M-F) pit and plant site which is located in Umatilla County. These are the facilities involved in this proceeding (Tr. 11-14).

The sand and gravel produced at the pit site is largely processed at the nearby plant. About 1-1/2 percent is processed elsewhere. Some material from other pits is also processed at the Milton Freewater plant but the record does not disclose the percentages. It is a fair inference from the whole record that most of the material processed at the M-F plant comes from the nearby pit. The plant covers some 7.75 acres and it has an office, scale, concrete batch plant, asphaltic concrete mixing plant, rock crushing and screening plant, and other facilities (Tr. 30-36, 14).

The plant produces 100,000 to 150,000 tons per year. Approximately 35 persons are employed at the plant and 3 at the pit (Tr. 33-34, 37). The Respondent sells its products in interstate commerce (Tr. 12).

The sand and gravel excavated at the pit is hauled by truck to the plant. Some times of the year for a few months the Walla Walla river, which has a water course between the two properties is flooded, and the material is hauled on county roads. This is about a 10 minute trip. Otherwise the river bed is completely dry, and the material is hauled

directly across the separating strip, a distance of some 460 feet. This short haul takes 4-5 minutes. From the actual site of the pit to the plant location is a distance of 1,600 - 1,700 feet (Tr. 15-16, 28-29).

It is not only the river bed that separates the plant and pit, however. Within the 460 feet strip there is land owned by a third party, namely, Umatilla County. Respondent and Umatilla County have an arrangement whereby, the county, whose only access to the property is through Respondent's pit site, is given a right of entry through Respondent's fence and gate. There apparently is no quid pro quo. The county at times has denied a right of way to the Respondent across its property. This happened in 1972 and other times, but not in the last year. Respondent has no easement and uses the county property only on a permissive basis (Tr. 16-17, 21-26).

Discussion

In approaching the issue of jurisdiction, the first inquiry is whether a materials plant such as above described, is included within the Act as a mine and thus subject to the provisions of the Act under section 4. Section 3(h)(1) defines coal or other mines in pertinent part as "an area of land from which minerals are extracted in nonliquid form * * * and (C) lands, excavations * * * structures, facilities, equipment * * * used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals * * *."

There apparently is no debate in this matter concerning the applicability of the Act to Respondent's crushing plant facility. Because of certain terminology in the standards, Respondent contends that its plant is excluded from regulation but it does not argue that the Act is inapplicable.

The plain words of the statute, as quoted above, leave little if any doubt that the definition of a mine includes the kind of milling facility operated by the Respondent. Aside from that, the legislative history indicates Congress' intention that the coverage of the Act be broadly interpreted and specifically that milling is included. See for example, S. Rep. No. 95-181, 95th Cong. 1st Sess. 1, 14, reprinted in the 1977 U.S. Code Cong. & Admin. News 3401, 3414.

The Third Circuit Federal Court of Appeals in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589, 592 (1979) stated that it agreed with the district court that the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator.

Thus, there appears to be no doubt that Respondent's plant or mill is subject to the Act and the regulations.

Respondent argues, however, that the phrasing of the definition of the term "mill" under Part 55 (see also Part 56) serves to limit the jurisdiction of the regulatory agencies. Part 56 contains standards directly applicable to sand, gravel and crushed stone operations. At 30 CFR 56.2 the following is found under definitions: "'Mill' includes any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine." The same definition is contained in Part 55 which covers health and safety standards for metal and nonmetallic open pit mines.

Respondent's argument is to the effect that this definition means if the plant is not contiguous to the mine or on the same tract of real property upon which the mine is located, that it is not a mill or plant subject to inspection. In this case, it argues that because the plant was completely separated from the pit by a minimum of at least 460 feet, and sometimes much more depending upon the season or other events, the plant was not in fact "at" the pit.

In response to this argument, Petitioner in its post hearing brief contends in effect that the Act is controlling and that "[n]o geographical limitation can or should be grafted upon the statutory definition by the usage of a certain preposition used in a regulation drafted prior to the 1977 Mine Safety Act." ^{2/} Petitioner also makes the point that the word "mill" is followed by the word "includes" whereas all of the other words in the definitional section are followed by the word "means" and that the drafters by using such terminology did not intend the definition for "mill" to be all inclusive. Further, Petitioner argues that the definitions in Parts 55 and 56 only refer to the standards which contain the particular word defined and if such word is not used, its definition has no relevance to the standard.

I accept the Petitioner's contention to the effect that the definition of the word "mill" as it appears in Parts 55 and 56 of 30 CFR is not a declaration of the Secretary's policy on the enforcement of the Act over milling facilities. The Secretary otherwise has indicated in the interagency agreement between MSHA and the Occupational Safety and Health Administration that he has retained jurisdiction over milling processes and nothing in the agreement suggests that such jurisdiction is limited by the relationship of the plant to the pit. Federal Register, Vol. 45 No. 75 pg. 22,829, April 17, 1979. In the circumstances, I don't believe that the definition of "mill" alone in the standards can be considered as a general limitation on the Secretary's authority to proceed under the Act. If these definitions have any application, it is limited to the enforcement

^{2/} This argument is distinctly at odds with the position taken by the Petitioner at the hearing and the discrepancy is pointed out by the Respondent in its posthearing reply brief. I accept the position taken by Petitioner in its posthearing brief as the considered view of the Secretary.

of the mandatory standards in Parts 55 and 56 in which the word "mill" appears. I have been unable to locate any standard in those parts, however, using the word "mill."

In this instance, MSHA has cited the Respondent, not for a violation of any mandatory standard but for a violation of a section of the Act itself. In light of the discussion above, I conclude that the definition of the word "mill" in Parts 55 and 56 is not related to the charge and is not a limitation on the authority of the Secretary to allege a violation of the Act.

Moreover, even if the "mill" definition should be construed as applicable and binding upon the Secretary, I would further conclude that nothing in the definition would prevent the Secretary from proceeding against the mill or plant operated by the Respondent. As the Petitioner observed in its brief, the use of the word "includes," especially where all other terms defined are followed by the word "means," clearly suggests that other facilities are included although not specified. The definition in other words is not all inclusive and, accordingly, the Secretary is free to apply the law, as it does, to Respondent's mill.

Finally, the preposition "at" in the definition does not necessarily require that a mill be "on" the pit property. Webster's Dictionary defines "at" in part as a word used as a function word to indicate presence in, on, or near: as the presence of the occurrence at a particular place. Cases cited in Words and Phrases under "at" indicate that the preposition "at" is commonly used as the equivalent of near or about e.g., Jordan v. Board of Supervisors of Tulare County, 221 P.2d 977, 979 and Abernathy v. Peterson, 225 P 132, 133. In this instance the M-F plant or mill was clearly near and also operated in conjunction with the pit even though not contiguous.

In light of the above, I find that Respondent's M-F plant or mill is subject to the provisions of the Act.

The charge is that Respondent by refusing entry to authorized representatives of the Secretary for the purpose of an inspection violated section 103(a) of the Act. This section authorizes inspections as follows: "Authorized representatives of the Secretary * * * shall make frequent inspections and investigations in coal or other mines each year * * * [and] shall have a right of entry to, upon, or through any coal or other mine."

Section 104(a) provides that an inspector shall issue a citation to an operator violating the Act. It states in part:

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 the 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.

With regard to penalties, section 110(a) provides that an "operator of a coal or other mine in which a violation occurs of a mandatory standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *." [Emphasis added.]

In view of such language it seems clear to me that a refusal of entry to inspectors who seek to conduct an inspection of a mine constitutes a violation of the Act for which civil penalties may be assessed.

There is no dispute about the facts on this record that the operator did refuse entry to authorized representatives who sought to conduct an inspection. Thus, I find that the operator did violate 103(a) of the Act, as charged, and is subject to assessment for such violation.

Assessment

History of prior violations: The record contains no evidence of prior violations.

Appropriateness of penalty to the size of the operator: The operator has 30-35 employees at its plant and office and three employees at the pit (Tr. 16, 32). It produces 100,000 to 150,000 tons annually (Tr. 37). I find this to be a small to medium sized operation.

Effect of the penalty: There being no contrary evidence, I find that the penalty assessed will not effect the operator's ability to continue in business.

Good Faith: I find that the operator, after it had determined its legal liability, exhibited good faith in achieving rapid compliance by admitting the inspectors. This happened within 24 hours of the refusal of entry.

Gravity: I find this violation to be serious because the entire effectiveness of the law depends upon access by inspectors for the making of inspections.

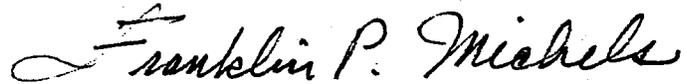
Negligence: I find only slight negligence because the Respondent in good faith believed that it had a legal right, based on certain language in Parts 55 and 56, to deny access to the inspectors.

Penalty: MSHA requests a penalty of \$100 for this violation. I have found the Respondent is chargeable only with slight negligence. It was in effect seeking to establish a principle, which it was advised was valid, for the refusal of entry. It is not clear that it would have obtained a hearing on the issue without first refusing entry to the inspectors so as

to establish a basis for review. Thus, this was in a sense a technical violation. In these circumstances, it seems to me that only a nominal penalty is warranted and I will assess a penalty of \$10.

ORDER

It is ordered that Respondent pay the penalty of \$10 within 30 days of the date of this decision.



Franklin P. Michels
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

5203 Leesburg Pike

Falls Church, Virginia 22041

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-201-P
Petitioner : A.C. No. 48-00837-05001
v. :
: Bill Smith Mine
KERR-McGEE NUCLEAR CORPORATION, :
Respondent :

DECISION ON REMAND

Appearances: Thomas E. Korson, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Richard F. Campbell, Esq., Oklahoma City, Oklahoma,
for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on September 27, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record. ^{1/} It was found that the violation charged in the withdrawal order did not occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record:

"This is a civil penalty proceeding which arises under the Federal Mine Safety and Health Act of 1977. The alleged violation occurred some 20 days after that Act went into effect.

The parties have been represented by competent counsel who I commend initially for their complete and, I would say, beyond the ordinary presentations in this case, and in their demeanor, their preparation and their general

^{1/} Tr. 180-187.

conduct of their respective actions and representations in this case.

The parties have waived the right to file briefs. There is a question whether the right to submit proposed findings of fact and conclusions of law are made mandatory by the Administrative Procedure Act's provision in the sense that the same can be insisted upon being put in writing. My own view is that such should be given to the discretion of the administrative law judge, but in this case that issue is not being posed. I will not make a specific finding to the effect that oral presentations sufficiently meet the APA requirements.

The issues in this case primarily are whether or not a violation of the cited regulation, 30 CFR 57.3-20 occurred, and if so, whether the same resulted from Respondent's negligence and whether or not such alleged violation was serious.

Preliminarily, I find that based upon stipulations submitted to me, that this is a large operator that which during the time it was operating the Bill Smith Mine, was producing approximately 243,000 tons annually of coal, and that on or about the time of the alleged violation it employed approximately 75 employees. Based upon the evidence before me, I would not conclude that this is one of the industry giants. On the other hand, it is a large operator, to be distinguished from a small or medium-sized operator in the context of a three-level spectrum.

Also I find, based upon stipulation, that it has no history of previous violations, or that it abated the withdrawal order which contained the citation of the violation alleged in good faith, meaning that it proceeded to rapidly achieve compliance with the standard allegedly violated after being issued the withdrawal order.

I finally find preliminarily that any proposed penalty I would make in this case would not affect the Respondent's ability to continue in business.

Turning now to whether or not a violation did occur, such question revolves necessarily upon the construction which should be given the regulation allegedly violated. 57.3-20 provides, and I quote, "Ground support shall be used when the operating experience of the mine, or any particular area of the mine, indicates that it is

required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used."

As I will note more clearly subsequently, the second sentence I find to be the critical one, and there are certain key words in that second sentence which, I believe, govern this proceeding. I do not find the salient, indeed critical, factual setting of this proceeding to be in substantial dispute. There is no question is there but that a rock fall did occur on March 29, 1978, and that some 12 to 24 hours earlier blasting had occurred in the general area on a prior shift.

I do find that the roof fall did occur in what is termed an "open stope" area, and that Respondent's mining methods were such that in open stope areas no ground support was required.

I find that on March 29, this inspector, Gary Frey, properly issued Withdrawal Order No. 338802, which is the subject of this proceeding, and that the same was issued prior to noon on said date, and further, that the order was issued after Inspector Frey had observed the area where the rock fall occurred, which observation occurred within moments or within minutes after the fall.

I find that there were several pieces of rock which fell, one of which went or weighed approximately 35 tons.

I find that the withdrawal order was properly issued; since its purpose was to insure the safety of persons in the area.

I find that in the area where the rock fall occurred, which was generally in the intersection clearly indicated on Exhibit R-1, and also shown clearly Exhibits P-1, 2, 3 and 4, had been supported by efforts on Respondent's part by the use of bolts and wire mesh.

I do not find, on the basis of the testimony, that the bolts used to support the ground in the area of the roof fall had been used or were being used to slush from, as demonstrated by Exhibit P-7. I note, parenthetically, that while the purpose of P-7 was not to show the use of the bolt as part of the slushing process, but merely to show the process generally, that it does depict the same and that it indicates that the sheave block was being attached to such.

In finding that these bolts were not used as part of the slushing process, I note that the inspector, on cross-examination, did indicate that, and I quote, "it could have been that these bent bolts I saw were not used for ground support and that the bent bolts which the inspector did see lying on the ground after the roof fall, were only one or two in number."

In any event, the inspector also indicated that roof bolts which had been weakened or bent by use in the slushing process only "could have contributed to the rock fall."

On the basis of all the testimony, I am unable to infer from the fact that a rock fall occurred that one, there was some specific cause for the rock fall. I have not found in this proceeding any evidence specifically pointing to a direct approximate traumatic or other type of cause; or two, that the rock fall would not have occurred had other types of means of ground support been employed by Respondent.

I recognize that such proof is difficult, if not impossible, to obtain in those circumstances. To establish precise causes or even other evidence from which inferences can be taken would have required a truly indepth study by experts, I believe, after this rock fall had occurred.

In any event, and I believe the bottom line with respect to the use of the bolts and mesh methods, vis-a-vis timbering, which would include use of the stulls on the one hand or the square set timbering method on the other, does not provide the ultimate key to the resolution of this case.

I make the finding, since they were one of the more blatant areas of dispute. The precise condition or practice described in the order then is that, "Adequate ground support is not being utilized in the 203 pillar stope access areas. A fall of ground occurred in the front access, approximately 35 tons. Men were traveling through this area."

The question raised by the description of the violation is, was there adequate ground support? The inspector testified that there was, in his opinion, inadequate support because there was no timbering. He indicated that had it been his decision, he would have used stulls. The question then arises, is there any provision or regulation that requires the use of timbering in the situation at the

time and place involved in this proceeding? There is no such provision in the Act itself. The regulation which is cited, 57.3-20, consists of two sentences, the second of which I will repeat again at this juncture for the purpose of focusing on it. It states, "If it is required, support, including timbering, rock bolting or other methods, shall be consistent with the nature of the ground and the mining method used." Support includes timbering, rock bolting or other methods. There is nothing in that provision which says in a given situation a given type of support is required.

I note that in the normal situation where roof control plans are required, there is an effort to be more specific in terms of the requirement. I think there should be such a requirement in this case. I am sympathetic to MSHA's position in this case; I think a dangerous situation was occurring, and I do believe, from all the evidence, that there was a certain looseness, indeed sloppiness with respect to putting up signs in this area, in all the ways, in all the accessways, and I believe there are loopholes in the system here which could cause fatalities ultimately. I think that the regulations are lacking in the type of detail which is designed in the plans which must be approved by MSHA and which can be changed and updated periodically.

However, the binding provision is that which I above quoted of the regulations. I construe it to do the following things: One, it gives the operator almost complete discretion on which type of ground support to install in a given situation. Two, the types of ground support which it can utilize, and I underline this word, includes, timbering, rock bolting or other methods. Three, that whatever method it employs shall be consistent with the nature of the ground and the mining method used.

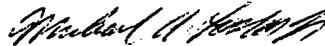
The evidence here is that its mining method was open stope, which would, one have required no ground support. The only question which I see is whether "The nature of the ground would require timbering of some kind." I am unable, on the basis of the record in this case, to conclude that that nature of the ground which was identified as sandstone, which in some places hard and some places soft, is such to conclude that timbering would be required. I therefore specifically find that that is no basis upon which I can apply the regulation to require the use of timbering. Even assuming there had been sufficient evidence of the nature of the ground

involved to require timbering and to prohibit rock bolting, the evidence that this area in question was an open stope area is binding. I therefore conclude that there is no violation of the cited regulation because of the inadequacy of the governing law.

I make the findings and conclusions of law specifically, one, there is no provision of law nor any regulation which requires the use of timbering, including the use of stulls or the square set timbering method, in the area where the rock fall occurred; two, the Respondent operator in this proceeding is not required by the Act or the pertinent regulations to prepare and submit for approval a ground support plan, particularly one which requires timbering in the factual circumstances which are the subject of this proceeding.

Having found that no violation occurred, this proceeding is ordered dismissed."

The petition having no merit, this proceeding is dismissed.



Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEST 79-173-M
: A.C. No. 04-00551-05001
v. :
EXCEL MINERAL COMPANY, : Docket No. DENV 79-454-M
Respondent : A.C. No. 04-00551-05002
: Sheep Springs Pit & Mill
: Docket No. WEST 79-174-M
: A.C. No. 04-02964-05002
: Excel Pit & Mill

DECISION

Appearances: Judith G. Vogel, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Louis F. Fetterly, Esq., Los Angeles, California, for Respondent.

Before: Administrative Law Judge Michels

These proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), by petitions for assessment of civil penalties filed by MSHA. Timely answers were filed by the Respondent in general denying the allegations and requesting a hearing. The cases were heard in Bakersfield, California, on October 30, 1979. A decision was made from the bench as to each citation in these three dockets except for one in which decision was reserved. These are hereby reduced to writing pursuant to 30 CFR 2700.65(a). Some corrections or clarifications have been made.

Preliminarily, the Petitioner requested dismissal of Citation No. 371373 in Docket No. DENV 79-454-PM. There being no objection, the petition was dismissed as to this citation with prejudice (Tr. 5). This ruling is amended by further vacating Citation No. 371373 and as so amended, it is affirmed.

Also pending was a motion to dismiss Citation No. 371370 in Docket No. WEST 79-173-M and Citation No. 371359 in WEST 79-174-M. There being

no objection, this motion was granted and the petitions dismissed as to these citations with prejudice (Tr. 5). This ruling is amended by further vacating Citation Nos. 371370 and 371359 and as so amended is affirmed.

Findings on Certain Criteria

Findings, based on stipulations were made as to certain generally applicable criteria as follows: "* * * I find as stipulated, that there is no history of prior violations. I further find that this is a small operator as stipulated. I further find that the penalties to be [assessed] here will not impair the operator's ability to continue in business" (Tr. 8).

It was further found that the Sheep Springs Pit and Mill and the Excel Pit and Mill were engaged in commerce and are subject to the jurisdiction of the Mine Safety and Health Review Commission (Tr. 8).

WEST 79-173-M

Citation No. 371370 - Vacated

Citation No. 371375

The following is the bench decision on this citation found at pages 43-46 of the transcript:

THE COURT: * * * This is my decision on citation number 371375: The condition or practice as alleged by the inspector is as follows: Quote, "The trailers at the docks were not all blocked from moving. Wheel chocks were available on chains secured to the docks. Loading of trailers with forklifts is a continuous operation."

The inspector cited the regulation or mandatory standard number 55.9-37. That reads as follows: Quote, "Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement."

The first finding required is that of the fact of violation. In this instance, the inspector testified that he observed two trailers which were free-standing and which were not chocked or blocked. There's testimony that -- to the effect that the trailers were blocked. But in this instance, I accept the testimony of the inspector that there were two non-blocked trailers.

The portion of the standard cited by the inspector is the second sentence. And this, as noted when I read it, requires that it be both mobile equipment and that it be parked on a grade. So far as whether or not this is mobile equipment, the testimony of the inspector is that it is in that category, and I accept his testimony.

I have to admit that I have some difficulty with that since it seems to me that it is at least partially immobile and not a piece of mobile equipment in the sense of a tractor or a drag line or some other similar kind of equipment. Nevertheless, I do find that it was mobile.

That brings me, then, to the point as to whether or not these trailers were on a grade. In spite of the fact that the inspector did indicate there was a slight or possible one percent grade, which I accept, I find that it is not a grade within the meaning of this regulation.

Further, the inspector did testify that it was "more level than anything." In my view, it would be difficult to find a place on the earth that is absolutely level like a billiard table. And so, accordingly, the regulation could not have meant that. It surely meant, or means, a grade of some significance so that if the equipment does begin to roll, it will keep rolling.

In this case, as I have already indicated, it was a relatively minor grade. So far as I could understand from this testimony, the effect of a trailer on this minor or one percent grade would be little different from that on a level grade when pushed.

Accordingly, my finding is that there has been no proof of a violation of this mandatory standard as charged. The citation is hereby vacated and the petitioner dismissed as to that citation.

I think it might be appropriate to add the comment that even though the standards do not literally seem to require chocking in that situation, I do not intend to mean by my decision that that practice of blocking or chocking those wheels isn't a good practice. There was testimony, and I would accept that, that there is always the possibility of the pushing of these machines, even though they are not on a significant grade, and therefore the possibility of danger and a hazard. My finding is only that it is not covered by this specific regulation.

That completes, then, my decision.

This decision is hereby affirmed.

Docket No. WEST 79-174-M

Citation Nos. 371343-371347 and 371349-371351

These citations all concern Respondent's prescreening plant which was built out of used equipment (Tr. 154). These were consolidated for decision at the Respondent's request so that consideration could be given to the issue comprehending all of the citations of whether the prescreening plant was under testing procedures at the time the citations were issued.

The oral decision from the bench on the listed citations, which in general cover the alleged lack of guards or handrails, is contained in the transcript at pages 189-199 and is as follows:

My decision on these seven citations will follow. For the purpose of the record, this concerns the following citation numbers: 371343, - 344, -345, -346, -347, -349, -350 and -351. I don't believe that I will be able to decide these cases on an absolutely consolidated basis. But I would take the principal argument, or a principal argument you made first and dispose of that. That is, whether or not this was in a so-called testing posture.

My remarks on that would be then applicable to each citation.

The record will show that the testimony is in some dispute on this issue. The inspector has a clear view to the effect that this is not, quote, "Testing," unquote, for the reasons that it involved a prescreening plant that was in operation over a long period of time, and it did not involve the testing of a particular part of that plant on a limited basis, that is, where the screen or guard would simply be taken off, or handrail, also, and when the particular repair or testing is done, replaced. On the other hand, we do have the testimony of Mr. Rutledge, who contends that the plant was in what I would think of as a start-up posture. It was composed of used machines that were put together and assembled, apparently over a relatively long period of time, and according to his testimony, it was not until May and June that any appreciable production occurred. His view was that this was testing.

Now, one of the little technical or legal problems here is that I don't believe that any of the sections cited specify removal for testing in so many words. And so far as railings are concerned, I'm not even sure there's anything in the regulations at all that would contemplate that kind of an exception.

Now, when it comes to guards, we do have one statutory standard, which is 56.14-6, which says, "Except when testing the machinery guards shall be securely in place while machinery is being operated."

Now, I suppose, and I don't believe it's been really seriously disputed here that insofar as a guard is concerned, at least, under 56.14-1, that there could be removal for that testing purpose. In other words, 56.14-6, in a sense, modifies 56.14-1. And I don't believe there's any dispute on that. [Reference to Part 56 corrected to refer to Part 55. See below.]

My finding would be on this that I would conclude as a general matter that this would not be what I would refer to as testing. I appreciate that there were problems in this start up over a period of time that might have dictated certain kinds of procedures that you wouldn't normally expect in a fully operational plant. And to an extent, I'm going to take that into account.

However, for many of the violations, there were no screens, there were no guards. The inspector saw none, even in the areas. And in some it was admitted that the guards had not been made for the particular pulley or screen, whatever it may have been. So it did mean that over a relatively long period of time, that is, several months, even though it was not fully operational, it was in operation, and certain employees, apparently only two for the most part, were subjected to those hazards.

In short, it was not the situation where a screen or a guard would be taken off temporarily for some particular repair or test and then placed back on, but it was more, in my view, of an operational situation in which there were really no -- at least in some instances, no guards or railings supplied.

So for that reason, I would reject that particular general argument.

Now, I will take each one -- or at least some of them one by one. * * * The first citation in this group is 371343. The inspector charged here, quote, "There was no handrail at the head pulley end of the walkway of the number one conveyor in the pit to prevent persons from falling about 20 feet to the ground below." He charged a violation of 55.11-2.

I should interject at this point that I have been improperly referring to the 56 series. However, the regulations, I believe, are exactly the same in both 55 and 56 as regards these particular standards. But I would like the record to be corrected on that point.

To continue, 55.11-2 reads, quote, "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, towboards shall be provided,". There's no dispute in the testimony that there was no handrail at the end of the walkway. There is no dispute that this was a walkway. It did have a handrail for the full length except for the end where it was missing. The walkway was some 20 feet off the ground. The testimony of Mr. Gibbs is that this handrail at the end was removed for the purpose of doing some maintenance repair work on the conveyor. His notes showed that it had been removed -- or that work had been done on this part of the conveyor on the 11th and 12th of July. The citation was issued on July the 19th, which is almost seven days later.

There's also testimony that the particular repair could not be accomplished with the rail in place. This testimony -- that was by Mr. Gibbs. And this testimony was disputed by Mr. Drussell. There was also the testimony of Mr. Gibbs that the plant was not in operation at the time.

This is an example, I think, of an instance in which the standards are mandatory, and they really don't provide any particular exceptions. It did result in a hazardous situation.

There is, furthermore, dispute that this [rail] needed to be removed for the repair. Mr. Drussel testified that he did not understand why it had to be removed. Moreover, it seems that some temporary type of protection could have been provided if, in fact, it was necessary to remove that section of the rail. It is my impression from the evidence that this was too long a period of time to be considered in the context of a temporary removal for an immediate repair, because it appears that it had not been worked on for at least seven days. I think in all those circumstances, I have really no alternative except to find that this is contrary to that standard.

So I find a violation of 30 CFR 55.11-2.

The following covers my findings on the criteria: It is clear that the removed rail was readily visible, and so

therefore it should have been known to the operator. On this, as well as all of these violations, I'm going to find less than ordinary negligence because of the complications of the start up. In other words, there is testimony that the employees of the operator did not believe they were violating any law because they thought they were in a testing posture. So I will take that into account on this as well as the others.

I believe this is a serious violation, because if there should be an accident and somebody should fall from that height, it could be a serious injury. So I find it to be a serious violation.

It was abated, according to the testimony, within the time set by the inspector, and I so find. Taking all of those factors into account, I hereby assess a penalty of \$25 for this violation.

The next citation is 371344. The inspector charged, quote, "There was no stop cord or railing along No. 1 conveyor in the pit, to prevent falling on the conveyor and being carried along it to the end where it emptied into a vibrating screen." He charged a violation of 30 CFR 55.9-7. That standard reads, quote, "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." My finding on the fact of violation is as follows: The inspector testified that on the number one conveyor there was no protective guard along the walkway between a person walking on that walkway and the conveyor; and further, that there was no stop device. This testimony is disputed by Mr. Gibbs, who testified that there was a screen in place along that walkway. And a picture was put in evidence, identified R-1, which shows such a screen. However, it is clear that that picture was taken long after the citation was issued.

On this citation, there's a 100 percent difference on the question of whether or not a screen was in place. It's difficult for me to find any way to determine who exactly may have been right and who may have been wrong. A screen as shown by the picture is something that could hardly be overlooked. Yet, the two witnesses in good faith, I assume, testified exactly the opposite about the existence of that screen. If a screen did exist, I think it's clear there was no violation. There are some factors here which suggest to me that possibly I should accept the inspector's testimony. But about the only one that is worth mentioning would be the fact that there were other screens and guards not in place. But I don't know that that's sufficiently strong to overcome the testimony that there was a screen in place.

In such a situation as this, I sometimes go back to the principle that the burden of proof is on the government by a preponderance of the evidence where there is really no way to make a determination between the two exactly opposite pieces of testimony. I would have to conclude that the government did not carry its [burden of proof as] required.

And I would like to make clear, however, that that does not mean that I did not consider the inspector's testimony credible, but Mr. Gibbs was credible, also. And I believe that they both testified in good faith as to what they saw, and for some reason they saw different things. And so I would just rely on the burden and find in this instance no violation.

Accordingly, as to citation 371344, the citation is vacated and the petition is dismissed as to that citation.

I'm going to try to handle, to speed this up, the following set of citations in a group: That is, 371345, 371346, 371347, 371349, and 371350. In each of these citations, the inspector charged for particular designated machines that the drives, pulleys, or other turning devices were not guarded. I will just read the first one as an example. Quote, "The V-belt drives on the vibrating shaker screen in the pit were not guarded to prevent getting caught in the pinch points or contacting the moving pulleys" [Petitioner's Exh. P-4]. In each of these cases, the charge is that it was a violation of mandatory standard 55.14-1. That is of 30 CFR. That standard reads as follows: Quote, "Gears, sprockets; chains; drive, head, tail, and take up pulleys; fly wheels; 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."

The other citations are similiarly worded, except that they refer to different drives or pulleys.

In each of these citations, there is no question and no dispute that the proper guards were not in place. There were circumstances which were offered as a defense in several of the instances, which I will take up. But so far as the evidence is concerned, it does show that the guards as required were not in place.

In each instance, the inspector testified that he did not see any evidence of the guards and he did not know nor did he see any evidence as to how long they had been off. In some instances, it is clear that there were no guards at that time available for some of the devices.

In looking at my notes as to the testimony, it appears to me that it is only in the case of 371345 that there was a general defense offered other than the defense of testing. And in that case, Mr. Gibbs testified that there was a bad bearing, and he wasn't sure which side the bearing was on. He had the guard off, according to his testimony, in order to make the necessary tests to determine which bearing was faulty.

His testimony was that the V-belt drive of the vibrating shaker had been run with the guard off for a day or more. He further claimed that this was necessary to make the tests or measurements required.

In this instance I will accept Mr. Gibbs' representations and conclude that there was a specific testing situation in which the guard was removed for a purpose while testing. So, accordingly, as to 371345, I hereby vacate that citation and dismiss the petition as to that citation.

So far as the other citations are concerned [i.e., 371346-371347 and 371349-371350], I believe that, in fact, a violation has been proved. And I so find. In each case the inspector testified that the operator knew or should have known because the lack of guards was easily visible. And I so find. He further testified to the fact that in each case it was a hazard. And I find, therefore, that the violations were serious.

In each case, the evidence is that the violations were abated in good faith within the time set by the inspector, and I so find. I would supplement my finding on negligence somewhat by stating as I did before, that for each of these I find less than ordinary negligence because of the circumstances mentioned heretofore.

For each of the four violations which were proved, I will assess a penalty of \$40.

The remaining citation in this group is 371351. In this instance, the inspector charged, quote, "The work platform at the balance wheel of the shaker screen in the pit was not provided with handrails." He charged a violation of 55.11-27. This standard provides as follows: Quote, "Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition." That is the end of the quotation on that part of the standard which is relevant to the citation.

The evidence is clear and it is admitted that there were no handrails. In this instance, a work platform was prepared of approximately two by four feet for the purpose of installing a bearing on the shaker screen. This platform was ten or more feet off the ground. Mr. Gibbs testified that he considered it a hazard to have a handrail on that platform in that if the balance wheel popped off it might crush him. He also testified that though safety belts were provided, he did not wear [one].

Mr. Drussel testified that in his view if safety procedures had been employed in the removal of that bearing, that the hazard referred to should not have occurred; that in any event, without the rail, there was a hazard either way, either being crushed or being thrown over and subjected to that long fall.

In this instance, I am going to accept Mr. Drussel's testimony that proper procedures would have eliminated, or at least mitigated, the particular hazard of the counterweight, I believe it was called.

In the case of this standard, it's relatively a rigid requirement that if you have a work platform, it must have a railing. And it does not actually allow for exceptions. I think in some circumstances it may be that there would be conditions where it should not be required. But I don't believe that we're faced with that here.

So I find, therefore, that there was a violation of 20 CFR 55.11-27.

The findings on the criteria are as follows: It was easily visible from the ground, and therefore there was some negligence because it should have been observed. I find less than ordinary negligence, for the reasons previously indicated. It was a clear hazard. Working on a platform of that nature without a belt could have resulted in serious injury to an employee falling therefrom. So as far as abatement is concerned, it was abated in good faith within the time set by the inspector. And I so find.

I hereby assess a penalty for this violation of \$40. That completes the decision on the series of citation relating to the prescreening plant.

This decision as to Citation Nos. 371343-371347 and 371349-371351 is hereby affirmed.

This citation was decided orally from the bench. The decision contained in the transcript pages 212-214 follows:

THE COURT: This is my decision in citation 371348: In this citation the inspector charges as follows, quote, "There was no berm or guard rail along the outside edge of the haul road from the loading area under the mill in the pit." The charge is 30 CFR 55.9-22. This reads as follows: "Berms or guards shall be provided in the outer bank of elevated roadways." On the fact of violation, first, it is clear, there is no dispute this was an elevated roadway. The standard is mandatory. It does require a berm. There has been testimony that such berms too high could be unsafe. It would not be appropriate for me, I believe, to decide that issue here. The issue was decided when [the Secretary] issued the regulation. There are provisions for variances or waivers or modifications of the applications of these rules. And if it does not apply or suit in a particular situation, that would be the appropriate procedure. Otherwise, the regulation or the standard is applicable.

Now then, there has been the argument -- the argument was made, rather, that there were berms there, they just weren't of the height of what the inspector required. I think the evidence shows that there were berms in some areas, or ridges up to possibly ten inches. The inspector testified that that was not sufficient. It seems to me that a fair reading of that standard would require adequate berms. There might be some dispute as to what the height actually should be to be adequate. But I think we could safely say that ten inches is so small that it perhaps would be a little more than no berm at all where you're dealing with larger vehicles.

So accordingly, I would hold that there was no berm in those areas as required by the standard. I do find a violation, therefore, of 30 CFR 55.9-22 as charged.

I find that the operator was ordinarily negligent, because it knew or should have known that an adequate berm was needed. Insofar as the hazard is concerned, or the seriousness, I accept the inspector's testimony that a truck could go over the edge and cause death or serious injury to an employee without the berm. Accordingly, I find that this violation was serious.

I find that, finally, it was abated with good faith within the time set by the inspector.

On this violation I assess the penalty sought by the MSHA, which in this instance is \$44. I assess that amount. That completes the decision.

This decision is hereby affirmed.

Citation No. 371360

The decision on this citation was reserved because of the issue raised as to the jurisdiction of the Secretary over this particular facility.

The inspector charged as follows: "The operator of the dragline at the ponds was not protected from contacting the moving cable drums and brake assembly or getting caught by the cable as it wraps on the drums while he operated the machine from the operator's seat." This condition was alleged to be a violation of 30 CFR 55.14-1 which is quoted under a previous citation above. It requires, in brief, that exposed moving machine parts which may cause injury be guarded.

The machine against which the citation was issued is a dragline operated at ponds of water at the main processing plant. It is used to drag the silt out of settling ponds (Tr. 214-217). The machine is located about 9 miles from the pit (Tr. 225). Respondent argued on the record that the operation of taking silt out of the ponds at the mill could not be construed as "mining." Subsequently, on November 15, 1979, Respondent filed a motion withdrawing its contention of a lack of jurisdiction.

I hereby find that the milling facility is subject to the Act and the regulations based on the legislative history, the plain language of the Act, and applicable precedents. For a full discussion of this issue, see my decision in Ready Mix Sand & Gravel Company, Inc., Docket No. WEST 79-66-M, issued December 5, 1979.

There appears to be no dispute that the machine drums and brake assembly were not fully guarded. The inspector testified that the machine may have had a small screen over some of the parts, but was not guarded as to the main moving parts (Tr. 215). Robert Hurst, employees' personnel and safety supervisor, testified that while he was not there on the day of the citation that the drums have three-quarter guards which were factory installed (Tr. 221). He admitted parts of the drums were still exposed (Tr. 222).

I find that moving machine parts were not guarded in that they were not adequately or completely covered and that this created a hazard to employees working in the area. I find therefore a violation of 30 CFR 55.14-1 as charged.

My findings on the criteria are as follows: This was a serious violation because an operator of the machine could get caught in the moving parts resulting in the probable loss of an arm or hand (Tr. 216). The

operator was responsible for some negligence. There is evidence to the effect that the lack of guards might have been difficult to observe from ground level. However, this condition would have been readily observable on a regular inspection of the machine. Because the machine was an older model which, according to the testimony, did not have full guards installed at the factory, the degree of negligence is somewhat lessened.

In all the circumstances, I assess a penalty of \$45 for this violation.

DOCKET NO. DENV 79-454-PM

Citation Nos. 371371-371374

Under this docket Citation No. 371373, at Petitioner's request, was dismissed. As to the remaining citations the parties negotiated a settlement which was approved. Citation No. 371371 assessed originally at \$66 was settled for \$40; 371372 previously assessed at \$72, was settled for \$45; and 371374 assessed by the Assessment Office at \$52 was settled for \$40. The decision from the bench approving the settlement of these citations follows:

THE COURT: I would note in connection with that stipulation that the parties have entered into a settlement for these citations. The first two, namely 371371 and 371372, both involve the standard 30 CFR 55.14-1. This is the same mandatory standard that was dealt with in other dockets. There it was my view that the penalty of, I believe it was, \$40, was appropriate in all of the circumstances. There may be some different circumstances here, but looking at the total picture, I conclude that the settlement of respectively \$40 and \$45 is appropriate and I accept that.

So far as 371374, the reduction has been from \$52 to \$40. This does not appear to me to be an excessive reduction, and for the reasons stated by Counsel, I accept that as appropriate in the circumstances. Accordingly, that disposes of the three remaining citations.

This decision is hereby affirmed.

A summary of the dispositions in the captioned proceedings follows:

DOCKET NO. WEST 79-173-M

<u>Citation No.</u>	<u>Assessment or Other Disposition</u>
371370	Vacated
371375	Vacated

DOCKET NO. WEST 79-174-M

<u>Citation No.</u>	<u>Assessment or Other Disposition</u>
371343	\$ 25.00
371344	Vacated
371345	Vacated
371346	\$ 40.00
371347	\$ 40.00
371348	\$ 44.00
371349	\$ 40.00
371350	\$ 40.00
371351	\$ 40.00
371359	Vacated
371360	\$ 45.00

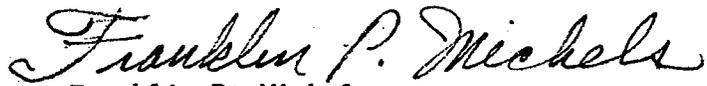
DOCKET NO. 79-454-PM

<u>Citation No.</u>	<u>Assessment or Other Disposition</u>
371371	\$ 40.00
371372	\$ 45.00
371373	Vacated
371374	\$ 40.00

Total assessment for all dockets: \$439.00

ORDER

It is ORDERED that Respondent pay total penalties of \$439.00 within 30 days of the date of this decision.


Franklin P. Michels
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 79-248-M
Petitioner : A/O No. 02-00840-05003
v. :
Oracle Ridge Project
ORACLE RIDGE MINING PARTNERS, :
Respondent :

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
Department of Labor, for Petitioner MSHA;
Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C.,
Phoenix, Arizona, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed under section 110 of the Act by the Secretary of Labor, Petitioner, against Oracle Ridge Mining Partners, Respondent.

This case was duly noticed for hearing and heard as scheduled on October 22, 1979.

At the hearing, the parties agreed to the following stipulations:

One, the operator is the owner and operator of the subject mine; two, the operator and the mine are subject to the Federal Mine Safety and Health Act of 1977; three, I have jurisdiction of this case; four, the inspector who issued the subject citation was a duly authorized representative of the Secretary; five, a true and correct copy of the subject citation was properly served upon the operator; six, a copy of the subject citation is authentic and may be admitted into evidence for purposes of establishing its issuance, but not for truthfulness or relevancy; seven, the operator is small in size; eight, the operator's previous history is in the range of low to moderate; nine, the imposition of any penalty will not affect the operator's ability to continue in business; ten, the alleged violation was abated in good faith (Tr. 4).

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-58). 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. 58). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 62-65).

Bench Decision

The bench decision is as follows:

This case is a petition for the assessment of a civil penalty filed under Section 110 of the Act.

The alleged violation is of 30 CFR 57.6-20 (c) which directs that magazines shall be constructed substantially of noncombustible material or covered with fire resistant material. In addition, 30 CFR 57.2 states that "substantial construction" means construction of such strength, material, and workmanship that the object will withstand all reasonable shock, wear, and usage to which it will be subjected.

The subject citation recites that an explosive magazine and a detonator magazine were not constructed of substantial material, but were constructed of aluminum sheeting.

The operator's first contention raised at the hearing is that the definition of "substantial construction" in section 57.2 does not apply to section 57.6-20(c). In the operator's opinion, it is sufficient under section 57.6-20(c) if the magazines have been substantially constructed of noncombustible material or covered with fire resistant material without regard to whether they can withstand reasonable shock, wear, or usage. From the Bench, during the course of the hearing, I rejected the operator's position. The definition in 57.2 appears at the outset of part 57 and plainly all the definitions are intended to apply to the entire part.

The fact that 57.6-20(c) speaks in terms of "constructed substantially" instead of "substantially constructed" makes no difference. To adopt such an approach would make form master over substance. Even more importantly, under such an approach, a magazine would be acceptable if it were wholly flimsy so long as its inadequate materials were made of noncombustible materials or covered with fire resistant materials. I cannot read the regulations in a way that would make them meaningless and nonsensical. Accordingly, I conclude section 57.6-20(c) must be applied together with the definition in section 57.2.

According to both the inspector and one of the operator's witnesses, the two magazines were constructed of aluminum sheeting 1/16th of an inch thick. The detonator magazine also was lined with 3/4 inch plywood. The magazines were located in cutouts in the side of the mountain. The inspector believed that a rock could fall on the top of the magazines, pierce the aluminum, and set off the detonators. The operator's witnesses believed such an occurrence was very unlikely because of the way the magazines were set back into the hill. The sincerity of the operator's witnesses was apparent and I am cognizant of it. However, after due consideration, I believe the inspector's testimony must be accepted. I further believe that the circumstances presented fall within the terms of "reasonable shock, wear, and usage" to which the magazines would be subjected. Accordingly, I find a violation existed.

I find the violation was serious. If a rock dislodged, a detonator could be set off. I further find that the operator was negligent in allowing this situation to exist.

In accordance with the stipulations of the parties, which I accepted at the outset of the hearing, I find that the operator was small in size, that its prior history was in the low to moderate range, that its ability to continue in business will not be affected by the imposition of any penalty and that the violation was abated in good faith.

Based upon the foregoing, and particularly in light of the operator's small size, a penalty of \$122.00 is assessed.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay \$122 within 30 days from the date of this decision.



Paul Merlin

Assistant Chief Administrative Law Judge

Distribution:

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Administrator, Metal and Non-metal Mine Safety & Health, U.S. Department of Labor

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SKYLINE TOWERS NO. 2, 10TH FLOOR
5209 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 79-67-M
Petitioner : A/O No. 02-00156-05004
v. :
: New Cornelia Branch
PHELPS DODGE CORPORATION, :
Respondent :

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
Department of Labor, San Francisco, California, for
Petitioner MSHA;
Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C.,
Phoenix, Arizona, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed under section 110 of the Act by the Secretary of Labor, Petitioner, against the Phelps Dodge Corporation, Respondent.

This case was duly noticed for hearing and heard as scheduled on October 22, 1979.

At the hearing, the parties agreed to the following stipulations:

One, the operator is the owner and operator of the subject mine; two, the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; three, I have jurisdiction of this case; four, the inspector who issued the subject citation was a duly authorized representative of the Secretary; five, a true and correct copy of the subject citation was properly served upon the operator; six, copies of the subject citation may be admitted into evidence for purposes of establishing issuance, but not for the purpose of establishing truthfulness or relevancy; seven, the operator has a small history of violations and there were only six paid violations in 1978; eight, the operator is large in size; nine, imposition of a penalty in these proceedings will not affect the operator's ability to continue in business; ten, assuming the violation existed, said violation was abated in good faith.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-62). 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. 61-62). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 66-70).

Bench Decision

The bench decision is as follows:

This case is a petition for the assessment of a civil penalty under section 110 of the Act. The alleged violation is of 30 CFR 55.9-2. This section provides that equipment defects affecting safety shall be corrected before the equipment is used.

The MSHA inspector who issued the subject citation testified that all the lug nuts on the No. 149 truck were loose. Another inspector who accompanied the issuing inspector testified to the same effect. The inspectors testified that they touched and felt all the lug nuts and that all were loose. Both inspectors further testified that the truck was in the service area where it was being refueled. According to the inspectors, the serviceman fired the truck up so that the truck would have gone back into service after being refueled with the loose lug nuts present and uncorrected, had a citation not been issued. I find the testimony of the inspectors especially detailed, clear and consistent on all the circumstances surrounding the subject condition.

The operator's witnesses testified that less than all of the lug nuts were loose, although it is not exactly clear from their testimony just how many they believed were loose. I recognize the testimony of the operator's mechanical foreman, that if all the lug nuts were loose the tire would be flat or partially flat, but the record has no showing how soon this would occur. Moreover, I accept the testimony of the issuing inspector that when the truck drove into the subject area, the inspector himself was on the opposite side from the affected wheel and that therefore he would not have seen the wheel and the tire at that time.

In any event, I find more persuasive and accept as completely credible the testimony of the inspectors that all the lug nuts were loose. I also accept the testimony of the inspectors that because the lug nuts were loose, the wheel could come off and proper braking might not occur. This, obviously, was not safe. This condition, together with the

fact that after refueling the truck the serviceman fired it up so that it would have gone back into service, constitutes a violation of 30 CFR 55.9-2.

I further conclude that the No. 149 vehicle was not out of service. Even the operator's witnesses testified that it was being refueled in the event that it should be used again. The former Board of Mine Operations Appeals of the Department of Interior held that where equipment was under repair and had not been used and was not going to be used until it met and satisfied all the mandatory standards, no violation occurred. Plateau Mining Company, 2 IBMA 303 (1973) and Zeigler Coal Company, 3 IBMA 366 (1974). Under the provisions of the 1977 Act, the decisions of the former Board remain binding upon the judges until specifically overruled by the Commission. However, it is my opinion that the Board's prior rulings have no applicability here. I have not overlooked the argument of operator's counsel that there were plenty of trucks so that the No. 149 would not have to be used. The difficulty I have with this argument is that the evidence does not show it. If the truck did not have to be used and if in fact it had been completely removed from service, there really was no reason to refuel it.

The testimony regarding the hazards already set forth also show that this was a serious violation. Even the operator's pit mechanical foreman, who himself found two loose lug nuts, found them together which he said was more serious than if they had been spaced apart. In any event, as I have found, all loose lug nuts existed which presented a very serious violation.

I further determine that the operator was negligent in allowing this condition to occur. The operator is responsible for the actions of its serviceman in refueling the truck and in preparing to allow it to return to service. Even more importantly, the maintenance procedures followed at the time were deficient. The fact that after this citation was issued the serviceman in this area was given a wrench to tighten loose lug nuts instead of merely reporting them and waiting for repair equipment to arrive from elsewhere shows that the procedure operative when this citation was issued was defective and dangerous. The operator was negligent.

As set forth in my opening statement, I accept the stipulations of the parties to the effect that the operator is large in size, that the imposition of a penalty here will not affect the operator's ability to continue in business, that the violation was abated in good faith, and that the operator has a small history of prior violations.

In determining the amount of penalty to assess, I am especially mindful of the operator's small history of prior violations to date, because this is, in my opinion, a serious violation.

Accordingly, a penalty of \$125.00 is assessed.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay \$125 within 30 days from the date of this decision.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in black ink and is centered on the page.

Paul Merlin
Assistant Chief Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

LESLIE COAL MINING COMPANY, : Contest of Citation
Contestant :
v. : Docket No. PIKE 78-400
SECRETARY OF LABOR, : Citation No. 069563
MINE SAFETY AND HEALTH : May 30, 1978
ADMINISTRATION (MSHA), :
Respondent : Preparation Plant
UNITED MINE WORKERS OF AMERICA, :
Respondent :
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. Assessment Control Nos.
Petitioner :
v. : PIKE 79-90-P 15-09724-03001
LESLIE COAL MINING COMPANY, : PIKE 79-91-P 15-09724-03002
Respondent : Preparation Plant

DECISION

Appearances: John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Contestant;
John H. O'Donnell, Trial Attorney, Office of the Solicitor, Department of Labor, for Respondent Secretary of Labor;
Mary Lu Jordan, Attorney, Washington, D.C., for Respondent United Mine Workers of America.

Before : Administrative Law Judge Steffey

Pursuant to a notice of hearing issued June 14, 1979, as amended July 19, 1979, and August 14, 1979, a hearing in the above-entitled consolidated proceeding was held on October 3 and 4, 1979, in Pikeville, Kentucky, under Section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves a notice of contest of Citation No. 069563 filed on June 30, 1978, by counsel for Leslie Coal Mining Company and two Petitions for Assessment of Civil Penalty filed by counsel for MSHA on January 31, 1979, in Docket Nos. PIKE 79-90-P and PIKE 79-91-P seeking assessment of civil penalties for 13 and 12 alleged violations, respectively, of the mandatory health and safety standards by Leslie Coal Mining Company.

Among other alleged violations, the Petition filed in Docket No. PIKE 79-90-P seeks assessment of a penalty for the violation of Section 103(f) of the Federal Mine Safety and Health Act of 1977 alleged in Citation No. 069563 which is the subject of the contest of citation filed in Docket No. PIKE 78-400.

The first day of the hearing held on October 3, 1979, was devoted exclusively to the introduction of evidence by counsel for contestant, MSHA, and UMWA with respect to the notice of contest filed in Docket No. PIKE 78-400. The civil penalty issues had been consolidated with the issues raised by contestant in Docket No. PIKE 78-400. Therefore, the evidence presented in Docket No. PIKE 78-400 dealt with all civil penalty issues which are normally the subject of civil penalty proceedings. Immediately after the conclusion of the hearing with respect to the issues raised on October 3, 1979, I rendered the following bench decision which is reproduced below exactly as it was transcribed by the reporter (Tr. 257-269):

Mr. Stephens explained in the off-the-record discussion the reason Exhibit 42 shows eighteen hundred tons coming out of the plant as opposed to sixteen hundred out of the Leslie Mine is that the preparation plant is processing some stock-piled coal.

The result is, it is actually appearing to process more than it takes in; but as a matter of fact, the figures are right.

Well, based on all that, it has been my practice not to find that a company is a large company unless it is producing around four or five thousand tons a day, or I have a chain of factual record information showing that some holding company owns it; and I just do not think I have the information that I would like to have to find that Leslie Coal Mining Company is a large operator, and I am going to find it is a moderate-size company, which is what I was planning to do before I got confused or worried about perhaps not having considered all the evidence. I just do not see there is enough evidence here to permit me to find a large company.

When I find a large company, I am thinking in terms of Consolidation and Itmann and Pittston and companies like that, and I do not think this is that size of an operation. I do not think Ms. Jordan's absence 1/ would keep me from making other findings about the civil penalty aspects of the case in her absence, so while I am discussing the size of the company, I will go on and discuss the other criteria.

The evidence shows that there is nothing to contradict or show, other than the fact that payment of penalties would have no effect on this company's ability to continue in business--Mr. Stephens has put no evidence to that effect--so I

1/ It was necessary for Ms. Jordan to leave the hearing room for a few minutes to make an urgent phone call.

find that the company would not be affected by any penalties that might be assessed in this proceeding, that is, its ability to continue in business.

These findings I am making at the moment will be considered applicable to the remaining civil penalty issues in this proceeding, but those are the only two that can be made as a general finding, because all the rest would relate to specific alleged violations. I cannot get into those without making the major finding with respect to Citation No. 69563.

That can be done now, because Ms. Jordan has returned to the hearing room. I think in order that this decision can later be put in a written form and mailed to all the parties--which is required by the Administrative Procedure Act--I should make some findings of fact.

On May 26, 1978, Inspector Hugh V. Smith and Inspector Thacker went to the Leslie Mine and preparation plant to make an inspection--or continuing inspection--which had already begun. At the time they arrived, they went to the mine office and indicated that a representative of the mine[r]s was needed under Section 103(f) to accompany them.

It turned out that Mr. Brian Stiltner had reported to the mine for the purpose of accompanying the inspectors. He had appeared because he assumed the inspection, which had previously been started, would be continued on May 26.

About the time that Mr. Stiltner had started to accompany the two inspectors to the preparation plant which was going to be inspected on May 26, the mine foreman--a gentleman by the name of Gene Brennager--indicated that he could not permit Mr. Stiltner to accompany the two inspectors because Mr. Stiltner had been notified on May 25 that he had been suspended for having participated in an unauthorized work stoppage which occurred on May 24, 1978.

The inspectors still needed someone to accompany them; and therefore, the management gathered together the men who were working at the preparation plant. And at that time it appears that only five men could be obtained for making a selection.

So, the five men selected a gentleman by the name of Ray Hall to travel with them. And Mr. Hall did accompany them on their inspection which lasted until approximately noon on May 26, 1978. The inspectors had called their supervisor and had been told that their procedure of getting Mr. Hall to accompany them in the absence of any other representative of the miners was an appropriate step to take.

However, when the inspectors returned to the Pikeville office, they were advised by their supervisor that they should, upon their next return to the mine, issue a citation alleging a violation of Section 103(f) of the 1977 Act.

Therefore, when Mr. Smith returned to the mine or preparation plant--which are contiguous--on May 30, which was the next working day after May 26, he issued Citation 69563 on that day, May 30th, 1978, citing the operator for a violation of section 103(f) of the Act and stating--and I quote--"Company officials (mine foreman) refused to permit a legally elected representative authorized by the miners to accompany an authorized representative of the Secretary of Labor during the physical inspection of the preparation plant on May 26, 1978."

Citation 69563 gave the company until--it was written at nine fifteen a.m. and gave the company until nine thirty a.m. to terminate or correct the problem. And on the same form, in the section labeled "Action to Terminate", it was indicated a representative authorized by the miners was permitted to travel with a representative of the Secretary, and that was indicated at eleven a.m.

Now, the testimony in general indicates that since this Citation 69563 was issued after the fact, that the time of issuance, the time given for compliance and time shown for abatement are just a matter of formality because the facts had already occurred and the company did nothing on May 30th that it had not done on May 26 to abate this alleged violation.

And I think, as Mr. O'Donnell correctly pointed out in his summation, the question of whether the company attempted to achieve rapid compliance is a criterion which is hardly applicable in this instance.

Therefore, if I assess a penalty, no amount will be attributable under the penalty--under the criterion of good faith effort to achieve rapid compliance.

We have had testimony by Mr. Stiltner, who is the gentleman most affected by the company's ruling. It appears that this suspension actually extended from four o'clock on May 25 to four p.m. on May 26.

Since Mr. Stiltner normally worked at that time-- from four p.m. until midnight--he was handed his notice of suspension on May 25 and therefore did not work on his normal shift from four until midnight on May 25.

And he considered that he had, therefore, complied with the notice of suspension by not working his normal shift. There was a union meeting that same night because of the work stoppage that had occurred on the previous day, and at that time the three safety committeemen, who were Messrs. Elmer Molloy, Roger Hunt, and Mr. Stiltner, agreed that Mr. Stiltner should be the one who would appear at the mine on May 26, on the day shift, to be the representative of the miners to walk around with them on their inspection.

It appears on the basis of a normal inspector's routine that when a representative of the miners accompanies the inspectors on a given inspection period that the inspectors are actually engaged in inspection for a period of about four hours; and therefore, the miner who is selected to represent the miners on this walkaround chore does not receive, normally, pay for eight hours.

Therefore, if Mr. Stiltner had been permitted to accompany the inspectors on this occasion, he would have received no more than four hours' pay, because the inspection ended at noon on May 26, and began about eight a.m. on May 26.

I think that those are probably the most important matters to be included in the formal findings, and the rest of the decision will be based upon a discussion of arguments and the evidence.

For that purpose, I undoubtedly will mix some facts in that have not been made a part of the formal findings. There is no doubt that the issue in this case--which, of course, is whether the company violated Section 103(f) of the Act when it forbade Mr. Stiltner from accompanying the inspectors--is a close one; and for about the first half of this hearing, I thought the company was entitled to do what it did, but that was before I had heard all the evidence.

And after hearing all the evidence, it appears to me that the union has the better argument here. Section 103(f), of course, states that a representative authorized by his miners--meaning the operator's miners--shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine.

It appears to me that the fact the company had suspended Mr. Stiltner for this twenty-four hour period does not give the company the right to interfere with the fact that the representative--that the miners had selected Mr. Stiltner as their representative on that specific day.

There is no indication in the record that I can find that shows that Mr. Stiltner came to the mine on May 26 for the purpose of trying to get paid for a period which he would otherwise have lost by his not having worked, from four to twelve on May 25, 1978.

I do not think any case can be decided apart from the specific facts giving rise to the controversy. Here, Mr. Stiltner and the other two gentlemen on the safety committee--Mr. Mollot and Mr. Hunt--were all working from four to twelve, and therefore by rotation method they were making themselves available on the day shift in order to accompany the inspectors during an inspection, which lasted approximately three weeks.

And they were also going ahead and working their four to twelve shift at the same time; and they were doing so in order that the work at the mine would be as uninterrupted as possible by the fact that they were also acting as the representative of the miners to accompany the inspectors.

Consequently, when mine management declined to let Mr. Stiltner go with the inspectors on May 26, there was not then available another man to take his place who was still in the same category of a committeeman that was desirable, because these were the three men who were to be selected to accomp[a]ny the inspectors.

Now, I recognize and I feel that management should have a right to discipline its miners, but in doing so I think that this type of situation could be avoided either by suspending--if they felt Mr. Stiltner was going to accompany the inspector during a period which was still within his suspension period--they could either have anticipated the situation by making it clear to Mr. Stiltner on May 25 that one of the other committeemen should come in on the day shift for the purpose of accompanying the inspectors, or by changing the suspension period in order to permit Mr. Stiltner to make this inspection with the inspectors.

In other words, I believe that the company cannot interfere with the person that the miners choose to accompany the inspectors. As long as he is still an employee and still a member of the safety committee and is still one of the people who is intended to accompany the inspectors, I believe the company must let him do so and must take that into consideration when they are suspending someone. *

I do not think it is something they can work around. I suspect now that I have found a violation of Section 103(f) occurred, and I shall pass on to the civil penalty aspects and deal with the other criteria.

I have already discussed three of them, and the only three that remain are the questions of negligence, gravity and history of previous violations.

As Mr. O'Donnell has indicated, Exhibit 1 does not show that the company has previously violated Section 103(f) of the Act; consequently, the penalty should not be increased under that criterion.

Mr. O'Donnell suggested the violation is a result of gross negligence, and I do not think I can go along with him on that; because I simply believe that when Mr. Brennager indicated that he did not believe that Mr. Stiltner could go with the inspectors on May 26, he was simply enforcing a suspension which he sincerely felt prevented Mr. Stiltner from going on this inspection.

I do not think in doing that that he had any intention of doing other than something he thought he was compelled to do--which was, since Mr. Stiltner was under suspension, that he could not accompany these inspectors and that somebody else could be obtained to do it just as well.

So, I cannot see that the company was more than [g]uilty of ordinary negligence in not having thought this through and having given it some consideration at the time that it made the suspension a punishment for Mr. Stiltner's alleged participation in this unauthorized work stoppage.

I do not think it is material to this case, the fact that there was a Step 3 proceeding at which Mr. Stiltner apparently was considered to have enough matters in his favor to justify his being paid. Because at the time that Mr. Brennager made this decision, no determination had been made as to the merits of the suspension period.

I just do not think the fact that later on Mr. Stiltner was paid is anything that has to be considered. And then we come to the gravity of the violation. Here again, there has been a lot of testimony about whether the use of a person other than the authorized representative really exposes the miners, as a general category in a mine, to any greater hazards than if the representative is someone chosen on the spur of the moment, as was done in this case on May 26.

The evidence does show that Mr. Stiltner had not received any training that other miners had not received at that period of time when Mr. Stiltner began working for the company. And the inspectors indicated that they were not aware that any of the people who did accompany them during this inspection pointed out any hazards that they themselves would not have seen in any event.

But there does seem to be one aspect of having the inspectors--or rather having a specific person or persons designated to accomp[an]y the inspectors; because it appears to me that the inspectors feel that if they get the same person each time--or a limited number of persons--to accompany them, that a process of training can be instilled in these people who go around with the inspectors, and the result is there is gradu[al]ly built up a certain amount of expertise in these representatives who accompany them.

The result is they can better field complaints from the miners in general and can coordinate the various inspections by adding knowledge to what has happened in the past. And this, I think, is helpful for both the company and the inspectors.

Consequently, from that standpoint, I think that there may be some moderate gravity in preventing the usua[l]ly authorized representative to go around and allowing someone to go who is chosen in a rather rapid way and without the full opportunity for the miners to consider the merits of his appointment or election as their representative.

But despite all that, I still do not think there is enough gravity to the kind of thing that happened on this day to justify a large penalty.

Consequently, I shall assess a penalty of fifty dollars. Now, it is my understanding, of course, that I will put this [decision] in the form of a writing, and it will be issued along with the other matters we are going to take up tomorrow when we go forward on the other civil penalty issues.

Settlement

On October 4, 1979, the second day of the hearing, counsel for both MSHA and Leslie Coal Mining Company stated that they had engaged in extensive negotiations during the evening recess and prior to the convening of the hearing and had been able to settle all the remaining issues in the proceeding. Counsel for both MSHA and Leslie gave their reasons for settlement as hereinafter described (Tr. 352-353).

Docket No. PIKE 79-90-P

Citation No. 67891 dated May 24, 1978, alleged that respondent had violated Section 77.502 because the doors and covers had been removed from the control panel unit serving the elevator. The Assessment Office proposed a penalty of \$122 for this alleged violation and respondent has agreed to pay a penalty of \$61. MSHA's counsel stated that he had agreed to accept the reduced amount because the doors and covers for the control panel had been removed so that work could be done on the elevator. Counsel for

respondent stated that the control room is accessible only by a system of steps and that there is a sign over the door into the control room bearing the words "Authorized Personnel Only" and that the room is kept locked and can be entered only when work has to be performed in the control room. Counsel for MSHA also observed that Section 77.502 refers to "a potentially dangerous condition" and he stated that a question existed as to whether the miners had been exposed to danger when the potential danger is located behind locked doors (Tr. 354-356; Exh. A).

Citation No. 67893 dated May 24, 1978, alleged that respondent had violated Section 77.400 by failing to guard the wire ropes and pulley that are used to hoist the plant elevator. The Assessment Office proposed a penalty of \$56 and respondent has agreed to pay the full amount of the proposed penalty. Respondent's counsel stated that he had agreed to pay the full proposed penalty with considerable reluctance because the ropes and pulley were located in the locked control room discussed above and therefore he did not feel that the ropes and pulley were freely accessible (Tr. 357-358).

Citation No. 67894 dated May 24, 1978, alleged that respondent had violated Section 77.1109-3(d) by failing to place a fire extinguisher at the permanent electrical installation located in the elevator room. MSHA's counsel stated that MSHA would be willing for Citation No. 67894 to be vacated because it had erroneously alleged a violation of Section 77.1109-3(d) instead of the correct section which is Section 77.1109(d). Additionally, counsel for respondent stated that a fire extinguisher had been provided just outside the door of the control room and that respondent considered that to be a better location for the extinguisher than inside the control room, although a fire extinguisher had been provided inside the control room after the citation was issued (Tr. 359-360; Exh. B).

Citation No. 67896 dated May 24, 1978, alleged that respondent had violated Section 77.204 because an opening 10 inches by 40 inches existed on the sixth level near the fire hose outlet at a location where the opening might allow men or material to fall to the lower levels where people were working. The Assessment Office proposed a penalty of \$48 and respondent has agreed to pay a penalty of \$40. Counsel for the parties stated that if evidence had been presented with respect to this alleged violation, respondent's witness would testify that the hole cited by the inspector had been cut into the wall, along with another opening measuring 12 by 20 feet, for the purpose of building an addition to the plant. Counsel for respondent stated that nothing was done to the large opening and the small opening was corrected simply by stringing a guard rope across it. Counsel for MSHA stated that the inspector disagrees with respondent's prospective witness as to what was done to abate the alleged violation (Tr. 361-363).

Citation No. 67897 dated May 24, 1978, alleged that respondent had violated Section 77.1109(b) because sufficient fire hose to project water to any point in the plant had not been provided at each floor. The Assessment Office proposed a penalty of \$90 and respondent has agreed to pay a penalty of \$50. MSHA's counsel stated that the reduced penalty was justified because respondent's prospective witness would testify that there was a hose available which would extend to any point in the plant, but that the hose

had been extended for the purpose of washing the floor and was still lying on the floor when the inspector observed it. The inspector would not agree entirely with respondent's claim regarding the fire hose, but the inspector did agree that a hose of some type was present (Tr. 364).

Citation No. 67898 dated May 24, 1978, alleged that respondent had violated Section 77.1605(a) because the left glass was cracked in a three-part windshield on a front-end loader. The Assessment Office proposed a penalty of \$106 for this alleged violation and respondent has agreed to pay the full amount. Counsel for respondent stated that he had agreed to the full amount solely to avoid litigation because he argued that the crack was on a part of the glass which had no windshield wiper, whereas the inspector's manual provides that a citation is not to be issued unless the crack impairs the operator's vision or would damage the windshield wiper blades (Tr. 366-367).

Citation No. 67900 dated May 24, 1978, alleged that respondent had violated Section 77.205(a) by failing to provide a ladder for a safe means of access to the right side of a front-end loader. The Assessment Office proposed a penalty of \$66 for this alleged violation and respondent has agreed to pay the full amount. MSHA believes that it would be possible for a person to step out of the loader on the side having no ladder and be injured by the fact that no ladder existed on the right side. Respondent argued that the standard does not require ladders on both sides of the loader and that since a ladder existed on one side, the loader was in compliance with Section 77.205(a) because a safe means of access had been provided (Tr. 368-369).

Citation No. 69563 dated May 30, 1978, alleged that respondent had violated Section 103(f) of the Act. A penalty of \$50 was assessed by me in the bench decision appearing in the first part of this decision (Tr. 369).

Citation No. 69565 dated May 30, 1978, alleged that respondent had violated Section 77.1710(i) because a usable seat belt had not been provided for a back hoe. The Assessment Office proposed a penalty of \$170 and respondent has agreed to pay \$70. MSHA's counsel explained that he was willing to accept a reduced penalty in this instance because the back hoe was owned and operated by a construction company. In such circumstances, MSHA's counsel stated that the Assessment Office had assigned an undue portion of the assessment to the operator's negligence. In this instance, MSHA's counsel believed that respondent's only negligence was in failing to check the independent contractor's hoe. MSHA's counsel also noted that the Assessment Office had apparently increased the penalty because a withdrawal order was issued, but the delay in abating the citation was justified when it is considered that respondent and the independent contractor were trying to decide which of them was obligated to correct the alleged violation. Also some of the delay arose because the contractor at first assumed that taking the back hoe out of service would be a sufficient act to abate the citation (Tr. 370-372).

Citation No. 69566 dated May 30, 1978, alleged that respondent had violated Section 77.410 by failing to provide a suitable back-up alarm for a back hoe. The Assessment Office proposed a penalty of \$90 for this al-

leged violation and respondent has agreed to pay a penalty of \$70. The reason for the reduced penalty in this instance is the same as described above, namely, that an independent contractor owned and operated the back hoe (Tr. 373).

Citation No. 69567 dated May 30, 1978, alleged that respondent had violated Section 77.1109(c)(1) by failing to provide a portable fire extinguisher for a back hoe. The Assessment Office proposed a penalty of \$150 and respondent has agreed to pay a penalty of \$70 for the same reasons given above with respect to the other two alleged violations pertaining to the back hoe (Tr. 374-375).

Citation No. 69569 dated May 30, 1978, alleged that respondent had violated Section 77.1109(d) by failing to provide a fire extinguisher at a permanent electrical installation located on the fifth level of the plant. The Assessment Office proposed a penalty of \$52 for this alleged violation and respondent has agreed to pay the full amount. Counsel for respondent stated that a fire extinguisher had been provided just outside the door of the welding room and that it was close enough to come within the guidelines in the MSHA inspector's manual which provides that a fire extinguisher may be considered in compliance if it is within 50 feet of the electrical installation (Tr. 376-377).

Citation No. 69570 dated May 30, 1978, alleged that respondent had violated Section 77.1109(c)(1) because a portable fire extinguisher had not been provided in the control room on the fifth level where four portable welding units were located. The Assessment Office proposed a penalty of \$40 and respondent has agreed to pay the full amount. Counsel for respondent stated that the factual situation with respect to this alleged violation was similar to that which has already been described in connection with the preceding alleged violation (Tr. 377).

Docket No. PIKE 79-91-P

Citation No. 69571 dated May 30, 1978, alleged that respondent had violated Section 77.200 because the preparation plant was not being maintained in a safe condition to prevent accidents because two pieces of metal were hanging loosely from the plant's framework on the third level. The Assessment Office proposed a penalty of \$90 and respondent has agreed to pay a penalty of \$45. Counsel for respondent stated that the bolts in the top of the panels were in the process of being removed as an expansion of the plant was in progress. MSHA's counsel stated that he had agreed to the reduced penalty because a question exists as to whether the citation involved a condition that could result in an accident (Tr. 378-379).

Citation No. 69572 dated May 30, 1978, alleged that respondent had violated Section 77.1102 because signs warning against smoking and open flames had not been posted at the oil storage area located adjacent to the hoist house. The Assessment Office proposed a penalty of \$30 and respondent has agreed to pay \$30. Counsel for respondent stated that the inspector incorrectly described the area involved as a storage area for fuel because the only material present was lubricating oil which could not be used, as alleged by the inspector's citation, to refuel equipment. The inspector conceded

that since he did not actually test the oil in the barrel, he would have to agree that it could have been lubricating oil (Tr. 379-381).

Citation No. 69573 dated May 30, 1978, alleged that respondent had violated Section 77.1109(e)(1) by failing to provide two portable fire extinguishers at the oil storage area located adjacent to the main hoist house located on the surface of the preparation plant. The Assessment Office proposed a penalty of \$40 and respondent has agreed to pay a penalty of \$30. If a hearing had been held with respect to the violation alleged in Citation No. 69573, the issues would be (1) whether the inspector was correct in labeling the liquid in the barrel as fuel or whether the liquid was lubricating oil, and (2) whether a half barrel of either fuel or lubricating oil would be sufficient to constitute an "oil storage area" as that phrase is used in Section 77.1109(e)(1). Counsel for MSHA stated that he was willing to accept a reduced penalty because of the disputed factual issues and the inspector's concession that he is not certain whether the liquid was fuel or lubricating oil (Tr. 382).

Citation No. 69574 dated May 30, 1978, alleged that respondent had violated Section 77.1109(c)(1) because respondent had not provided a portable fire extinguisher for a back hoe being used on the surface at the preparation plant. The Assessment Office proposed a penalty of \$40 and respondent has agreed to pay a penalty of \$25. If a hearing had been held with respect to the allegations in Citation No. 69574, the primary issue would have been whether respondent had violated Section 77.1109(c)(1). Respondent's counsel claimed that the alternator on the back hoe was inoperable and that the back hoe had been taken out of service and therefore did not have to be maintained in accordance with Section 77.1109(c)(1). MSHA's counsel stated that his position was that any vehicle on mine property had to be maintained in a safe condition and that would include being in compliance with Section 77.1109(c)(1). Respondent's answer to MSHA's argument was that new equipment must be brought on mine property and checked for permissibility and other factors before being taken underground. Respondent argues that it would be improper to cite violations on such new equipment or on any equipment which is not in service. MSHA's counsel stated that the parties had agreed to a penalty of \$25 in settlement of the issues described above (Tr. 383).

Citation No. 69578 dated May 30, 1978, alleged that respondent had violated Section 77.400(b) by failing to provide a guard to protect workers from injury in case of a whipping motion which might result from a broken belt. The Assessment Office proposed a penalty of \$52 and respondent has agreed to pay a penalty of \$35. Respondent's counsel stated that there was a guard outby the belt and between the belt and the traveled area. He said that the only time a miner would come inby the guard is when work needed to be done on the belt and that at such times, the belt is shut off. Moreover, according to respondent's counsel, the citation was abated by the erection of some danger signs instead of a guard. MSHA's counsel stated that he had agreed to accept a penalty of \$35 in view of the question of whether anyone would ever come into a hazardous position below the belt (Tr. 384-385).

Citation No. 69579 dated May 30, 1978, alleged that respondent had violated Section 77.202 because an excessive amount of loose dry coal had been allowed to accumulate around the electrical components on a feeder. The Assessment Office proposed a penalty of \$52 for this alleged violation. Respondent's counsel stated that in this instance the feeder had been out of service for 6 months and MSHA's counsel agreed that since the feeder was out of service, there was no danger of fire and that MSHA has decided to vacate Citation No. 69579. Counsel also explained that even though the citation states that the switch for the feeder was in an "on" position, that condition caused no hazard because the feeder was not connected to a power source (Tr. 386-387).

Citation No. 69580 was dated May 30, 1978, and alleged that respondent had violated Section 77.1109 by failing to provide a portable fire extinguisher on the same feeder mentioned in the preceding paragraph above. The Assessment Office proposed a penalty of \$38 and MSHA has agreed to vacate Citation No. 69580 for the same reason as given above, namely, that the feeder had not been used for 6 months and that respondent had no plans to use it. In such circumstances, it is doubtful that a feeder is required to be provided with a fire extinguisher, although respondent did abate the citation by providing a fire extinguisher for the inoperative feeder (Tr. 388).

Citation No. 69581 dated May 30, 1978, alleged that respondent had violated Section 77.400(b) by failing to install a guard on the outby conveyor belt at a point immediately outby the opening of the main silo. The Assessment Office proposed a penalty of \$52 for this alleged violation and respondent has agreed to pay the full amount. Respondent's counsel introduced as Exhibit C a picture of the conveyor belt for the purpose of supporting his argument that there was a passageway all the way around the belt and that no one had to travel under the belt conveyor as alleged in the inspector's citation (Tr. 389-390).

Citation No. 69582 dated May 30, 1978, alleged that respondent had violated Section 77.205(b) by failing to provide and maintain a safe means of access outby the drawoff tunnel opening for a distance of about 20 feet in all directions. The citation specifies that a safe means of access was prevented by existence of an excessive accumulation of loose coal, muddy water, and other materials in a depth of from 6 to 12 inches. The Assessment Office proposed a penalty of \$72 and respondent has agreed to pay a penalty of \$36. Respondent's counsel challenged the inspector's claim as to the factual situation and also argued that a loadout area was involved where some spillage would be expected. It was the second shift's duty to clean the area, but a strike had begun on the second shift so that the area was not cleaned as it would have been if normal operations had continued on an uninterrupted basis (Tr. 391-393).

Citation No. 69588 dated May 31, 1978, alleged that respondent had violated Section 77.1605(1) by failing to provide suitable bumper blocks which would prevent overtravel or overturning. The bumper blocks were rendered ineffective, according to the citation, because loose coal had been

allowed to accumulate over them. The Assessment Office proposed a penalty of \$32. MSHA's counsel stated that MSHA had agreed to vacate this alleged violation because the feeder had been out of service for 6 months and was not being used (Tr. 394).

Citation No. 69589 dated May 31, 1978, alleged that respondent had violated Section 77.400(a) by not providing a guard for a tail roller. The Assessment Office proposed a penalty of \$72 for this alleged violation, but the guard pertained to the feeder which had been out of service for 6 months and, for that reason, MSHA's counsel stated that the citation would be vacated.

Citation No. 69592 dated May 31, 1978, alleged that respondent had violated Section 77.1104 by allowing loose coal to accumulate around the loadout control tower located on the surface adjacent to the railroad tracks. The citation also referred to a 30-gallon oil can and alleged that the conditions created an extreme fire hazard. The Assessment Office proposed a penalty of \$60 and respondent has agreed to pay a penalty of \$48. Respondent's counsel stated that the area involved was a loadout area where some accumulation of coal is bound to occur. The area had not been cleaned as well as would normally have been the case because of a work stoppage. In such circumstances, MSHA's counsel believed that a reduced penalty was justified.

I find that counsel for respondent and MSHA gave satisfactory reasons for the penalties agreed upon in their settlement conferences and that the settlement agreement hereinbefore discussed should be accepted.

Summary of Assessments and Conclusions

(1) As hereinbefore found in my decision in Docket No. PIKE 78-400, the Application for Review or Notice of Contest of Citation No. 69563 should be denied and Citation No. 69563 should be affirmed.

(2) Pursuant to my decision in Docket No. PIKE 78-400, respondent should be assessed a penalty of \$50 for the violation of Section 103(f) of the Act alleged in Citation No. 69563. That penalty is also a part of MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-90-P and will hereinafter be listed among the penalties otherwise settled by agreement of the parties.

(3) Respondent is the operator of the Leslie Mine and Preparation Plant and, as such, is subject to the provisions of the Act and to the regulations promulgated thereunder.

(4) The settlement agreements proposed by the parties in Docket Nos. PIKE 79-90-P and PIKE 79-91-P should be approved because good reasons were given by respondent's and MSHA's counsel in support of the settlement agreements.

(5) Pursuant to the parties' settlement agreements and my decision in Docket No. PIKE 78-400, the civil penalties listed below should be assessed.

Docket No. PIKE 79-90-P

Citation No. 67891 5/24/78 § 77.502	\$ 61.00
Citation No. 67893 5/24/78 § 77.400(a)	56.00
Citation No. 67896 5/24/78 § 77.204	40.00
Citation No. 67897 5/24/78 § 77.1109(b)	50.00
Citation No. 67898 5/24/78 § 77.1605(a)	106.00
Citation No. 67900 5/24/78 § 77.205	66.00
Citation No. 69563 5/30/78 § 103(f)	50.00
Citation No. 69565 5/30/78 § 77.1710(i)	70.00
Citation No. 69566 5/30/78 § 77.410	70.00
Citation No. 69567 5/30/78 § 77.1109(c)(1)	70.00
Citation No. 69569 5/30/78 § 77.1109(d)	52.00
Citation No. 69570 5/30/78 § 77.1109(c)(1)	<u>40.00</u>
Total Settlement and Contested Penalties in Docket No. PIKE 79-90-P	\$ 731.00

(6) Pursuant to the parties' settlement agreement, the civil penalties listed below should be assessed.

Docket No. PIKE 79-91-P

Citation No. 69571 5/30/78 § 77.200	\$ 45.00
Citation No. 69572 5/30/78 § 77.1102	30.00
Citation No. 69573 5/30/78 § 77.1109(e)(1)	30.00
Citation No. 69574 5/30/78 § 77.1109(c)(1)	25.00
Citation No. 69578 5/30/78 § 77.400(b)	35.00
Citation No. 69581 5/30/78 § 77.400(b)	52.00
Citation No. 69582 5/30/78 § 77.205(b)	36.00
Citation No. 69592 5/31/78 § 77.1104	<u>48.00</u>
Total Settlement Penalties in Docket No. PIKE 79-91-P	\$ 301.00

(7) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-90-P should be dismissed as requested by MSHA's counsel to the extent that it seeks assessment of a penalty for the violation of Section 77.1109(d) alleged in Citation No. 67894 dated May 24, 1978.

(8) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-91-P should be dismissed as requested by MSHA's counsel to the extent that it seeks assessment of civil penalties for the violations of Sections 77.202, 77.1109, 77.1605(1), and 77.400(a) alleged in Citation Nos. 69579, 69580, 69588, and 69589, respectively.

WHEREFORE, it is ordered:

(A) The Application for Review or Notice of Contest filed in Docket No. PIKE 78-400 is denied and Citation No. 69563 dated May 30, 1978, is affirmed.

Leslie v. MSHA & UMWA, Docket Nos. PIKE 78-400, et al. (Contd.)

(B) The parties' requests for approval of settlement are granted and the settlement agreements submitted on the record in Docket Nos. PIKE 79-90-P and PIKE 79-91-P are approved.

(C) Pursuant to the parties' settlement agreement and the decision in Docket No. PIKE 78-400, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling \$1,032.00 as set forth in paragraphs 2, 5, and 6 above.

(D) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-90-P is dismissed to the extent specified in paragraph 7 above.

(E) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-91-P is dismissed to the extent specified in paragraph 8 above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5209 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

BURGESS MINING AND CONSTRUCTION CORPORATION,
Applicant
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),
Respondent

: Contest of Citation
:
: Docket No. SE 79-42
:
: Boothton Pit
:
:
:
:

DECISION

Appearances: Frank M. Bainbridge, Esq., Birmingham, Alabama, for Applicant;
Murray A. Battles, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama, for Respondent.

Before: Judge Fauver

This proceeding was brought by Burgess Mining and Construction Corporation under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., to review the validity of a citation issued by a federal mine inspector pursuant to section 104(a) of the Act.

The parties submitted prehearing statements pursuant to a notice of hearing, and a hearing was held on July 10, 1979, in Birmingham, Alabama. Both sides were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

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

FINDINGS OF FACT

1. At all pertinent times, Applicant, Burgess Mining and Construction Corporation, operated a coal pit known as the Boothton Pit, in Shelby County, Alabama, which produced coal for sales in or affecting interstate commerce.

2. A navigable stream, the Cahaba River, cuts through Applicant's operations and interrupts its 9-mile haulage road used in connection with mining operations at its Boothton Pit.

3. In 1969, Applicant obtained the necessary federal and state authorizations to construct a bridge across the river so Applicant could travel back and forth from its mines to the preparation plant, which are on opposite sides of the river. To ensure that the bridge would not impede the river's flow, the approved design (for a flat-top concrete bridge resting on the riverbed) included a number of 36-inch pipes parallel to the course of the river's flow and through which it could pass.

4. Since its construction, the bridge has remained structurally unchanged, without rails or berms on either edge. The driving surface was measured to be about 6 feet above the riverbed and, with the exception of heavy rains, the river was about 3 feet deep on the upstream side and about 1 foot deep on the downstream side of the bridge. The bridge is about 26 feet wide and about 210 feet long.

5. On May 9, 1979, MSHA inspector Greg McDade, accompanied by his supervisor, James Sanders, issued a citation charging Applicant with a violation of 30 CFR 77.1605(k), as follows:

Guards were not provided on either side of the concrete bridge across the Cahaba River which had been constructed by this mining company as a part of the haulage road system from the mine site to the preparation plant. The bridge is 24-1/2 feet wide, 410 feet long with a 5-foot drop from the top of the bridge to the water level on the lower water side of the bridge and a 2-foot drop to the water level on the high water side of the bridge.

6. Section 77.1605(k) provides that "Berms or guardrails shall be provided on the outer bank of elevated roadways." Both inspectors considered the bridge part of Applicant's haulage road system for transporting coal from the pits on one side of the river to the preparation plant on the other side.

7. Inspector McDade determined that guardrails should have been installed to prevent coal trucks and other vehicles from going over the edge of the bridge. He considered as adequate anything that would keep a large vehicle on the bridge by deflecting its tires inward in case it lost control, such as 12 x 12 ties stacked 24 inches high and anchored to the bridge.

8. Before the inspection on May 9, 1979, the subject mining operations had been inspected by MSHA on a regular basis, at least 30 to 50 times, from 1970 to 1979. During this period, MSHA never cited Applicant for failing to install guardrails or berms on the bridge, although the lack of guardrails or berms on the haulage road was the subject of a notice of violation issued to Applicant on May 1, 1972, by MSHA's predecessor 1/ which stated: "Elevated

1/ MSHA was created March 9, 1978, when federal mine safety and health enforcement was transferred from the Interior Department to the Department of Labor.

roadways along the haul road between the mine and the preparation plant needed berms or guards provided on the outer banks." At that time, the predecessor agency (the Interior Department) furnished Applicant with a study indicating specific locations along the 9-mile road where it had determined guardrails or berms should be installed. The bridge, which is part of the haul road, was not included as an area in need of guardrails or berms. As part of a settlement of the 1972 notice, the parties agreed that Applicant would withdraw its application for review of the notice and would install rails or berms at the places specified by the Interior Department.

9. The bridge has been used regularly without guardrails or markers for about 10 years with only one recorded mishap, in 1971 or 1972, when defective brakes forced the front wheel of a coal truck to slide over the retaining wall at one end of the bridge. The truck was traveling slowly enough to prevent its falling off the wall. A coal truck traveling at normal speed would probably fall on its side into the river if one of its wheels ran off the edge of the bridge, especially if it were loaded.

10. Applicant normally has five to seven coal trucks operating between the pit and preparation plant. A driver usually makes six or seven trips across the bridge each day. Coming from the preparation plant on the east side of the river, an unloaded truck would approach the bridge downhill, make a 90-degree turn onto the bridge, at about 5 to 10 miles per hour, and come to an almost complete stop before straightening up and crossing the bridge. The driver would shift into fourth gear and attain a speed of 25 to 35 miles per hour before reaching the west side of the bridge.

11. Returning from the mine to the preparation plant, the truck might cross the bridge at about 20 to 30 miles per hour before downshifting into third gear as it entered the 90-degree turn on the east side of the bridge. Entering the turn, the truck would be traveling about 10 to 15 miles per hour. The speeds in Fdgs. 10 and 11 assume normal driving behavior.

12. Drivers treat the bridge as a one-way road, though the road on land is two-way.

13. Applicant's coal trucks have air brakes with master cylinders on each wheel. The steering is power-assisted and is operated by hydraulic system. In the event of a motor failure, the power steering and hydraulic system would probably fail, but the brakes would continue to operate as long as there was still air pressure. The overall effectiveness of the brakes would be reduced when wet.

14. The water level of the Cahaba River varies depending upon the amount of rainfall, with the river overflowing the structure's surface several times each year, usually in the late winter and early spring.

15. At various times, Applicant's trucks have crossed the bridge, in daylight, when the water was above the driving surface. The bridge would

no longer be visible when the water was 6 inches to 1 foot above its surface and would be impassable when the water was deeper than 2-1/2 to 3 feet. When the bridge is under water, the only way to determine its location is a ripple effect caused by the water moving against the bridge on the upstream side and dropping off on the downstream side. The upsurge would be fairly constant across the bridge's surface until the run-off on the downstream side. The lines of demarcation would be reasonably clear to a driver.

16. When the overflow on the bridge is too deep, drivers may refuse to cross the bridge without objection from Applicant. Applicant itself has refused to permit use of the bridge when it determined the water to be too high. The standard used by Applicant for determining when the bridge is unsafe is the axle height of the smallest vehicle, a pick-up truck, which is about 14 inches. The axle on Applicant's coal haulage trucks is 27 inches above the ground and the frame is over 38 inches above the surface. In rainy seasons, a supervisor generally would watch the river on an hourly basis.

17. During the winter, drivers have often crossed the bridge in the dark when working a late shift, but not with the water above the road surface. There are no floodlights on the bridge and the headlights on the trucks are not considered adequate for driving at night if the bridge is under water.

18. Applicant introduced in evidence an undated memorandum circulated by MESA's assistant director respecting the application of section 77.1605(k) (Exh. B-8, p. 2). This memorandum states in part:

This standard only applies to roads cut along the side of a mountain, hill, pit wall, or earth bank where one side of the road is protected by natural barrier (inner bank) but where vehicles or equipment may run off and roll down the unprotected outer bank.

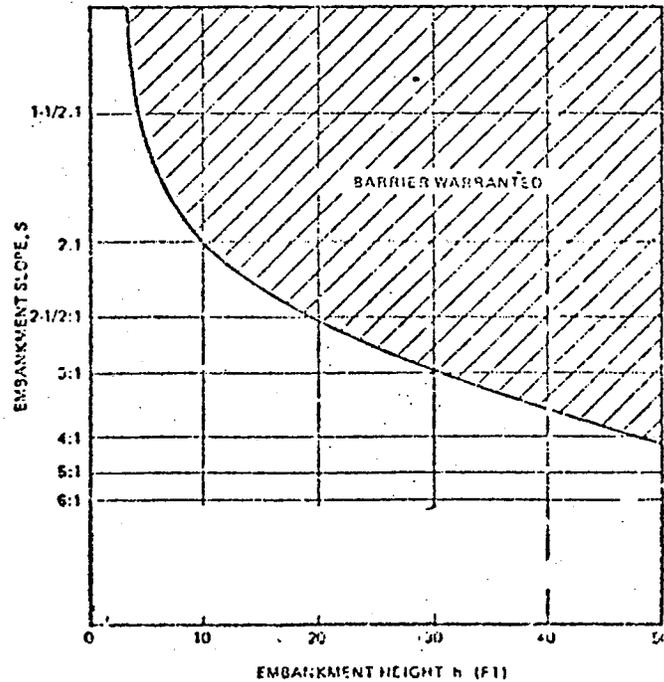
This standard does not apply to roads "elevated" above the terrain to provide drainage, or because the road is "elevated" by reason of drainage ditches * * * to facilitate drainage or snow removal. [Diagrams excluded.]

In 1972, Applicant received the above memorandum as an attachment to a memorandum dated October 19, 1972, addressing the same issue, which states that the "memorandum dated June 28, 1972, * * * is hereby revoked and superseded by this memorandum." The October 19 memorandum, which appears to supersede the undated one, reads in part:

Section 77.1605(k) provides: "Berms or guard rails shall be provided on the outer bank of elevated roadways." This

standard applies to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks.

Berms or guard rails shall be provided on the unprotected bank, or banks, where the embankment slope and embankment height equal or exceed those slopes and heights shown in the following figure:



DISCUSSION

This case concerns the validity of a citation issued under section 104(a) of the Act. The inspector's citation alleges that Applicant violated 30 CFR 77.1605(k) and that the violation could significantly and substantially contribute to the cause and effect of a mine safety hazard. The threshold issue is whether the bridge is covered by 30 CFR 77.1605(k), which requires that "Berms or guardrails shall be provided on the outer bank of elevated roadways."

Applicant contends that the bridge is not covered by the standard. It contends that the plain meaning of the standard shows that it is intended to apply only to roads cut along the sides of a mountain, hill, pit wall, or earth bank where one side of the road is protected by a natural barrier, the inner bank, but where vehicles or equipment may run off the other side, the outer bank. It points out that the Secretary has promulgated no regulation specifically applicable to bridges or fords. (Applicant relies on the testimony of Inspectors McDade and Sanders who stated that no such regulation existed.)

Applicant also contends that the prior undated memorandum, the 10 years without serious mishap, the 1972 settlement concerning the lack of guardrails along the haulage road, and the 30 to 50 safety inspections without a charge of violation concerning the bridge, all shed "probative value as to the correct 'construction' to be given to the regulation."

The Secretary contends that Applicant's bridge across the Cahaba River is an "elevated roadway" within the meaning of section 77.1605(k) and must, therefore, have berms or guardrails. The Secretary argues that section 77.1605(k) "applies to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks."

In applying 30 CFR 55.9-22, which is identical to 30 CFR 77.1605(k), to an elevated pipeline roadway with banks on both sides, Judge Moore concluded that the standard applied to all elevated haulage roadways whether curved or straight. Cleveland Cliffs Iron Company, VINC 78-300 (September 8, 1978). He interpreted "outer bank" to mean whichever bank is hazardous "and if both sides of the road present a hazard of rolling down a steep embankment, then both sides of the roads are required to have berms."

In contrast, Judge Koutras in Peabody Coal Company, VINC 77-102-P (December 13, 1977), held that the elevated side of an inner bank, even though dangerous, was not subject to the guardrail standard:

I conclude that Respondent's position with respect to the application of the regulation on the facts presented in this case is correct. The term "outer bank" is not further defined by the regulations. However, the term "outer" has been construed to mean "of or pertaining to the outside; that is without or on the outside; external; opposed to inner," 67 C.J.S. 538; Brislin v. Carnegie Steel Co., 118 F. 579 (WD Pa. 1902). On the facts presented, the parties are in agreement that the deceased ran off the road at the inside turn of the road while traveling around a curve in the road. In my view, this point was the inner bank of the roadway which I have found was elevated. However, the regulatory language specifically and

clearly on its face requires a berm or guardrail on the outer bank, which in this case would be the opposite side of the roadway adjacent to and paralleling the drainage ditch and county road. [Emphasis in original.]

In the instant case, some light is shed on the issue by a question and answer in the parties' briefs. The Secretary asked: "Would Burgess contend that a bridge on a haulage road 50 feet high would not be required to have guardrails in that it is not an elevated roadway and does not have an outer bank?" In the Secretary's view, section 77.1605(k) would require the bridge to have guardrails, but in the view of Applicant:

While all would agree that any bridge 50 feet high should have rails, Burgess does not agree that MSHA under existing "standards" has the right to require rails and to impose fines and penalties for the absence of rails on bridges whether the bridge be 50 feet high or, as in this case, five feet high.

The Secretary's question overlooks the possibility of an imminent danger withdrawal order. Section 107(a) of the Act authorizes such orders wherever miners are subject to an "imminent danger." This authority applies without regard to the question of compliance with a safety standard or regulation. It is directed at dangerous conditions, regardless of the question whether a safety violation has been committed.

The existence of this authority moots the Secretary's question whether a 50-foot high bridge could go unguarded. Closer examination might indicate that bridges of much lower heights, including the height of Applicant's bridge, may pose a question of imminent danger. This question is not involved here, since the inspector issued a citation, not a withdrawal order, and since his citation found that: "the violation has not created an imminent danger" (Exh. B-11). However, the authority granted by section 107(a) makes clear that the issue of the application of the guardrail regulation is not an all-or-nothing question of protection or no protection concerning bridges. Rather, the issue is whether Applicant's bridge is covered by a regulation that says "berms or guardrails shall be provided on the outer bank of elevated roadways." I hold that it is not.

Two of the operative terms of the regulation--"elevated" and "roadway"--could apply to the bridge. The bridge is an integral part of the haulage road and could reasonably be held to be a "roadway." Also, it is necessarily elevated to cross the river, and could reasonably be held to be an "elevated roadway." However, the use of the term "the outer bank" indicates that the regulation was intended to apply to roads cut along the side of a mountain, hill, pit wall, or earth bank, and not to apply to a bridge crossing a river.

This plain meaning is confirmed by the Government's longstanding administrative enforcement position that interpreted the regulation to apply to such roads and not to bridges crossing rivers. Its many years of

investigation of Applicant's site without asserting a different interpretation, its settlement of an administrative litigation with Applicant premised on this very interpretation, and its issuance of an early memorandum showing this interpretation all show that the original intent of the drafters of the regulation was not to require guardrails or berms on bridges crossing rivers. These are significant support for the view that such was, and has always been, the plain meaning of the words of the regulation. When the Government changed its position on enforcement, the change reflected a change in policy, not a later discovery that the words "the outer bank" really mean "one * * * or both" banks of a road.

The Government is bound by the plain meaning of the words used in its regulations. It also has the duty to make its regulations as simple and clear as the subject matter will permit. An operator is entitled to rely upon the plain meaning of words and should not be held liable (which may mean substantial civil or criminal penalties and a mine shutdown) for failing to anticipate that the Government will rely upon a hidden or obscure meaning.

If the Government decides to change enforcement policy, it must not do so by an interpretation that stretches a regulation beyond its plain meaning. Fairness requires that rulemaking procedures to revise the regulation be employed.

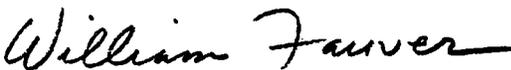
CONCLUSIONS OF LAW

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

2. Applicant's bridge across the Cahaba River is not subject to the safety standard provided in 30 CFR 77.1605(k).

ORDER

WHEREFORE IT IS ORDERED that the application for review is GRANTED and the subject citation is VACATED.


WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	
	:	Docket No. DENV 79-139-PM
Petitioner	:	A.O. No. 41-00046-05001
v.	:	
	:	Docket No. DENV 79-140-PM
EL PASO ROCK QUARRIES, INC.,	:	A.O. No. 41-00046-05002
Respondent	:	
	:	Docket No. DENV 79-176-PM
	:	A.O. No. 41-00046-05003
	:	
	:	El Paso Quarry & Plant Mine

DECISION

Appearances: Barbara G. Heptig, Esq., and Jack Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Ralph W. Scoggins, Esq., El Paso, Texas, for Respondent.

Before: Judge Charles C. Moore, Jr.

The three cases captioned above were consolidated for hearing to the extent that general information introduced in the first docket number tried was not repeated in the other docket numbers although it was agreed that such information or evidence could be considered as having been introduced in all three cases. The company is a large operator and I find that no penalty that might be assessed will affect its ability to continue in business. It has no prior history of violations and all violations which are found herein to have occurred, were abated promptly and in good faith.

DOCKET NO. DENV 79-139-PM

Citation No. 159658 alleges that an elevated roadway was not equipped with berms or guards along the outer edges in violation of 30 CFR 56.9-22. The road that is subject to the citation is for access to the very top of the quarry wall for the purpose of drilling and blasting. Inspector Kirk stated that the road was not used for hauling, loading, or dumping. In Cleveland Cliff Iron Company v. Secretary of Labor, VINC 78-300-M (September 8, 1978), I ruled that an identical berm standard only applies to mine roads designed for hauling, dumping and loading. I see no reason

why the requirement should be restricted to such roads, but it nevertheless is, and until the standard is changed or the Commission rules otherwise, I shall continue to interpret the standard as applying to only such roads as I have indicated. The citation is VACATED.

Citation No. 159660 alleges that two employees on the No. 2 bench were breaking boulders with a hammer and were not wearing eye protection as required by 30 CFR 56.15-4. The evidence disclosed that the two "employees" were actually what is termed "rock pickers" in the El Paso area. They are not employees of El Paso Rock Quarries, Inc., but are actually either customers or employees of customers. As the evidence showed, a customer comes in and agrees to buy rock that has been blasted by the Respondent. The customer then takes his own employees to the area and has them break up the rock for collection in a truck.

This is not the typical "independent contractor" case such as the Interior Department's Board of Mine Operations Appeals, the Federal Mine Safety and Health Review Commission, the Federal courts, and the administrative law judges have been struggling with. In all of those cases, the alleged violation was caused by, or was allowed to occur by, an independent contractor who was performing some function for the mine operator. The alleged culprit was being paid by the mine operator to perform some service in those cases. In the instant case, however, the individuals who were not wearing the required protective goggles, were not performing any function for the mine operator. They were customers buying rock or they were the servants of customers buying rocks.

I cannot find in the cases decided by the Board or the Commission any guidance as to the question of whether a mine operator should be held responsible under the mine safety law for acts committed by a customer or a customer's servant. Section 3(g) of the Act defines a "miner" as "any individual working in a coal or other mine." Inasmuch as the rock picker is doing his work in a mine, he fits the definition of a miner. As such, he should be entitled to the same protection that the Act affords miners who are working for a mine owner.

The standard in question, 30 CFR 56.15-4, requires that "all persons" wear safety goggles "when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." These rock pickers were breaking rocks with a hammer and were not wearing eye protection. I find that breaking rocks with a hammer creates a situation where eye injury could occur and since the Act was designed to protect miners and these rock pickers are miners, I find that a violation of the standard occurred. According to the inspector, the rock pickers do not speak English or at least do not admit speaking English. It would do little good, therefore, for the inspector to try to determine who their employer was in order to serve a citation on him. In some cases, the truck driver might be the employer, but in others, he might be an employee of someone else. If the Act is to be enforced under the circumstances, the inspector's only recourse is to serve the mine operator. The mine operator may not have authority to

require the customers to wear protective glasses, but at least he could furnish the glasses and instruct the rock pickers to wear them. I am going to find the mine operator responsible for the actions of the rock pickers, but I find very little negligence involved in the violation. A penalty of \$25 will be assessed.

Citation No. 159661 alleges that employees were observed riding on the outside running board of a dump truck in violation of 30 CFR 56.9-40(a). The standard cited prohibits men from being transported "in or on dippers, forks, clamshells, beds of trucks unless special provisions are made for their safety, or buckets except shaft buckets." At the commencement of the hearing, the attorney for MSHA moved to amend the citation so as to allege a violation of subsection (c) of 30 CFR 56.9-40 which prohibits miners from riding "outside the cabs and beds of mobile equipment * * *." The attorney for Respondent objected to the amendment and pursuant to Eastern Associated Coal Corporation, 5 IBMA 185 (1975), the motion was denied. The prayer for a penalty is accordingly DENIED and the citation is VACATED.

Citation No. 159662. The allegation here is that the outer edge of the second bench from the top of the quarry was not equipped with berms or guard rails as required by 30 CFR 56.9-22. The bench involved was clearly the type of roadway where a berm is required by the regulation and it is equally clear that there was no berm at the time of the inspection. While berms must be constructed after blasting since the blasted boulders are used to form the berms, and while Respondent had just recently finished blasting at the time of the inspection, it is nevertheless true that Respondent allowed haulage trucks to use the road before building the berms. While I cannot accept the inspector's testimony that the berms would stop a fully-loaded truck, they would serve as a visual warning as to the location of the edge of the bench where the 40-foot drop begins. Or, if the truck were a runaway, they might slow it down enough to give the driver sufficient time to jump. The gravity is high but the negligence, in view of the fact that the blasting had just been finished, is low. A penalty of \$100 is assessed.

Citation No. 159663. The citation alleges a violation of 30 CFR 56.9-71 in that a traffic sign "was partially hidden in the berm and vehicles were observed going to the opposite pattern of the right-of-way." The mandatory standard states that "traffic rules including speed, signals, and warning signs shall be standardized at each mine and posted." There is no allegation that the traffic was not standardized nor is there an allegation that the traffic pattern was not posted. The allegation merely is that one of the signs (not the only sign) was partially hidden in a berm. The partially-hidden sign was 600 to 800 feet from a proper sign and according to the testimony, the drivers are told verbally that when driving a haulage truck they should drive on the lefthand side. In order to rule in MSHA's favor, I would have to interpret the standard to require a sign every so many feet or perhaps at every intersection. But the standard does not require that and I accordingly VACATE the citation.

Citation No. 159664 alleges a violation of 30 CFR 56.3-12 in that two employees loading rock by hand were between the truck and the quarry wall. The standard prohibits this practice because of the danger of rolling rocks trapping the miner against the truck or other piece of equipment leaving him with no escape route. Boulders were in fact coming down the slope wall and the miners were diverting them into the dump truck. As in a previous citation, these miners were non-English speaking rock pickers and essentially customers of Respondent. While it may seem harsh to require Respondent to control the activities of customers, I know of no other way that the purposes of the Act can be effectuated except to hold the mine operator accountable for the safety of these rock pickers. I hold the violation to be of moderate gravity and that it involves a low order of negligence. A penalty of \$25 will be assessed.

Citation No. 159665. The allegation is that 30 CFR 56.9-87 was violated in that the automatic reverse alarm was inoperative on one of the company trucks. This was a 35-ton haulage truck and naturally could do serious damage if it were to back over another piece of equipment or a miner. But the evidence indicates that all such equipment is checked every morning and every night, and whenever the vehicle is backed up. The drivers are instructed to take any truck to the shop to be fixed by mechanics when a failure occurs. In the circumstances, I do not believe that the Act requires a mine operator to guarantee that a piece of equipment will not break down. His obligation is to check it often and repair it when it does break down and there is no proof in this case that the operator did not do just that. If the inspector had been able to determine when the horn became inoperative and that the miner operator should have known of it, a violation would be established. In the present circumstances, however, the citation is VACATED.

Citation No. 159666. The charge is that an employee was barring down loose rock on the lift of the third bench without a safety belt and rope in violation of 30 CFR 56.15-5. This is another "rock picker" violation and I have already held that the mine operator is responsible if a violation occurs. In this case, however, I am not convinced that there was a violation. The standard requires safety belts and lines "where there is danger of falling." The individual in this case was working on a slope that he could walk up and down, but the inspector did not know the angle or grade of the slope. MSHA has failed to carry its burden of proving that there was a danger of falling and the citation is accordingly VACATED.

Citation No. 159688. The citation alleges that loose unconsolidated rock on a quarry wall was not supported or barricaded as required by 30 CFR 56.3-5. The standard is somewhat general but prohibits men from working under or near dangerous banks and requires that overhanging banks be taken down or barricaded and posted. The evidence is not clear as to exactly what the inspector was referring to in using the phrase "loose, unconsolidated rock." It could not have been "loose" in the sense of unattached at any point because the wall was vertical and something was keeping the rock from falling. The inspector stated (Tr. 44): "Yes, sir, they were broken

on three sides and only secured by one end." He apparently made the judgment that they were not sufficiently secure and therefore decided to use the term "loose and unconsolidated." But in order to abate the citation, Respondent had to rent a crane and try to dislodge the rocks with a large steel wrecking ball sometime referred to as a "headache pill." Respondent tried the crane and headache pill for 2 weeks and could not dislodge the rocks. It ended up having to blast the rocks out of the wall. In the circumstances, I do not see how I could find that these rocks were loose and unconsolidated. The citation is VACATED.

Citation No. 159667. This citation alleges a violation of 30 CFR 56.9-71 in that proper traffic signs were not posted. The evidence clearly establishes that at an intersection near the No. 1 primary crusher there were no stop or yield signs present. The fact that the drivers were told that trucks actually hauling rock had the right-of-way is no substitute for the traffic signs required by the regulation. There was negligence on Respondent's part but the gravity was only moderate. A penalty of \$50 will be assessed.

Citation No. 159668. The citation alleges a violation of 30 CFR 56.4-23 in that records concerning the inspection of fire extinguishers were not available on the mine property. There is no allegation here that the fire extinguishers were defective, but merely that the records of inspections were not kept. Respondent's evidence was that the inspections were made but it admitted that no records were kept. I find the violation occurred but the hazard and negligence involved were of a small order. A penalty of \$50 will be assessed.

Citation No. 159669. The citation alleges a violation of 30 CFR 56.11-2 in that tools, bars, pulleys, etc., were stored on a platform and that the platform contained no toeboards. The inspector thought that the hazard was to people passing below the platform who might be injured by falling objects. The standard states: "Crossovers, elevated walkways, elevated ramps, and stairways, shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided." The standard is obviously intended to provide safety for people working on the platform and toeboards would be required if a slipping hazard were present. The standard does not prohibit storage of materials in the absence of toeboards. The citation is VACATED.

Citation No. 159670. The citation alleges a violation of 30 CFR 56.15-5 in that the crusher operator climbed on top of the jaw crusher to break a boulder with a sledge hammer without using a safety belt and rope. The inspector actually saw the operator climb into a hazardous position, he saw that safety belts and ropes were available in the cab of the jaw crusher but that the miner ignored them. The miner did not speak English and the inspector could not question him, but the only defense offered was that safety equipment had been supplied and the miner had been instructed to use it. I find there was a violation, that it was potentially hazardous and that Respondent was negligent in not doing more than merely instructing the miners to use safety equipment. A penalty of \$150 will be assessed.

Citation No. 159671. The allegation is that the work platform on the northwest side of the second No. 1 primary crusher tower was filled with 12 to 18 inches of spillage in violation of 30 CFR 56.20-3(b). The standard requires that the floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. There was no denial that this was a work place and there was no denial that the spilled rock was on the platform. The evidence did not establish when the spillage occurred and when the operator knew or should have known of its occurrence. The gravity is moderate and the negligence in the absence of the aforementioned possible evidence has not been established to be great. A penalty of \$100 will be assessed.

Citation No. 159672. The citation alleges that the troughing pulleys under the feeder where metal sideboards protruded to create a pinch point were not guarded in violation of 30 CFR 56.14-1. The standard requires that gears, sprockets, chains, pickup pulleys, etc., which may be contacted by persons, and which may cause injury to persons, shall be guarded. A pinch point is such an area and there is no contention here by Respondent that the area in question was not a pinch point. The only question is whether the area is such that a person may contact the pinch point and be injured. It was the inspector's testimony that employees would be required to be in the area to clean around the tail pulley, and to service the pulleys. The Respondent's witness testified that the only time an employee would have any reason to go to the area in question would be to perform services when the pulley was not running. Stopping the machinery for maintenance is required by 30 CFR 56.14-29 "except where machinery motion is necessary to make adjustments." There is no evidence in this case that machinery motion would be necessary for the type of maintenance work described by the inspector. If the parties had submitted diagrams or photographs, they might have shown whether or not the area in question was such that a person might wander in and be injured by the unguarded pinch point. As long as the attorneys, however, are content, who hover around a black-board drawing, and have a witness point and say such things as "in order to get from this point here over to that point, you have to pass by this point here" they will have to be content with not having a record that supports their contention. In such cases, I will rule against the party having the burden of persuasion and insofar as this violation is concerned, that party is MSHA. The citation is VACATED.

Citation No. 159673. The citation alleges a violation of 30 CFR 56.11-1 in that loose unsupported cement was hanging from the steel structure over the No. 3 tunnel conveyor travelways. The standard requires that safe means of access be provided to all working places. Inasmuch as employees are required to go into the tunnel involved to clean and repair, it is a work place within the meaning of the regulations. The particular piece of cement that the inspector considered loose and unsupported, had been in the same place and condition for 8 years at the time of the inspection. While the fact that the 1-1/2 inch thick piece of concrete had been in place for 8 years does not guarantee that it will stay in place for an additional day. It does bring into question the inspector's judgment as to

whether it was in fact "loose, unsupported cement" the inspector's description of the violation was insufficient to support his allegation that the cement was in fact loose and unsupported or that a dangerous condition existed. The citation is VACATED.

Citation No. 159674. The citation alleges a violation of 30 CFR 56.16-5 in that two compressed gas cylinders were standing upright and not secured. The violation was established beyond question, as was the fact that Respondent was negligent. According to the inspector, however, there was very little chance that someone would be injured by the cylinders falling on them. A penalty of \$50 will be assessed.

Citation No. 159679. The citation alleges a V-belt and drive in the travelway was not enclosed as required by 30 CFR 56.14-1. The testimony regarding this violation was somewhat contrary to the citation, but the fact is that a V-belt, located in a travelway was not completely guarded. It was also established that there was nothing to prevent miners in the area of this V-belt during a working shift, and that a finger could be lost if caught in the V-belt. Respondent was negligent and the violation was hazardous. A penalty of \$100 will be assessed.

Citation No. 159680. The citation alleges a violation of 30 CFR 56.14-1 in that the tail pulley of the No. 4 conveyor belt was not guarded. This citation is similar to the one immediately preceding it in this opinion, but involves a pulley rather than a V-belt. The hazard and negligence are about the same and accordingly, a penalty of \$100 will be assessed.

Citation No. 159681. This citation also involves an unguarded pulley and alleged violation of 30 CFR 56.14-1. The evidence is essentially the same as that presented with respect to the two preceding citations. The gravity, negligence, and the violation itself were clearly established and a penalty of \$100 will be assessed.

DOCKET NO. DENV 79-140-PM

Citation No. 160809 alleges a violation of 30 CFR 56.3-5 in that men were working drilling boulders at the toe of a 75-foot highwall with loose unsupported rock hanging on the wall. The standard states that men shall not work near or under dangerous banks. The inspector testified that the rock which he considered to be loose because he saw a crack on one side, was about halfway up the 75-foot wall, and that the men were working 30 or 40 feet from the toe of this vertical wall. In order to hit the men, the rock would have to fall away from the vertical face at an angle of approximately 45 degrees, and the testimony of the inspector did not convince me that this could happen. Also, the citation was abated by barricading the area, and the so called loose rock was left in place for approximately a year before it was taken down. In the light of these two factors, MSHA has failed to carry its burden of showing there was in fact a violation. The citation is VACATED.

Citation No. 159682 alleges a violation of 30 CFR 56.11-2 in that the handrails around a work platform had an opening approximately 2 feet wide. The platform in question was about 10 feet high, and the inspector could see from the tracks that workers had stepped through the opening onto a guard for a V-belt or pulley. He actually saw one worker step onto the guard. There was a falling hazard, and Respondent was negligent in allowing the hazardous situation to exist. A penalty of \$50 will be assessed.

Citation No. 159683 alleges a violation of 30 CFR 56.11-1 in that an access ladder ended at an unguarded tail pulley. The inspector stated that if someone climbed the ladder, they could easily put their hand in the unguarded tail pulley. Instead of citing Respondent for having an unguarded tail pulley, the inspector chose to cite Respondent for failure to provide safe access to a working place. Inasmuch as there is a specific standard requiring that certain pieces of machinery be guarded, I do not believe the safe access standard was intended to cover the same type of condition. If the safe access standard can be stretched to cover unguarded pulley's, etc., it could also be stretched to cover everything from bad brakes to unsafe blasting caps. I do not believe that was the intent of the regulation and the citation is accordingly VACATED.

Citation No. 159684 alleges a violation of 30 CFR 56.14-1 in that a revolving counter balance wheel, next to a travelway was not guarded. Although this wheel was solid and did not have gears or sprockets, it was nevertheless a dangerous piece of exposed machinery in an area where it could injure a miner. Respondent was negligent in allowing the condition to exist and is assessed a penalty of \$100.

Citation No. 159685 alleges a violation of 30 CFR 56.14-1 in that a revolving counter balance wheel, located in a travelway was not guarded. This violation is the same as the previous violation except in a different location. The hazard and negligence are the same and the same penalty of \$100 is assessed.

Citation No. 159686 alleges a violation of 30 CFR 56.11-12 in that an opening under a wash tower along a travelway was not guarded. The evidence established is that there was a hole 4 feet long and 18 inches wide, along the walkway that was unguarded. A person falling through the hole would fall about 8 feet to a metal structure and be seriously injured. The violation is established and Respondent was negligent. A penalty of \$100 is assessed.

Citation No. 159690 alleges a violation of 30 CFR 56.12-67 in that the fence enclosure around a transformer was torn and opened in one corner. The purpose of having a fence around a transformer, is to keep unauthorized people away from the dangerous high-voltage connections. The tear in the fence was 2 feet wide and easily big enough for a person to enter. The defense was that if a person wanted to get in, he could climb over the fence, but climbing over a 6-foot fence is obviously not as easy as walking through a hole in the fence. I found this to be a serious violation, and

that Respondent was negligent in allowing the condition to exist. A penalty of \$100 is assessed.

DOCKET NO. DENV 79-176-PM

Citation Nos. 159692, and 159699 were withdrawn by the Solicitor and no evidence was presented with the respect to them. They are accordingly, VACATED.

Citation Nos. 159675, and 159695 both allege a violation of 30 CFR 56.11-2 in that walkways were not equipped with toeboards. The inspector issued the citations because of that hazard to workers below the platforms here in question. The standard states: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

In my opinion, the requirement of toeboards is for the protection of the workers on the walkway, and not for protection of those underneath. 30 CFR 57.11-7-8 does provide that walkways and ramps be kept free of loose rock and extraneous materials, but that standard was not mandatory when the citations were issued. MSHA cannot enforce a nonmandatory standard by trying to stretch a mandatory standard to fit. The citations are VACATED.

Citation Nos. 159676, 159678, 159689, 159693, and 159694 all allege a violation of 30 CFR 56.14-1. They involve the failure to adequately guard balance wheels, and a V-belt. All were clearly unguarded and were accessible to workers. They all appeared to involve about the same degree of hazard and negligence, and I am assessing a penalty of \$100 for each citation, or a total of \$500 for this group.

Citation Nos. 159696, and 159697 both allege a violation of 30 CFR 56.14-1 in that head pulley's were not guarded and the pinch points were approximately 4 feet off of a work platform. The defense is that the only reason a miner would have for going in the area of these head pulley's, would be for maintenance, and that when maintenance is performed the machinery is shut down. That defense may reduce the likelihood of injury, but the standard is designed to protect anyone using that walkway whether he has any reason to be there or not. The required guards were missing, and Respondent was negligent. The gravity appears to be equal, and a penalty of \$100 for each violation will be assessed, which is a total of \$200 for this group.

Citation Nos. 160802, and 160803 both allege a violation of 30 CFR 56.14-1 in that pinch points of troughing rollers and side boards were not guarded, and were within 3 feet of the walkway. I had occasion to consider a similar condition, in Dravo Lime Company v. MESA, IBMA 77-M-1, October 28, 1977, and I ruled in that case that standard 56.14-1 does require guards in the vicinity of troughing rollers and sideboards. I am still of the same opinion, and the ruling here is the same. The required guards were missing, Respondent was negligent, and the gravity is the same. A penalty of \$100 each will be assessed, or a total of \$200 for this group.

Citation Nos. 160801, 160804, and 160805, all allege violations of 30 CFR 56.11-12 in that openings in the floor through which men or material may fall were not protected by railings or covers. While the unguarded holes varied in size, the inspector thought that a man could fall through any of them, and would fall about 12 feet. He also thought objects could fall through the holes onto people below. The standard clearly requires guards or covers over such holes, and the fact that the inspector saw no one in the area is no defense to the allegations contained in the citations. I do not consider the possibility of a 12-foot fall through holes of a size involved here as serious as the unguarded belts, and pulley's, and fly wheel, etc., but the possibility of injury existed, and Respondent was negligent in not guarding these openings. A penalty of \$50 each will be assessed, or a total of \$150 for this group.

Citation No. 159691 alleges a violation of 30 CFR 56.12-68 in that the fence surrounding a transformer was not locked. While the evidence is far from conclusive, it appears likely that the citation here was issued within minutes of Citation No. 159690 involved in Docket No. DENV 79-140. It does appear that the inspector looked at the fence, cited Respondent because of the hole which a miner could walk through, and then cited the operator because there was no lock on the gate. If the fence is torn open, there is hardly any point in having the gate locked, and in my opinion, only one citation should have been issued. The instant citation is accordingly VACATED.

Citation No. 159698 alleges a violation of 30 CFR 56.12-8 in that a "conduit was broken and the connector box was missing, leaving the splice open on the No. 8 conveyor belt drive motor * * *." The evidence presented by the Secretary was somewhat confusing as to this alleged violation, and did not describe a situation where power wires pass into or out of electrical compartments. That is what this mandatory standard is concerned with. The citation is VACATED.

Citation No. 159700 alleges a violation of 30 CFR 56.14-2 in that a travelway was not guarded against the whipping action of a broken overhead conveyor belt. The violation was clearly established, and injury could result from having a broken belt fall on a miner. Respondent was negligent, and a penalty of \$100 is assessed.

Citation No. 160806 alleges a violation of 30 CFR 56.11-1 in that in order to gain access to a travelway at the top of the bend, miner's are required to climb through or over handrails, and through openings in the side of the building. There is a gap between 24 and 30 inches between the handrails in the side of the building. A 30- to 40-foot fall could result. The standard requires the operator of a mine to provide safe access to all working places, and Respondent has failed to do so in this instance. That failure was negligent, and a serious accident could result. A penalty of \$200 is assessed.

ORDER

It is therefore ordered that Respondent pay to MSHA, within 30 days, a total penalty in the amount of \$2,650.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	:	Civil Penalty Proceedings
		:	
		:	Docket No. WEST 79-94-M
		:	A/O No. 04-00010-05001
v.		:	
		:	Docket No. WEST 79-96-M
RIVERSIDE CEMENT COMPANY,	Respondent	:	A/O No. 04-00010-05003
		:	
		:	Docket No. WEST 79-138-M
		:	A/O No. 04-00010-05006
		:	
		:	Crestmore Mine and Mill
		:	
		:	Docket No. WEST 79-176-M
		:	A/O No. 04-00010-05008
		:	
		:	Docket No. WEST 79-177-M
		:	A/O No. 04-00010-05009
		:	
		:	Docket No. WEST 79-198-M
		:	A/O No. 04-00010-05007
		:	
		:	Crestmore Plant

DECISION

Appearances: Alan Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA; D. Marshall Nelson, Esq., Riverside Cement Company, Newport Beach, California, for Respondent, Riverside Cement Company.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against Riverside Cement Company. A hearing was held on November 27, 1979.

At the hearing, the parties agreed to the following stipulations:

1. The operator is large in size.

2. The operator has no history of prior violations.

3. The operator's ability to continue in business will not be affected by the imposition of any penalties herein.

4. There was good faith abatement with respect to the twelve alleged violations which involved an alleged violation of 30 CFR 57.14-1 (Tr. 2-3).

Citation Nos. 376299, 375252, 375253, 375254, 376341, 376347, 376348, 376305, 376309, 376313, 376327, 375285.

Each of these citations alleges a violation of 30 CFR 57.14-1. At the hearing, the Solicitor and the operator introduced documentary exhibits and testimony with respect to these citations (Tr. 1-53). Upon conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench (Tr. 53-54). After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 61-64):

Citation 00376299 involves a petition for the assessment of a civil penalty based upon an alleged violation of section 57.14-1 of the mandatory standards.

Section 57.14-1 provides as follows: "Gears; sprockets; chains; drive, head, tail, and take-up pulleys; fly wheels; 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."

The condition set forth in this citation is as follows: "The exposed moving machine parts (rollers) under the feed chutes where skirting is provided along the tail pulley area of crusher conveyor number eleven were not guarded. These rollers on the conveyor may be contacted by persons which may cause injury. This is located at the top deck of the secondary crusher."

Three MSHA inspectors testified, including the inspector who issued the subject citation. They all stated that Section 57.14-1 would be cited in a case such as this because it presented a very dangerous situation. The hazardous condition was presented because a skirt board was present, attached to the belt at this location to prevent spillage. Due to the skirt board there was no play in the belt so that if an individual got caught between the belt and the rollers, he would not have time or space to get out and would be

seriously injured. All the inspectors agreed that rollers along the belt where skirt boards are not present would not be cited under this mandatory standard.

I find there was no violation.

Section 57.14-1 talks of gears, sprockets, chains, drive pulleys, fly wheels, couplings, shafts, saw blades, fan inlets and "similar exposed moving machine parts". MSHA did not explain how or why rollers could be construed as similar to the enumerated items in the mandatory standard. Even more importantly, MSHA only cites rollers where skirt boards are present. As already stated, one of the inspectors specifically indicated that MSHA would not cite a roller where no skirt board was present, because if there was an injury from an individual touching a roller, it would not be a serious injury. I reject this argument. A mandatory standard simply cannot be administered on this basis. What constitutes or what might constitute a serious injury is so subjective that an operator would never know what was expected of it.

Moreover, if rollers fall within the definition of "similar exposed moving machine parts", then they are always within the definition and should be guarded everywhere. In other words, reference to this mandatory standard for this case either proves nothing for MSHA or it proves far too much. The Solicitor, during his oral argument, admitted that MSHA was selectively applying this mandatory standard to situations only where a serious injury would result. However, as I already have stated, a mandatory standard simply cannot be utilized in this way. Undoubtedly, a hazard is presented by the cited condition and by other such conditions, but it is unfair to the operator and to the inspector as well to attempt to use a standard which either goes nowhere or goes too far. The proper course would be for MSHA to amend the regulations to cover this situation.

I have neither the authority nor the inclination to substitute myself for the rule-making procedures set forth in the Act. The Secretary must realize that he cannot circumvent rule-making procedures regardless of how time-consuming they may be by attempting to persuade Judges of the Commission to interpret existing regulations in an unfair and unreasonable manner.

I note that in Secretary of Labor v. Massey Sand and Rock Company, Docket Number Denver 78-575-PM, dated June 18, 1979, Administrative Law Judge Koutras vacated ten citations under analogous circumstances. The reasons for my determination today are set forth herein. 1/

1/ As I advised the Solicitor during oral argument, on July 27, 1979, the Commission denied the Secretary's petition for discretionary review of Judge Koutras' decision (Tr. 60).

The parties have agreed that the interpretation adopted for citation 00376299 will govern eleven other citations involving this mandatory standard.

Accordingly, I hereby vacate the following citations: 376299, 375252, 375253, 375254, 376341, 376347, 376348, 376305, 376309, 376313, 376327, and 375285.

The foregoing twelve citations are vacated and no penalty will be assessed.

The bench decision is hereby affirmed.

Citation Nos. 375261, 376323, 376318, 376340, 376286, 376310, 376291.

The Solicitor moved to vacate these citations, stating that he did not feel there was sufficient evidence available to prove these violations. From the bench I granted this motion (Tr. 65). The granting of the Solicitor's motion to vacate is hereby affirmed.

Citation No. 376332.

The Solicitor moved to have a settlement approved for Citation No. 376332 in the amount of \$305, reduced from the original assessment of \$530. The citation involved the inspector's finding of material spillage on the top work deck of the No. 2 reclaimer, a violation of 30 CFR 57.20-3(b). The Solicitor stated that there was apparently some confusion on the operator's part concerning the existence of a violation, and that this might have caused a delay in the abatement of the condition. From the bench I approved the settlement, stating that \$305.00 was a substantial amount which would effectuate the purposes of the Act and that the original penalty seemed high, since the application of the Act to an operation such as this was very new (Tr. 66). Approval of this settlement from the bench is hereby affirmed.

Citation Nos. 375248, 375250, 375259, 375265, 375267, 376284, 376301, 376302, 376330, 375278, 375280, 375286, 376315, 376319, 375258, 375268, 376285, 376342, 379001, 376283, 376322, 376311, 376336.

The Solicitor moved to have a settlement approved for these citations in the amount of \$1,826, 2/ which was the originally assessed amount. The Solicitor stated that ordinary gravity and ordinary negligence were involved in all of these citations. From the bench I approved these recommended settlements after having reviewed typewritten summaries of all the violations (Tr. 68). Approval of these settlements from the bench is hereby affirmed.

2/ \$1,826 added to \$305 is \$2,131 which was the figure referred to by the Solicitor (Tr. 67).

ORDER

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

In accordance with the foregoing determinations, the operator is ORDERED to pay \$2,131 within 30 days from the date of this decision.



Paul Merlin

Assistant Chief Administrative Law Judge

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U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 79-45-M
Petitioner : A/O No. 04-00011-05001
v. :
: Docket No. WEST 79-46-M
RIVERSIDE CEMENT COMPANY, : A/O No. 04-00011-05002
Respondent :
: Docket No. WEST 79-47-M
: A/O No. 04-0011-05003
:
: Oro Grande Plant

DECISION

Appearances: Alan Raznick, Esq., Office of the Solicitor, United States Department of Labor, San Francisco, California, for Petitioner, MSHA;
D. Marshall Nelson, Esq., Riverside Cement Company, Newport Beach, California, for Respondent, Riverside Cement Company.

Before: Judge Merlin

The above captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against Riverside Cement Company. A hearing was held on November 27, 1979.

At the hearing, the Solicitor moved to vacate six citations, stating that after reviewing the evidence available to MSHA regarding these citations, he had determined that MSHA could not prove the existence of the citations or the conditions that were cited in the citations. The citations MSHA moved to vacate were: 375084, 375091, 375092, 375505, 375513, and 375119. From the bench I granted the motion to vacate.

The Solicitor then moved that the remaining citations in these cases be settled for 100 percent of the assessed penalty, an amount totaling \$510. He explained that after reviewing the evidence he had concluded that moderate gravity and ordinary negligence were involved. I accepted the Solicitor's representations after I had independently reviewed each and every one of the citations. I pointed out that the assessed amounts were low but that I kept in mind that the Act was being newly applied to an operation such as this.

ORDER

The decision granting the Solicitor's motion to vacate citations 375084, 375091, 375092, 375505, 375513 and 375119 is hereby AFFIRMED;

The acceptance of settlements in the amount of \$510 for citations 375097, 375506, 375107, 375110, 375114, 375120, 375525, 375085, 375089, 375093, 375095, 375104, 375499 and 375501 is hereby AFFIRMED; the operator is ORDERED to pay \$510 within 30 days from the date of this decision.



Paul Merlin

Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 79-98-M
Petitioner : A/O No. 04-00010-05005
v. :
: Crestmore Plant
RIVERSIDE CEMENT COMPANY, :
Respondent :

DECISION
ORDER TO PAY

Appearances: Alan Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA;
D. Marshall Nelson, Esq., Riverside Cement Company, Newport Beach, California, for Respondent, Riverside Cement Company.

Before: Judge Merlin

This case is a petition for the assessment of two civil penalties filed by the Mine Safety and Health Administration against Riverside Cement Company.

At the hearing, the Solicitor moved that the two citations in this proceeding be settled for 100% of the assessed proposed penalty, amounting to \$555. He explained that the gravity involved was serious but that ordinary negligence was involved, and that he felt the proposed penalty to be a fair one. From the bench, I stated the following:

I want to state for the record what everyone here should know, and that is that a penalty proceeding before the judges of the commission is de novo; therefore, I'm not bound by the assessed amounts, either upwards or downwards. I have, therefore, reviewed both of these citations and the inspector's statement which were attached to the Solicitor's Motion to approve settlement. It appears to me that the proposed settlements are substantial and will effectuate the purposes of the Act. Accordingly, they are approved, and the operator is directed to pay \$555.00 (Tr. 3).

ORDER

The operator is ORDERED to pay \$555 within 30 days from the date of this decision.



Paul Merlin
Assistant Chief Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-123-PM
Petitioner : A/O No. 45-00572-05001
v. :
 : Acme Pit & Plant Mine
 :
ACME CONCRETE COMPANY, : Docket No. DENV 79-124-PM
Respondent : A/O No. 45-00659-05001
 :
 : Matheson Pit Mine

DECISION

Appearances: Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Monte Geiger, Director, Governmental Services & Safety, Inland Empire Chapter of General Contractors, Spokane, Washington, for Respondent.

Before: Judge Charles C. Moore, Jr.

It was stipulated at the outset that Respondent has no prior history of violation, and that any penalty will not impair its ability to continue in business. I find the operator is medium in size and that all violations found to have occurred were abated promptly and in good faith. Matters of negligence and gravity will be considered with respect to each individual citation.

DOCKET NO. DENV 79-124-PM

The citation here was not introduced into evidence, but a copy was attached to the petition. It is Citation No. 346027 and alleges a violation of 30 CFR 56.9-11 in that there were radial cracks in the windshield of a front-end loader. The principal impact area was in the right upper corner of the windshield, but the radial cracks extended to the area in front of the driver and at that point were about 2 inches apart. The standard does not specifically prohibit cracked windshields, but it does require that windshields be maintained in good condition and inasmuch as these cracks impaired the driver visibility, the window was not being maintained in good condition. It was conceded that the cracks were caused by children throwing rocks down into the pit and hitting the windshield.

The abatement consisted of removing the broken windshield, installing a large metal grill work in front of the window space and then replacing the glass window. Respondent's Exhibit No. 1 contains two photographs of the grill work designed to protect the windshield. While this grill work is considered as satisfactory abatement by MSHA, it is conceded that the grill restricts the drivers visibility more than the cracked windshield which was considered a violation. In other words, the situation is more hazardous now that the citation has been abated than it was at the time the citation was issued. In the circumstances, I have to consider negligence and gravity as extremely small. A nominal penalty of \$1 is assessed.

DOCKET NO. DENV 79-123-PM

At the outset of the hearing with respect to this docket number, the Solicitor's attorney withdrew the following citations: 346017, 346019, 346021, 346022, and 346023. Those citations are accordingly VACATED.

Citation No. 346016 alleges a violation of 30 CFR 56.9-22 in that a berm was not provided on an outer bank of the elevated roadway to the crushing plant feed hopper. The evidence establishes that the road is used for hauling stone to the crusher and that on one side it is elevated about 4 feet above the surrounding terrain. On the elevated side, the angle of the bank at the edge of the road is approximately 32 degrees from the horizontal. While a 4 foot elevation with a 32 degree angle does not seem like a condition a frontend loader would have difficulty in negotiating, these were wheeled loaders and it was the inspector's opinion that one could possibly turn over if one wheel went over the edge. No witness appeared to dispute the inspector's testimony, and I will accordingly find that there was a possibility of an injury, in view of the angle and elevation, however, together with the fact that the front-end loaders contained roll over protection and seatbelts I think the gravity of the violation was very low. I also find a low order of negligence and assess a penalty of \$25.

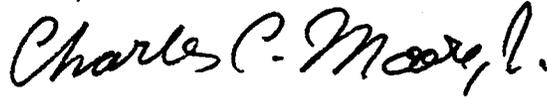
Citation No. 346018 alleges a violation of 30 CFR 56.9-7 in that an unguarded surge conveyor with a walkway alongside was not equipped with an emergency stop device. While the regulations define "travelway" there is no definition of "walkway" in the regulations. Inasmuch as it is the purpose of the regulations to protect the miners, I am going to consider a walkway to mean, a place were a miner could reasonably be expected to walk even if he has no job related reason for going to the area in question. I believe the area involved in this surge tunnel was a walkway, and for that reason, either a guard or a stop cord was required on the conveyor. I find there was very little negligence and in the absence of any testimony concerning a pinch point I find the gravity was not high. A penalty of \$25 will be assessed.

Citation No. 346020 alleges a violation of 30 CFR 56.14-1 in that a tail pulley was unguarded. The inspector testified that a person could be injured at the pinch point, but that the structure of the conveyor itself guarded three-fourths of the area in question. He seemed to think it unlikely that someone would be injured. It was nevertheless a violation to leave a part of the pulley unguarded even though the negligence and gravity are of a low order. A penalty of \$25 is assessed.

Citation Nos. 346024 and 346025 both involve radial cracks in winding of equipment as did Citation No. 346027. The facts are similar and the same penalty is accordingly assessed, \$1 for each citation.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days, a civil penalty in a total amount of \$78.



Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 450 Golden Gate Avenue, Box 36017, Room 10404 Federal Building, San Francisco, California 94102 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

CYPRUS INDUSTRIAL MINERAL CORP., : Application for Review
Applicant :
v. : Docket No. DENV 78-558-M
: :
SECRETARY OF LABOR, : Order No. 34205
MINE SAFETY AND HEALTH : August 3, 1978
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Scott H. Dunham, Esq., O'Melveny & Myers, Los Angeles,
California, for the applicant;
Thomas E. Korson, Attorney, U.S. Department of Labor, Office
of the Solicitor, Denver, Colorado, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

This is an action filed by Cyprus Industrial Minerals Corporation (Contestant) pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e)(1), seeking review of an imminent danger closure order issued by MSHA inspector Donald K. Everhard on August 3, 1978, pursuant to section 107(a) of the Act. The withdrawal order, No. 342065, cited a violation of 30 CFR 57.3-2, and the condition or practice which the inspector believed constituted an imminent danger warranting closure of the "whole mining area of the Bosal #1 claim," is described as follows on the face of the order: "Dangerous loose rock and overburden was present on the north side of drift immediately above the working level of the drift. The face and south rib also had not been completely scaled and dangerous loose rocks were observed also."

In its review petition, contestant asserted that the order was improperly and unlawfully issued because (1) the area which is the subject of the order is not a mine within the meaning of the Act and was beyond the jurisdiction of MSHA, and (2) even if the area cited can be construed to be a "mine," the operator was one Leonard "Pee Wee" Holmes, an independent contractor who was in fact the "operator" at the time the order issued.

Respondent filed an answer to the review petition on September 7, 1978, and moved to dismiss on the ground that contestant failed to include a copy of the order with its petition. Applicant filed a response to the motion, and by order issued by me on September 21, 1978, respondent's motion to dismiss was denied, and by notice of hearing issued on October 12, 1978, the matter was scheduled for a hearing on the merits in Helena, Montana, November 17, 1978.

On November 6, 1978, respondent filed a motion for a continuance of the hearing on the ground that MSHA was in the process of reviewing its enforcement policy with regard to independent contractors and that there was a good possibility that in light of this review, the parties would probably resolve the matter without the necessity of a hearing on the merits. By order issued by me on November 8, 1978, the case was continued, and on January 24, 1979, I issued another order directing the parties to advise me of the status of MSHA's policy review concerning independent contractors and whether the case should be scheduled for hearing. On February 6, 1979, respondent's Arlington, Virginia Solicitor's Office advised me by letter that MSHA had not changed its enforcement policy with regard to citing mine owners for violations committed by independent contractors and that it did not appear that any future policy changes in this regard would be applied retroactively. The Solicitor also advised that the order in question was still in effect and that a hearing would be required. Accordingly, by notice issued April 13, 1979, a hearing was scheduled for Helena, Montana on July 17, 1979, and the parties appeared and participated therein. The parties waived the filing of written proposed findings and conclusions but were afforded an opportunity to present their respective arguments on the record at the hearing, and the arguments presented have been considered by me in the course of this decision.

Issues

1. Whether the area where the alleged imminent danger was found was a mine within the meaning of the Act.
2. Whether the conditions cited and described by the inspector presented an imminent danger warranting the issuance of a closure order pursuant to section 107 of the Act.
3. Whether the mine owner, rather than the independent contractor, was the proper party to be served with the closure order in question.
4. Additional issues raised by the parties are identified and discussed in the course of this decision.

Stipulations

The following admissions and stipulations were made by the parties (Exhibit JE-1):

1. This review proceeding is properly before me pursuant to section 107 of the Act.

2. Applicant Cyprus Industrial Minerals (CIM) is an operator of certain mines generally subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. (the "Act"), and MSHA is the governmental agency responsible for administration and enforcement of the Act.

3. Leonard "Pee Wee" Holmes is an independent exploration contractor who contracted with CIM to perform work for CIM on property owned by CIM according to his own methods and without being subject to the control of CIM except as to the final result of his work. Holmes contracted with CIM to establish a portal and drive two exploration drifts for CIM, one at its Snow White Mining Claim and the other at its Bosal #1 Mining Claim. CIM specified the work it wished performed and the geographical area wherein the work was to be performed but Holmes was solely responsible for achieving the results desired by CIM. The only work being performed was for assessment. There was no production at these sites.

4. In performing the work for CIM, Holmes furnished all the equipment, manpower and supplies. CIM did not supervise or otherwise direct Holmes in his work. He exercised complete control over the area in which he was working. He was not an agent or an employee of CIM. The completed work, however, inured to the benefit of CIM.

5. Holmes has worked as an independent exploration contractor for more than 10 years and has worked in underground and aboveground mining of minerals for approximately 35 years.

6. Raymond Pederson was an employee of Holmes. He was not an agent or employee of CIM. Holmes hired Pederson to work with him to perform the work Holmes contracted to do for CIM. Pederson had worked in aboveground and underground mining of minerals for approximately 18 years.

7. The alleged violation of the Act cited in Order No. 342065 occurred during the course of work performed by the independent contractor, Holmes, and his employee Pederson. None of the employees of CIM were endangered by or involved in the occurrence which resulted in Order No. 342065.

8. Holmes is not in any way affiliated with CIM other than pursuant to the Agreement for Services executed by Holmes and CIM which called for Holmes to do certain construction work. The Agreement for Services provided that the relationship between CIM and Holmes was to be that of owner and independent contractor.

9. By Thursday, July 27, 1978, Holmes and Pederson completed without incident the portal and exploration drift at CIM's Snow White Mining Claim. The following day, Friday, July 28, 1978, Holmes and Pederson began working to establish a portal and exploration drift at CIM's Bosal #1 Mining Claim.

10. On Wednesday, August 2, 1978, Holmes and Pederson began preparations for setting posts for the portal at the Bosal #1 Mining Claim. They proceeded to clear away the muck that had collected at the base of the portal as a result of barring and scaling the face of the hill. Also on Wednesday, Holmes and Pederson used a frontloader CAT 988 to clear the overburden above the portal. They also scaled from the top of the hill as well as from the ground and barred and scaled the brow.

11. On Thursday, August 3, 1978, Holmes and Pederson began working around 8 a.m. They did more barring and scaling of the face of the hill in preparation for setting posts. They completed the barring and scaling to their satisfaction and were in the process of setting the posts when rocks suddenly broke loose from the face of the drift and struck Pederson, crushing him. Pederson was pronounced dead at the scene.

12. On August 3, 1978, MSHA inspector Donald K. Everhard served Order No. 342065 to Donald F. Kennedy of CIM. Order No. 342065 was issued pursuant to Secretarial Order No. 2977. Mr. Everhard believed that the barring and scaling had not been completed satisfactorily because of the presence of loose rock.

Testimony and Evidence Adduced by the Respondent MSHA

MSHA inspector Donald K. Everhard testified that he has been associated with the mining industry since 1948, and with MESA and MSHA as a mine inspector for the past 5-1/2 years. He has also worked as a contract miner and is familiar with the hazards of loose rock, since he has observed loose rock fall and has attended classes dealing with the subject. He went to the job site in question after receiving a phone call from his office advising him that there had been a fatality there. He arrived there at about 4:45 p.m., and CIM engineer Don Kennedy, State mine inspector Bill Gilbert, and contractor Leonard Holmes were there when he arrived. Mr. Holmes explained what had taken place, and they examined the site from a safe distance. From the top right-hand edge of the site which had been cleared of loose rock, he observed loose rock in the face of the drift, some smaller loose rock on the right-hand side, and a high overburden on the left side (Tr. 24-28).

Inspector Everhard identified a copy of the order he issued and confirmed that it refers to section 57.3-22 and he indicated that is what he intended to cite (Tr. 29). He issued the imminent danger order after observing hanging loose rock in the center of the drift which was approximately 18 feet high, and hanging loose rock on the right-side of the drift. Although loose overburden had been cleared from the top edge of the face on the right-hand side back about 10 to 12 feet, the left-hand side had loose overburden above the solid rock which had not been cleared away for some 25 feet. The rock was overhanging loose rock which could have slipped at anytime. Had work proceeded as previously done on the same schedule an accident could have occurred. He believed the loose rock on the right hand side should have been rebarred and rescaled and the high overburden on the left should have been completely removed (Tr. 29-32).

On cross-examination, Mr. Everhard indicated that he prepared his "inspector's statements" no later than August 5, and that he did make reference to a violation of section 57.3-2 in the report. The loose rock he observed hanging on the face of the drift was in the same approximate area as the rock which fell from close to the center of the drift. He recalled the accident investigation report of August 3, 1978, and indicated that he prepared a rough drawing of the accident scene. The victim, Mr. Pederson, was standing on the right side of the drift and Mr. Holmes on the left side. The rock which struck Mr. Pederson fell from somewhere near the center of the drift. He took no pictures of the job site once he arrived there because he had no camera, and he was not at the site prior to the accident. He was told by Mr. Holmes that barring and scaling of the walls had taken place prior to the accident and he did observe barring and scaling tools in the area, and he had no reason to believe that it was not done (Tr. 33-40).

Inspector Everhard testified that he issued the order to the operator, Cyprus Industrial Mineral Company, rather than Mr. Holmes because he was verbally instructed to do so by his supervisor who advised him that this was the policy (Tr. 40). He did not question Mr. Holmes regarding who was controlling or supervising the operation on the day in question and he was aware of the fact that the accident victim was employed by Mr. Holmes and had no affiliation with CIM (Tr. 41).

On redirect, Mr. Everhard indicated that while scaling and barring of rock had been done when he arrived at the job site, it was not complete because he still observed loose rock in the face area and the sides and it was not adequately supported. He cited 57.3-22 because loose ground should have been removed and adequately supported to eliminate the hazard of loose rock. The operator's nearest mine is a mile and a half from the job site in question. He considered the job site to be an underground mining operation because there was a drift into the side of the mountain and underneath the ground (Tr. 47).

In response to questions from the bench, Mr. Everhard testified that he was told that only two men, namely Mr. Pederson and Mr. Holmes, were working at the operation prior to the accident, and that this was the usual number of people working there. Neither Mr. Everhard nor MSHA had previously inspected the site at anytime. The work began there sometime in mid-July 1978. Prior to the accident of August 3, the drift had been driven some 18 to 21 feet. The men were establishing a drift under the brow into the side of the mountain. After establishing the brow, they were to drive in another 20 to 23 feet underground. The overburden and loose material was removed from the drift opening by a front end loader, and a jack-leg mining machine which was used to drill holes was also used and the material was blasted out. A compressor was also present to produce air to run the jack-leg machine, and picks, shovels, and bars were also there. The drift was unsupported and it was an active working (Tr. 47-52).

On recross Mr. Everhard stated that he was told a half a ton of loose rock covered the accident victim and that he was struck by a large rock.

Mr. Everhard never received a copy of the contract between Mr. Holmes and the operator, and he indicated that his description of the drilling and blasting which was taking place was standard procedure for cutting a drift, and while he observed a post or two lying alongside the walls, no support timber was installed, and the two men were starting to install it at the time of the accident (Tr. 56-57).

Applicant's Testimony and Evidence

Donald F. Kennedy, production manager, CIM, Beaverhead Mine, testified that 21 employees work at the mine and that it is an open-pit operation mining talc, and is located about a mile and a half from the site of the accident. No mining was taking place at that site and no employees of the operator were there performing any work. He hired Mr. Holmes to do the work there because someone was needed with experience driving underground workings for assessment work on the mining claims, and the operator had no one with that experience. Mr. Holmes was recommended as someone who had done this type of work and the reports on him were good. He was at the site on one occasion prior to the accident for the purpose of showing Mr. Holmes the second site where another adit was to be driven. The contract with Mr. Holmes called for the driving of two adits, and Mr. Kennedy exercised no control or supervision over the work performed by Mr. Holmes. The purpose of the exploration drift was to determine the width of any talc in the area. At the time the drift was opened he did not intend to use it for mining, and it was possible that the portal would have been so used but this could not be determined until they knew what was found (Tr. 69-73).

On cross-examination, Mr. Kennedy testified that had the drift being developed by Mr. Holmes produced substantial indications of the existence of valuable minerals further steps would be taken to mine the minerals, drilling would commence, and an open-pit mine would have been developed. Mr. Holmes' project was to last for some 2 or 3 weeks, and his work was not expected to exceed 3 weeks. In fact, it took him 2 weeks to drive the drift. Mr. Holmes was instructed to complete another drift first, and then start on the Bosal work (Tr. 73-77). Mr. Kennedy conceded that his company generally could have trained its own personnel to perform the work done by Mr. Holmes, but simply drilling a bore hole would not result in mineral samples as large as those disclosed by developing a drift (Tr. 79). At the time of the accident, he was the company official responsible for safety matters (Tr. 85). In open-pit mining, problems are encountered with loose rock (Tr. 89).

On redirect Mr. Kennedy stated that one of the considerations in hiring Mr. Holmes to develop the drift in question was that he had prior experience in this type of work, and the company opted not to do the work because of its lack of expertise (Tr. 90). In response to bench questions, he testified that no mining is presently taking place on the Snow White Claim because no minerals of value were discovered and no mining is taking place at the site of the withdrawal order and no equipment is located there (Tr. 90-91). Although Mr. Holmes had not as yet developed an actual drift at the time of

the accident, a trench was developed into the side of the hill. Mr. Kennedy viewed the conditions cited in the withdrawal order and conceded that some surface loose alluvium material was present on the left side up on the surface (Tr. 93). He surmised that the small amount of material which fell on the victim resulted in the fatality, and from all appearances of the fatality area he did not feel that a danger was present (Tr. 95). He believed that the remaining material which was located some 25 feet up the high face after the accident was small loose alluvium material consisting of rock and dirt (Tr. 95). If he were the inspector he would have issued a citation in order to clear some of the loose materials, but he would not have considered the conditions an imminent danger (Tr. 97). Mr. Holmes was developing a portal, and a portal is the initial entry into the underground drift (Tr. 98). The drift established by Mr. Holmes at the Bosal claim was identical to the one established at the Snow White Claim (Tr. 98, Exh. A-1).

On recross, Mr. Kennedy testified that he visited the Bosal claim earlier prior to the accident and he did so to show Mr. Holmes the approximate direction in which to drive the drift and Mr. Holmes intended to establish a brow at the job site in question (Tr. 100).

Leonard Holmes testified that he owns a bar and has also engaged in contract mining for some 25 years, including experience in driving exploration drifts such as the one he was driving at the Bosal claim, and that he has never had an accident. He contracted with CIM to drive two exploration drifts and he identified a copy of the contract (Joint Exh. 3). The accident victim, Ray Pederson, worked for him previously in 1975 performing drift work, cleaning out old raises, and performing ventilation work. He paid Mr. Pederson and Mr. Pederson had some 18 years of experience in mining, including the driving of many exploration drifts. He and Mr. Pederson worked on drifts at Cyprus' Snow White claim, including timbering work. They also intended to use timbers at the Bosal drift work. He described the work being performed at the time of the accident, including drilling and cutting preparations to establish a portal, and the cleaning of the sides of the brow in order to establish room for the installation of timbers. During this process, he borrowed a piece of equipment from CIM to help clean off the brow. He also described the work performed by him in attempting to clear an area to facilitate the installation of support timbers (Tr. 103-109).

Mr. Holmes described how the accident occurred and indicated that a "slip" was encountered and he described it as "a greasy piece of ground that's under your rock." One of the walls "looked bad," but he indicated that it was a granite formation which interlocked with other rock and once this occurred "you didn't have to worry" because "the rock was interlocked." Prior to any attempts to set posts, material was barred and scaled from the foot of the rib wall, and the "cat" borrowed from CIM was also used for barring and scaling. No loose rock was observed at the foot of the wall and rib prior to the setting of the posts and he believed "we were safe." He identified the area on Exhibit A-2, labeled "Foot wall rib" where the accident victim was standing holding the posts when the rock fell and struck

him. Mr. Holmes was standing to the left and was not struck by any rock. The base of the drift at the time was 10 feet wide and the face was some 22 feet from where they could establish a portal and the timbering was from the face back. The ground conditions were examined on a daily basis while the work was being performed (Tr. 109-115).

Mr. Holmes testified that based on the existing conditions immediately before the accident, he did not believe that an imminent danger existed, and that after the rock fell and struck Mr. Pederson he did not intend to continue setting posts before doing any other work. After Mr. Pederson was killed he intended to do nothing but leave the area. Assuming he went back the next day, he would have cleaned up the area and started again, and this work would have included additional barring and scaling since once the rock fell it would have "loosened up something else again." Once timbering begins, barring, scaling, and cleaning out the muck would have been the safest way to proceed. In his opinion, there was no way to bar and scale to eliminate the hazard which existed at the time the rock fell and struck Mr. Pederson. He had encountered loose rocks slips in the past and indicated that "you will run into that anytime you are mining." The only way to prevent rock slippage is to timber and he was in the process of doing that at the time of the accident. The purpose of setting the timbers was to establish a brow underneath the face of the drift in order to support it. Mr. Holmes defined an imminent danger" as "something that you could work under or around if you wanted to take a chance." In his opinion, after the accident occurred the conditions which existed did not present an imminent danger where someone would be injured or killed if they continued work in that area. The rock which fell came from the hanging wall on the foot wall side of the area where work was being performed. Mr. Holmes stated he was responsible for the work being performed at the accident site because it was his contract (Tr. 115-120).

On cross-examination, Mr. Holmes indicated that he was paid by CIM for the work performed on the Snow White claim, but has not been paid for the work performed at the Bosal site (Tr. 121). Mr. Holmes denied that there was loose ground at and above the face at the time of the accident, but that 4 tons of rock struck Mr. Pederson at one time and he was not struck by a single rock although the material came out in one chunk. The rocks fell from approximately 4 to 6 feet above where he was holding the posts (Tr. 128). The slip of ground which caused the fall occurred 4 feet back and 2 feet into the face and they could not see it. They would not have been working underground had they observed the slip (Tr. 129-130). The "cat 988" which was used was owned by CIM since he did not own one (Tr. 131). Regarding the existence of any loose rock on the hanging wall side before the accident, Mr. Holmes stated that there was "none that was of any bother to us," but that overburden was present above the hanging wall and it could have fallen in at any time because "when you are mining it could happen" (Tr. 138).

On redirect and in answer to a question as to whether the presence of the overburden on the left side hanging wall presented an imminent danger, Mr. Holmes stated "Not if they are miners, no, that hanging wall wouldn't have bothered them one bit" (Tr. 139).

William H. Gilbert, testified that he is employed as a Montana state mining inspector with 30 years prior mining experience in underground mining and some surface mining experience. He was present at the mine site immediately after the accident and examined the job site immediately after the accident. He took some measurements and some photographs. In his view, the prevailing conditions after the accident did not present an imminent danger, but the area would have had to been barred down again. He is authorized under state mining laws to issue imminent danger withdrawal orders but did not issue one in this instance because Mr. Kennedy told him that he decided to stop the project and Mr. Holmes was going to move all of his equipment out. In view of this, he saw no point in issuing any order and he did not feel that the conditions at that time justified an imminent danger order and he would not have issued one (Tr. 143-144).

On cross-examination, Mr. Gilbert stated that he would not have issued an imminent danger order because he "didn't think the conditions were that bad" (Tr. 145). He knew that inspector Everhard had issued a citation, but did not know it was an order, and he first learned that an imminent danger order had issued the day of the hearing (Tr. 146). Mr. Holmes would have had to bar down the muck in order to work safely in the future (Tr. 148).

In response to bench questions, Mr. Gilbert stated that under state law "imminent danger" is not defined. It simply states that if an imminent danger exists a withdrawal may be issued and it remains in effect until the condition is abated (Tr. 151-152). Regarding the conditions which prevailed after the accident, he testified that the ground, like all surface ground, was shattered and loose (Tr. 153-154).

Inspector Everhard was recalled in rebuttal and testified further as to the conditions which prevailed after the accident. Loose, unstable overburden ground was present and it could have slipped off the top of the hanging wall and slipped into the work site onto the floor of the drift (Tr. 158). On cross-examination, Mr. Everhard testified as to how supporting timbers should have been installed and that a 22 foot area had been taken out (Tr. 164). He did not cite the operator for failure to examine the face and rib and has no way of knowing whether this was done or not (Tr. 166). Mr. Holmes was recalled and testified that no CIM employee operated the borrowed Cat 988 but that Mr. Pederson did (Tr. 169).

Arguments Presented by the Parties

Respondent MSHA

Respondent argues that Inspector Everhard's concern about the loose material which remained on the hanging wall side of the overburden justified

his imminent danger order and that the opinion of the state mine inspector regarding the presence of an imminent danger should be given no weight. Further, respondent argues that the testimony establishes that additional work had to be performed before any mining could continue after the fatal accident and that this factor also supports the inspector's order. As for the independent contractor question, respondent asserts that the record establishes that the work performed by Mr. Holmes at CIM's Snow White and Bosal claims indicates that it was of very short duration, that Mr. Holmes performs work at several locations and in effect has a very limited presence on the mine site, whereas CIM has an ongoing operation and could have performed the work itself by training its personnel. Under the circumstances, respondent submits that MSHA's discretionary policy of citing mine operators rather than contractors is a good policy which should be affirmed.

With regard to the question as to whether the work being performed by Mr. Holmes constituted "mining" within the meaning of the Act, respondent argues that section 3(h)(1)(c) of the Act which defines a mine to include "shaft, excavation, or tunnel" indicates that the work being performed by Mr. Holmes justifies a finding that the work site was in fact a "working to be used in the work of extracting minerals" and that it is covered by the Act (Tr. 171-179).

Applicant

Applicant argues that the primary issue in this case is the independent contractor question and CIM is not the proper party in the proceedings. Counsel argues that the parties have stipulated that Mr. Holmes is an independent contractor and that CIM exercised no control or authority over the work being performed by Mr. Holmes other than to instruct him as to the results which should come from his work. Although counsel conceded that CIM lent Mr. Holmes a bulldozer, it was operated by Mr. Holmes' employee Pederson and not by any CIM employees. Based on the Monterey Coal Company decision, counsel asserts that it is clear that CIM is not the proper party in this proceeding and that Mr. Holmes, as an indispensable party, should have been made a party and should be responsible for the imminent danger order. As for the suggestion by MSHA that CIM train its own personnel to perform the work done by Mr. Holmes, counsel argues that there is no requirement under the law that it do so and that the stipulation is dispositive of this question. Finally, counsel argues that MSHA's policy of citing mine operators rather than contractors, without any effort to ascertain such circumstances as control, operator expertise, safety considerations, etc., is arbitrary and without legal foundation.

With regard to whether the work site in question may be considered a "mine site" covered by the Act, counsel argued that the work being performed by Mr. Holmes was clearly work being performed in order to determine the presence of an ore body worthy of being mined. Counsel conceded that there was an ore body present, but argues that the work by Mr. Holmes was exploration and assessment work and that the portal being established was

not intended to be used for mining purposes. Rather, the ore would be mined by strip mining. Since the work was preliminary to any actual mining, counsel suggests that MSHA had no jurisdiction to cite violations.

With regard to the existence of any imminent danger, counsel relies on the testimony of state mining inspector Gilbert who was of the opinion that the conditions presented did not justify the issuance of such an order, and that at the time of Mr. Everhard's arrival on the scene, all work had ceased, Mr. Holmes had left the scene, and the deceased accident victim had been removed. Further, counsel argues that Mr. Holmes testified that in the event further work would have proceeded after the rock fall, the first thing he would do would be to clear the area out and scale and bar down the materials which resulted from the apparent slip in the rock. In addition, counsel points to the fact that Mr. Holmes observed no rock in the area which presented any danger and that he believed the area was safe to work in (Tr. 179-187).

Findings and Conclusions

Were the activities and work being performed by Mr. Holmes at the mine site in question mining operations covered by the Act, and did MSHA have jurisdiction to issue citations and orders?

The Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq., defined the term "mine" as:

(1) an area of land from which minerals other than coal or lignite are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (2) private ways and roads appurtenant to such area, and (3) land, excavations, underground passageways, and workings, structures, facilities, equipment, machines, tools, or other property, on the surface or underground, used in the work of extracting such minerals other than coal or lignite from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in the milling of such minerals, except that with respect to protection against radiation hazards such term shall not include property used in the milling of source material as defined in the Atomic Energy Act of 1954, as amended. [Emphasis added.]

The Metal and Nonmetallic Mine Safety Act was repealed upon enactment of the Federal Mine Safety and Health Act of 1977, P.L. 95-164, November 9, 1977. Section 3(h)(1) of this law defines a "coal or other mine" as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts slopes, tunnels and workings, structures,

facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment; * * *. [Emphasis added.]

Section 104(a) of the Act provides as follows:

(a) 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 violation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Section 107(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 exists. 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.

Applicant has stipulated that it is a mine operator covered generally by the Act. With regard to the surface and underground activities and work conducted by Mr. Holmes at the No. 1 Bosal Claim on contestant's mine property, the testimony and evidence adduced here reflects that Mr. Holmes' work was in fact work normally associated with a talc mining operation. Mr. Holmes was driving a drift at the time of the accident and this work included blasting, drilling, cutting, removal and cleaning of materials, timbering, bulldozing overburden, barring and scaling of loose rock, and attempts at establishing a brow and a portal for the express purpose of extracting minerals. Similar work had previously been completed by Mr. Holmes at applicant's Snow White Claim, and it seems clear that Mr. Holmes is in fact an experienced mining man of many years experience in driving drifts. Further, applicant conceded the existence of a mineable ore body and that Mr. Holmes' work was directly related to the eventual mining of that ore; and, by the very terms of the contract (JE-3) Mr. Holmes agreed to establish a portal and to drive an exploration drift. Under these circumstances, I conclude and find that Mr. Holmes' work at the time of the accident were in fact mining activities within the meaning of the Act, that the work being performed at the Bosal Claim was work at a "mine" as defined by the Act, and that MSHA had enforcement jurisdiction to regulate those activities through the applicable mandatory safety standards promulgated under the Act. Applicant's arguments to the contrary are rejected.

Were the conditions described by the inspector an "imminent danger, and if so, was the withdrawal order properly issued?"

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. § 802(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The legislative history of the Act brings out relevant testimony with regard to this question. The conference committee report, section-by-section analysis of the 1969 Act has the following to say about imminent danger:

[T]he definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved.

And, at pg. 89 of the report:

The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the

miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held 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 or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd, Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (7th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), and in this case the court phrased the test for determining an imminent danger as follows:

[W]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. § 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated

where the contestant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucas Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328, (1973-1974); Kings Station Coal Corporation, 3 IBMA 322 81 I.D. 562 (1974).

At the hearing, MSHA's counsel took exception to my ruling that he should proceed first and establish a prima facie case (Tr. 17-20). MSHA's exception is rejected and my prior ruling made at the hearing is hereby reaffirmed.

I am not persuaded by applicant's argument that state mining inspector Gilbert did not believe that the conditions which existed did not constitute an imminent danger and that he would not have issued a withdrawal order under state law. It is clear from the record here that the state definition of an "imminent danger" is not the same as that set forth under the Federal law in question, and the fact that mining activities had ceased is irrelevant. Mr. Gilbert was obviously satisfied with the fact that all mining had ceased after the accident and order was issued and I believe that this fact served as the basis for his opinion that he would not have issued an imminent danger order. However, he candidly admitted that additional work of scaling and barring would still have to be done before any mining could continue after the accident, and I find his testimony that the prevailing conditions after the accident were "not that bad" to be somewhat equivocal. The critical question presented is not what Mr. Gilbert would have done, nor whether Mr. Everhard should have taken some other course of action instead of issuing an imminent danger withdrawal order, but rather, whether his action was justified by the circumstances presented. See Eastern Associated Coal Corporation, 2 IBMA 128, 173 (1973), where the former Interior Board of Mine Operations Appeals stated that "[W]e are not called upon here to decide whether the Inspector chose the most appropriate of several alternatives, but rather, we are called upon to decide whether the action he did take was a proper and lawful exercise of authority under the Act." Further, the fact that all mining activities had ceased and Mr. Holmes had withdrawn both himself and his equipment from the accident scene is likewise irrelevant. As pointed out by the Board of Mine Operations Appeals in the cases of UMWA, District #31, 1 IBMA 31 (1971), and The Valley Camp Coal Company, 1 IBMA 243 (1972), the effect of an order of withdrawal not only takes the miner or miners out of the area of the dangerous condition, but also keeps them out until the danger has been eliminated. In the UMWA case, the Board stated:

* * * an Order of Withdrawal is more extensive than the mere withdrawal of miners--it also confers jurisdiction on the Bureau to prohibit reentry until an authorized representative of the Secretary determines that an imminent danger no longer exists * * *. Thus the purpose of a withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the conditions or dangers have been eliminated. Regardless of the sequence of events or the method by

which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to section 104.

Although Mr. Kennedy did not believe that an imminent danger existed after the accident occurred, he admitted that loose alluvium materials consisting of rock and dirt were still present some 25 feet up the high face of the area in question, and that if he were the inspector he would issue a citation requiring the materials to be cleaned up. Further, while Mr. Kennedy testified that a small amount of loose materials and rock fell on the accident victim, Mr. Holmes, who was present and an eyewitness to the fall, testified that approximately 4 tons of materials fell on the victim and that it came from the hanging wall side of the area where the work was being performed. He attributed the fall of materials, including "chunks" of rock, from a slip of the ground which he believed occurred some 4 feet back and above where the victim was standing attempting to install some posts. Mr. Holmes also testified that the slip was undetected and he candidly admitted that he and the victim would not have been working in the area had they known about the slip of ground. Further, Mr. Holmes admitted to the existence of overburden, including loose rocks, on the hanging side of the wall prior to the accident and while he dismissed it as something that did not "bother" him or would be of no concern to miners, he candidly admitted that the overburden could have fallen at any time because anything can happen when one is engaged in mining activities. It seems to me that after the slip of ground, which was not detected, and which apparently caused the fall of rocks and other materials which killed and covered up the victim on the day in question, that it was altogether likely that given the same circumstances after the accident, another slip could occur and again cause another fatality once the work was continued. The fact that additional barring and scaling would have again been accomplished before beginning work again a second time would not, in the circumstances here presented, insure that another slip would not occur. Barring and scaling had been previously done by Mr. Holmes, but that did not prevent the undetected slip of ground which caused the fatality.

Inspector Everhard expressed concern over the existence of loose, unstable overburden and rocks, and overhanging loose rock located up an 17 foot high drift and above the area where work had ceased after the fatal accident. He also expressed concern over the fact that he did not believe that the drift area where the work was being performed at the time of the accident had been adequately supported to prevent loose rocks and materials from falling. He was concerned over the fact that had Mr. Holmes continued work after the accident, following the same mining procedures which were described to him at the time of the accident, another fall could occur as a result of further ground slippage due to the loose materials present, and that if this occurred the slip would have fallen into the area where work would have been performed. In these circumstances, I conclude and find that Inspector Everhard acted properly in issuing the order and that the conditions which were present as described in his order presented an imminently

dangerous situation that could reasonably be expected to result in serious injury or death before the conditions could be abated and that normal mining activities could not continue or proceed until those conditions were abated.

Was the imminent danger order properly served on the mine owner-operator?

Applicant argues that the imminent danger order here was inappropriately served on CIM, the mine owner, and that it should have been served on Independent Contractor Leonard "Peewee" Holmes. In support of this argument, contestant argues that the parties have stipulated that Mr. Holmes, as an independent contractor, was performing contract work for CIM, and that Mr. Holmes is an indispensable party since he was the person who was operating and in control of the "mine" at the time the order issued and that CIM exercised no control or direction over the work being performed by Mr. Holmes at the job site (Tr. 5-8).

Respondent MSHA's position is that the Secretary has discretion as to which mine "operator" to cite, and that in this case, in the exercise of his discretion, the Secretary decided to cite CIM as the owner-operator of the mine (Tr. 13-16). Further, it is clear from Inspector's Everhard testimony that although he was aware of the fact that the accident victim was employed by Mr. Holmes rather than CIM, and did not inquire of Mr. Holmes as to who was supervising and directing the work at the scene of the accident, he issued the order to Cyprus because his supervisor instructed him that this was MSHA's enforcement policy (Tr. 40-41). It is further clear to me that although MSHA's counsel attempted to make a record concerning the factual basis for the issuance of the order, i.e., supervision, direction, continuing presence on the mine, borrowed equipment, etc., that at the time the order issued on August 3, 1978, the inspector was merely following MSHA's enforcement policy of citing only the owner-operator and not the independent contractor. As a matter of fact, MSHA stipulated that the order was issued in compliance with Interior Secretarial Order 2977, and I note that the reason for the delays in this proceeding is the fact that MSHA initially sought a continuance on November 17, 1978, on the ground that it was at that time reviewing its enforcement policy regarding independent contractors and the argument was then made that the review may resolve this controversy without the necessity of a hearing. Subsequently, on February 6, 1979, MSHA advised that no changes were made in its enforcement policy and the case proceeded to hearing.

During the course of the argument, MSHA's counsel stated that the Secretary's decision to issue the order against the mine owner was based on a "matter of law and policy," and the fact that a contractor did not have a Mine Identification Number was part of the "mix" or considerations that goes to that policy determination (Tr. 83-84). When asked about the status of any proposed independent contractor guidelines or regulations, counsel stated that as of the hearing (August 3, 1979), none were promulgated but "it is hoped that in the near future there will be issued a proposed regulation on that subject for public comment" (Tr. 84). Counsel's position was succinctly stated as follows at page 14 of the transcript:

On the independent contractor issue, it is our position that the statute with its definition of operator as including independent contractors gives the Department of Labor the discretion to issue citations to operators for violations committed by their independent contractors. We think that is a position which the Congress intended. We think that we have the discretion to either issue the citation to the operator or to the independent contractor. We have exercised our discretion here to issue the citation to the operator, and we think essentially that that forecloses the issue.

And, at pp. 174-178:

On the independent-contractor issue, I submit that we have shown that the facts of this case show why the Secretary's policy of citing owners, operators, for the acts or omissions of independent contractors--we have shown why that's a good policy.

This was a very small job. The Snow White claim, which was similar, took only three days. This particular work was not expected to last I believe it was either two or three weeks that the--according to the testimony of Mr. Kennedy.

Mr. Holmes is clearly the type of businessman who works at different sites. He is hard to follow down. Cyprus, on the other hand, is a mile away. Cyprus has an ongoing operation. It is administratively practical for Cyprus in these circumstances to be held to Mr. Holmes' actions.

Cyprus should be charged, and I submit that the legislative history shows that Congress intended to give the Secretary the discretion to cite the operator. In this circumstance there is nothing in the legislative history which indicates that Congress wanted the Secretary to proceed against the independent contractor. It was for the Secretary to decide, and I submit that that exercise of discretion by the Secretary is sound.

JUDGE KOUTRAS: Now, let me stop you on that point. You feel that the legislative history supports the conclusion that the reason that Congress included an independent contractor was to give the Secretary the discretion to--which party to cite?

MR. KORSON: I think it was the intention to give the Secretary the discretion to decide that issue.

JUDGE KOUTRAS: Standard of discretion?

MR. KORSON: Well, Your Honor, under the Administrative Procedure Act, there are circumstances under which the discretion of an agency may be examined, yes.

JUDGE KOUTRAS: Which is to see whether it's arbitrary or capricious?

MR. KORSON: That's correct.

JUDGE KOUTRAS: If the agency hadn't decided for the independent contractor without any standards at all, would that be arbitrary or capricious?

MR. KORSON: That would be arbitrary or capricious, but that is not what happened here. What I am suggesting is there are at least two alternative positions here that could have been taken with the Secretary here with the statutory language. The Secretary could have concluded that he would direct his inspectors to cite the independent contractor in this situation, but he decided not to do that, at least for the time being, and I submit that the two choices presented are both entirely defensible policies based on the statute.

The Secretary's policy decision to proceed against a mine operator-owner rather than an independent contractor was recently reviewed by the Commission in MSHA v. Old Ben Coal Company, Docket No. VINC 79-119, October 29, 1979. While expressing some doubt concerning the Secretary's "owners only" enforcement policy, and while expressing some concern that any unduly prolonged continuation of a policy that prohibits direct enforcement of the Act against contractors, the Commission nevertheless in Old Ben affirmed the Secretary's present discretionary enforcement policy of proceeding only against the mine operator-owner. Further, upon review of the decision of Judge Michels in MSHA v. Monterey Coal Company, Dockets HOPE 78-469- 78-476, rejecting MSHA's absolute or strict operator-owner liability theory, the Commission, on November 13, 1979, reversed Judge Michels and in so doing relied on its ruling in Old Ben.

On October 23, 1978, MSHA published a draft of its proposed regulations dealing with certain guidelines which are intended to enable mine inspectors to proceed directly against contractors for their violations, and on August 14, 1979, proposed regulations were published in the Federal Register, 44 Fed. Reg. 47746-47753 (1979). Although the Commission views this as an intent by the Secretary to enforce the Act directly against contractors for violations they commit, and alluded to the fact that continued enforcement against owner-operators rather than contractors on the ground of administrative convenience would be an abuse of discretion and contrary to Congressional intent, the Commission nevertheless opted to allow the Secretary additional time to implement changes in his contractor enforcement policy and chose not to disturb the Secretary's interim policy decision to

proceed solely against owner-operators out of consideration for the Secretary's "consistent enforcement for reasons consistent with the purposes and policies of the 1977 Act." Under the circumstances, while I may be in agreement with Judge Michels' well-reasoned ruling in his Monterey decision and with Commissioner Backley in his dissents in Old Ben and Monterey, I am constrained to apply the Commission's decisions in those cases to the facts presented here, and, following those decisions, I conclude and find that the order in question here was properly issued to CIM and contestant's arguments to the contrary are rejected.

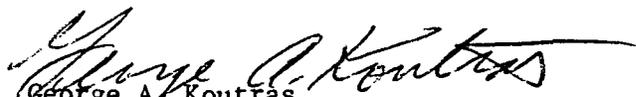
Although there was a question raised during the opening arguments at the hearing with respect to the question as to whether MSHA has established the fact of violation concerning the specific mandatory standard cited by the inspector on the face of his order (Tr. 10-15), it is unnecessary for me to make a specific finding on this question at this time. It is clear, and the parties are in agreement, that an imminent danger order may be validly issued and affirmed for conditions or practices constituting an imminent danger but not constituting violations of any specific mandatory safety standard, Eastern Associated Coal Company, 1 IBMA 233, 235 (1972). In this regard, I take note of the fact that on November 19, 1979, MSHA filed its proposal for assessment of civil penalty against Cyprus Industrial Minerals pursuant to section 110(a) of the Act, seeking a \$1,000 civil penalty assessment for an alleged violation of 30 CFR 57.3-22, the mandatory safety standard cited by the inspector on the face of the imminent danger order here in question. That matter is still pending before me and the parties will have an opportunity to address the pertinent issues presented in that proceeding.

Conclusion

In view of the aforementioned findings and conclusions, and on the basis of the preponderance of the reliable and probative evidence adduced in this proceeding, I find that the conditions described in the order of withdrawal constituted an imminent danger and that the order was properly issued. The evidence of record supports the inspector's judgment that the conditions he found on the day in question presented a situation that could reasonably be expected to result in death or serious injury before the conditions could be abated and that normal mining operations could not continue or proceed until the conditions were abated. I have also concluded that the work being conducted by Independent contractor Holmes for CIM at the time the order issued were activities directly related to mining at a mine within the meaning and intent of the Act and that the order was properly issued to CIM as the mine owner.

ORDER

Order of Withdrawal No. 342065 issued August 3, 1978, is AFFIRMED and this proceeding is DISMISSED.


George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

12/19/79

DEC 19 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-337-PM
	:	Petitioner : A.C. No. 35-02386-05002
v.	:	
	:	Cougar Mine
W. A. BOWES, INC.,	:	
	:	Respondent :

DECISION

Appearances: Donald F. Rector, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
Warde H. Erwin, Esq., Portland, Oregon, for Respondent.

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act) 30 U.S.C. § 820(a) by a petition filed February 12, 1979. A timely answer was filed by the Respondent denying the charges and requesting a hearing. On August 30, 1979, a hearing was held in Pendleton, Oregon, at which both parties were represented by counsel.

Issues

1. Whether the Cougar Mine of the Respondent is engaged in "commerce" within the meaning of that term under Section 3(b) of the Act.
2. Whether Respondent violated the mandatory standards as charged, and, if so, the amount of penalty which should be assessed.

Commerce

The matter of whether the Cougar Mine is engaged in interstate commerce was decided tentatively from the bench for the purpose of permitting the rendering of decisions on the merits of the citations. I found, subject to full and complete reconsideration upon the submission of briefs, that interstate commerce was established (Tr. 44). The parties duly filed briefs on the matter which I have carefully considered. The following is my reconsidered determination on the question of interstate commerce.

Facts on "Commerce"

The following is a statement by Respondent's counsel which provides helpful general background about the Respondent and the Cougar Mine, as well as factual data on the issue of commerce. See pages 10-15 of the transcript. Counsel for MSHA stipulated that if witnesses were called they would testify to the facts contained in Respondent's opening statement. Counsel in effect accepted the statement as facts (Tr. 18-19). It is as follows:

MR. ERWIN: Well, basically we have just now touched on what I was going to say, because the evidence will probably be very simple.

There is a question, a serious question, as to whether or not this operation is within interstate commerce. And I think by way of opening statement I can tell you what I expect the evidence will show because it is going to come from our clients anyway.

One is that William Bowes, Incorporated, is not a production company. It has properties -- Now, it doesn't own any properties. Let me put it that way first. Every property that it is in the process of developing is separately incorporated and there are properties being developed under contract with New York owners. There is property in Wyoming, not being developed at all. There is a property owned by New York people. There is property in Colorado which is being developed I presume under a lease but no production as far as William Bowes is concerned. There is a property in South Mountain -- incidentally, that property in Colorado is copper. It is a different operation than what we are talking about here. These are precious metal mines.

There is a property in South Mountain, Idaho, which is not producing, has not produced. There is a property in Nevada which has not produced and only assessment work is being done on it. There is a property in southern Oregon, but that's not true. The only other property in Oregon is this property as far as I know.

Now, these properties are being developed with the idea that they will perhaps some day be put into production. To this date they have not produced any ore nor has any been shipped from the mine, no by-product has been shipped from the mine. They are totally in the development stage of their operation. * * *

The purpose of the work they are doing now is eventual production so that they can remove the precious metal from the ore in some method. I think it is a little important

that you know why this is an exceptional situation insofar as the processing of the raw product is concerned. And it is because this particular vein that they are interested in in the Cougar Mine is a type of material which is susceptible to what they call a heap leaching method of extraction.

Normally when we think of hard rock ore, we think of going to a crushing plant or a reduction plant of some kind of thing that you normally think of. And if that were true we certainly would be having to ship ore into Tacoma and we would probably have to have other kinds of reduction plants, some sort of a mill someplace to do that.

Not all ore is susceptible to the heap leaching process. So on the Cougar Mine what they have done is to build what appears to be almost the size of a small football field and it is paved with asphaltic pavement, it has ridges in it, squaring it off into sections so they can put a heap of ore on this section and another heap of ore on another section and so forth. Because in this particular case the people in New York do not own this but they are leasing this property from another party. So this is not an owned property. The property is being developed for the same owners but under a lease with a different party.

What they do when they get these heaps of ore on these various pads, each one slopes down so that the fluid that they use will eventually go into the same trough. They put a hose, just like a garden hose which has holes in it and spray like you water your lawn a diluted solution of cyanide.

Now, cyanide as it permeates these heaps of ore carries with it and leaches out the precious metal of both gold and silver.

So what runs off of these piles from this other operation is a solution of cyanide. So that is saturated with gold and silver ore, we hope. And it is then pumped --

ALJ: Is this a new process?

MR. ERWIN: It's not completely new but it has not been used in this part of the country, and the only other one that I know that is in operation is in New Mexico -- no, it is in Carlin, Nevada, where the same type of thing is used. It is an open pit gold mine there.

After this saturated solution drains off of these piles, it is then pumped into a tower where there is carbon columns

where the water or solution rate of flow is controlled so that it goes down through these carbon columns, the carbon extracts from the solution basic mineral that we are interested in recovering.

To date there has been no production from that except for test purposes and that's all. None of it has been shipped.

To be quite frank, at this moment we are having difficulty in trying to extract from the carbon columns the precious metal and determine whether or not they are getting a sufficient quantity out of this operation to make this procedure worthwhile.

The point of all of this explanation is to show the court and really for counsel's edification, too, that there is nothing at this moment being shipped interstate by way of product, nothing has been shipped outside the State of Oregon, nothing probably will be shipped outside the State of Oregon for a long time, if ever. I don't know. After they recover the gold out of these carbon columns, I don't know whether the gold would be sold in interstate commerce then or whether people would come to the mine to pick it up. I am not knowledgeable enough to know how that would be done.

But in any event at this moment this mine is totally in the development stages, as are the rest of the properties of William Bowes, many of which there is no activity on yet. They are merely in the assessment stages on many of them.

Counsel asked some questions about supplies. Most of our supplies are bought locally. In fact I will ask Mr. Henderson to testify, and I guess probably all of them are bought locally. I don't know where the cyanide come from but I suspect it could be purchased locally, although it might have to be shipped in. But my understanding is that that doesn't constitute interstate commerce. It is the transportation out or the sale of the product which constitutes interstate commerce.

So there is a little question as to whether at this stage we come under this act at all. And I thought it might be helpful if I would explain to the court why this is an unusual type of mining operation, why it is not subject to the usual situation.

There are few other facts in the record bearing directly on the commerce question. Kenneth D. Henderson, mine manager at the Cougar Mine testified that he was familiar with two other mine sites of the Respondent,

namely, the South Mountain property in Idaho and the operation in the Steamboat Springs area, Colorado (Tr. 20). Also he testified that Cougar property is owned by a family in Baker, Oregon, and leased to the Respondent, a New York corporation (Tr. 21).

Mr. Henderson explained that the mine was not producing ore on the lower level but that the operator was working the upper levels on a part time basis and the personnel used varies from 14 to as many as 25 (Tr. 21-22). The approximate length of the tunnel worked in August 1978 was about 470 feet (Tr. 27).

Explosives are used in the operator's conventional method of mining. The explosives are purchased on a 60-day interval basis. These are obtained in Boise, Idaho, and shipped from there to the Cougar Mine in Oregon. Fifty cases are purchased at a time which cost a total of \$2,500 (Tr. 23-24).

Discussion of "Commerce" Issue

Respondent contends that its Cougar Mine operation is solely developmental, that no ore has been produced or shipped, and that the mine operation therefore neither is in "commerce" or affects "commerce." It cites Morton v. Bloom 373 F. Supp. 797 (WDC Pa. 1973) as holding that a one man coal miner who sold the production of the mine in intrastate commerce is not subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969.

In approaching this discussion, it is first noted that the delegation of authority under the act is very broad. In affirming the District Court decision, the United States Court of Appeals for the 3rd Circuit in Kraynak Coal Company v. Marshall, Docket No. 78-2576 ___ F.2d ___ (3rd Cir. 1979) held on interstate commerce as follows:

Appellants also argue that the Coal Mine Act does not reach them because their mine sells coal only intrastate to the Penntech Papers Company. They contend that these sales are insufficient to bring their operation within section 803, which declares that the act covers "[e]ach coal of other mine, the products of which enter commerce, or the operator or products of which affect commerce." In enacting the statute Congress intended to exercise its authority to regulate interstate commerce to "the maximum extent feasible through legislation." S. Rep. No. 1005, 89th Cong., 2d Sess. 1, reprinted in [1966] U.S. Code Cong. & Ad. News 2072, 2072. We agree with Judge Rosenberg's conclusion that "the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of § 803 of the Act." 457 F. Supp. at 911. See also Shingara, 418 F. Supp. at 694-95.

While the court was passing on the 1969 Act, the present Act, the Federal Coal Mine Health and Safety Act of 1977, was not changed with reference to commerce. It may be concluded, therefore, that the 1977 Act contains a delegation of authority over commerce as broad as that which Congress can give.

Respondent's principal argument in this case, as noted above, seems to be that because the Cougar Mine was developmental and no ore was produced, nothing therefore either moved in commerce or affected commerce. The commerce grant in Section 4, however, does not necessarily require that products be produced. It states in part "or the operations or products of which affect commerce" (emphasis added). "Commerce" in Section 3(b) is defined very broadly as encompassing "trade, traffic, commerce, transportation, or communication among the several states or between a place in a State and anyplace outside thereof * * *". In this case the facts, as will be related in more detail below, show at a minimum an "operation" which affects commerce, i.e., affects any trade, traffic, transportation, or communication among the several states or otherwise as set out in section 3(b).

The evidence or reasonable inferences therefrom demonstrates that the operation affects commerce in several direct ways. First, Respondent is not a one man operation or a small, localized business as was true in the Bloom case, supra. Far from it. Respondent is in a way a multi-state operation. William Bowes, Incorporated, is not a "production" company, but it does separately incorporate and under contract or lease develop certain properties. Some of the properties include one in Wyoming, one in the Steamboat Springs area in Colorado, a South Mountain property in Idaho, a property in Nevada and the Cougar Mine in Oregon, the subject of this proceeding. Apparently none are at this time in production, but rather are in a developmental stage.

The fact of these different properties in different states, even though not in production suggests an operation which affects trade, traffic, or communication between two or more states. It is a fair inference that communication by telephone, mail, or otherwise has occurred between states involving the New York Corporation and the Oregon Corporation or other properties.

Specifically concerning the Cougar Mine, although there has been no production, the leasing of the property in Oregon by a New York Corporation and the building of a significant facility including an area paved the size of a small football field and all reasonable inferences therefrom permits a conclusion that the operation has affected trade, traffic, or communication between states. Finally, as to the Cougar Mine, the evidence expressly shows the movement of goods from out of state: specifically, the shipments of explosives from Boise Idaho, to the plant site in Oregon. Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976). Therein, the court held that the "purchase of several items of equipment and an insurance policy produced by out-of-state sources also brings [the mine] within the

affecting commerce rubrique and exposes them to the Act." Cf. Kraynak Coal Company v. Marshall, *supra*, and Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974).

Finally, the holding of the Ninth Circuit in Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), appears to be dispositive of the argument that the Cougar Mine was only in the developmental stage. In that case, involving the Occupational Safety and Health Act, the court held that the activity of clearing land for the purpose of growing grapes is an activity which, if performed under unsafe conditions, will adversely affect commerce; that clearing land is an integral part of the manufacturing of wine, and therefore commerce is affected by the activity. In this proceeding, the activity of developing a mine is an integral part of gold mining and the subsequent production of gold and similarly will affect commerce.

Based on the above cited facts and circumstances, I affirm my decision from the bench that the Respondent at its Cougar Mine facility is engaged in "commerce" within the meaning of that term in the Act and subject to the Act and the regulations.

Decisions on the Citations

Citation No. 350060

The decision made orally from the bench on this citation is contained in the record at pages 70-75 and reads as follows:

This decision deals with Citation No. 00350060. My finding on the fact of the alleged violation is as follows:

The mandatory standard in this case, alleged to have been violated, is 30 CFR 57.13-21 and reads as follows, "Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines at high pressure hose lines of three quarter inch inside diameter or larger, and between high pressure hose lines of three quarter inch inside diameter or larger, where a connection failure would create a hazard."

The inspector in citing the violation stated, "A safety chain or other suitable locking device was not used at the connection of the high pressure air line to the jack leg air drill in use at the face of the decline to prevent persons from being injured in the event the air line came loose from the drill."

The evidence consists mainly of the testimony of the inspector and is not in dispute on most aspects of the charge. The inspector did testify that he found -- or that he

observed the jack leg drill in use and while he did not see an automatic shutoff valve, he believed that there may [not] have been one. He also observed that the machine was of the type that normally requires the three quarter inch inside diameter hose. He also observed that the jack leg drill did not have the safety chain or other suitable locking device. A locking pin was acceptable to the inspector and abatement consisted of inserting of the locking pin.

I find these to be the facts. And I should add that no evidence in defense was presented which would suggest that there was an automatic shutoff valve or that this machine otherwise was not covered by this mandatory standard.

In circumstances and for the reasons that I am going to shortly explain, I find this to be a violation of the standard as charged.

The principal defense as I understand it and which I believe deals with the aspect of negligence more than it does the fact of the violation is to the effect that this was the fault of the individual employee. However, I will deal with that right here and now because it was a defense raised.

Perhaps my view is colored to some extent. I have grown up and developed under the coal mine law or when the law was applied only to coal mines. The question of responsibility of the operator was fairly early settled and did not ever seem to be in serious doubt. I think the legislative history, the way the Act is written, all tell us that Congress intended for the operator and not the employee to be held responsible. It was only I think in perhaps one rare instance, and that is in the securing of the smoking materials, do they ever place responsibility on the employee.

Now, I fully recognize and I think that everybody that works with this does, that there are occasions when no matter what the operator does, it is just simply impossible to carry out a particular regulation. That is, where you fail to get the employees' cooperation. Some of those areas I have mentioned previously. That is, personal protective devices. And the board has ruled on that.

However, in other areas dealing with the use of machines and devices, I don't think that rule applies.

The argument was made and put very strongly and very ably, that * * * it was impossible for the operator here to comply with this particular regulation, and I would say

from what I have seen, that it was perhaps difficult, but I cannot agree with the impossible designation. I accept the fact that in this case the operator was diligent, used all reasonable means available to it to comply with the law, but in spite of all of that employees did get out of line and did not follow through and engaged in the acts that they weren't supposed to for the purposes of safety.

So what is the answer to that? It would just be glib of me [if] I sit here and say there is an answer; that you can somehow penalize men. Maybe that's impossible, labor relations being what they are. I don't know what the answer to it is.

I simply could not subscribe, however, to the proposition that there is no answer, and my general conclusion would be that further efforts or other efforts could be employed to prevent this sort of a violation.

My judgment, of course, is based upon the clear requirements of the law which place the responsibilities solely and exclusively upon the operator. And if I did not so hold, I would just be going contrary to the very settled law in this area. So that would then be the reason for my finding of the violation in this case as to this citation.

I will go through all of the criteria for this first alleged violation and that won't be necessary hereafter.

As to the history of prior violations, based on the stipulation, there were only two other prior citations. I find there was no significant history of prior violations.

As to the appropriateness of the penalty to the size of the operator, pursuant to the stipulation I find that the penalties herein will be appropriate to the size of the operator. I should make the finding that there were 20 employees working at the mine and that they worked some 19,000 man-hours.

I would conclude that this would be a small mine under the circumstances and that the penalties, if any, that are assessed herein will be appropriate to its size.

The effect on the operator's ability to continue in business. Pursuant to the stipulation, I find that the fines which will be assessed will not affect the operator's ability to continue in business.

Good faith compliance. Again, based upon the stipulation, I find that the operator which abated all of the violations within the times established, demonstrated good faith efforts to achieve rapid compliance.

Gravity. On this criterion, the only evidence that we have is that by way of the inspector who testified that if this hose breaks loose, it might whip around and injure employees, and in this instance one employee might have been subjected to the effects, could have resulted in bruises and eye injury. And also that employee could not have easily avoided the whipping hose. I appreciate the statement by counsel for the operator that this maybe isn't all that serious. However, that would not be evidence of record and I could not rely on it. Accordingly, I find it to be a moderately serious violation.

The last and final criterion is negligence. I have already indicated some of my thoughts on the negligence. I think it is evident that the operator did have a program to check these kinds of activities to make sure that this hose was locked. In this instance it appears that it might have been the fault of an individual man, not inserting the key. In the circumstances I would find slight negligence.

Accordingly, and in summation, I find that the operator violated the regulations as charged and that an appropriate penalty would be that which has been recommended by the Secretary, which is \$18. I hereby assess the penalty of \$18.

This decision is hereby affirmed.

Citation No. 350061

The decision made orally from the bench on this citation is contained in the record at pages 88-89 and reads as follows:

ALJ: I will proceed now to make my decision from the bench on this citation, which is 00350061, with the same reservations that I mentioned for the prior citation [that is, subject to reconsideration of the "commerce" issue].

In this case the inspector has alleged in his citation that there was a violation of 30 CFR 57.6-5, which reads "Area surrounding magazines and facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass, or trees (other than live trees ten or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet."

The inspector indicated in his citation the condition or practice to be that the area around the powder magazine had an accumulation of rubbish, dry brush and other combustible materials.

The only evidence we have in this citation is that received through the inspector. That is, his testimony and certain of the exhibits.

The inspector has testified that there was an accumulation of materials which included a fallen tree, grass, possibly some brush and bark. This material was close up and even on top of the magazine.

There is also evidence that at this particular time it was not dry but that it had rained a short time before.

In light of this evidence and there being nothing to the contrary, I find that there has been a violation of the mandatory standard as alleged. My findings on the two criteria of gravity and negligence are as follows: On gravity, I find that while it may not have been extremely serious on this particular day because of the dampness, it was a situation in which dry periods do occur and therefore it could have been dangerous. I find therefore that this violation was moderately serious. On negligence, for the circumstances it appears to me that this was a situation which the operator knew or should have known about. And I find that this was ordinary negligence.

Accordingly, in summation, I find that the operator violated the regulation as charged and that an appropriate penalty is that proposed by the Secretary in this case, the sum of \$10.

The above decision is hereby affirmed.

Citation No. 350062

The decision on this citation was rendered orally from the bench. It will be found at pages 103-106 of the transcript and reads:

ALJ: The following is my decision with reference to citation No. 00350062.

This decision is made with the same reservations as those made previously.

The inspector alleged in this case a violation of 30 CFR 57.6-20(f) which requires that "Magazines shall be * * * (f) Made of non-sparking material on the inside, including floors."

And the inspector alleged as the condition or practice that the storage explosive magazine seen had exposed sparking material on the inside of the magazine.

The evidence received consists of the testimony and the exhibits of both the inspector and of the operator, Mr. Henderson. There is not much, if any, dispute about the facts. The magazine had a door of an outside metal construction to which was nailed wooden planks. The nails came through the backs on the inside and were bent over.

The inspector has testified that this was a sparking material and could be the source of a spark or an explosion of the dynamite stored in the magazine.

The inspector's statement which was filed indicates that the possibility of the event occurring would be rare. So far as the fact of violation is concerned, which has nothing to do with the frequency or the likelihood of the event, I do find that the standard was violated as alleged.

I think, as I understand it at least, the defense is mainly along the lines that there was such a small amount of sparking material as to make it virtually impossible that a spark would ever occur.

Now, unfortunately, the standard does not specify the amount of sparking material. That is, whether it could be a small amount or a large amount.

The inspector has given his view as to the possibilities in which even what is obviously a relatively small amount of sparking material could still be sufficient under some circumstances to cause a spark. The main point that I would have to decide, then, was whether or not that was sufficient sparking material to come within the standard and, based on the inspector's testimony, I find that it is.

My findings on the two statutory criteria of gravity and negligence are as follows: * * * I do not find that that would be serious. I would refer back to the inspector's view that the possibility of the event occurring would be rare. I believe in light of that circumstance that I would find it to be non-serious.

Now, that leaves negligence. In light of all the testimony including that of Mr. Henderson who held the view that this would not cause a spark and that he never realized that this would be required under the regulations, I find that there was a small degree of negligence. The penalty proposed

by the Secretary which is \$10, I believe, already takes into account the factors of non-seriousness and a small degree of negligence, so I would find the same amount . . . I would assess the same amount, that is, a penalty of \$10.

In summation, if it is not clear, I find that the operator has violated this regulation as alleged and that appropriate penalty, taking into account all of the statutory criteria, would be the sum of \$10.

Citation No.350063

A decision was rendered from the bench on this citation and will be found at pages 136-138 of the transcript as follows:

ALJ: I will make my decision in the citation No. 00350063. It will be made subject to the same reservations heretofore mentioned.

The inspector has charged a violation of 57.12-2 which reads "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." The inspector found as the condition or practice that the diesel electric power generator did not have a disconnect switch located at the generator set and that the diesel electric generator was located within 150 feet of the mine portal.

In this instance there is not a great deal, if any, dispute as to the basic situation. The diesel is located 150 feet or so from the mine portal. There is a line running therefore from the diesel to the portal and as I understand it, at least, there is no question that that line is not protected. There is no dispute that if a line . . . or I should say circuit or piece of equipment needs to be protected, that the type of switch required was appropriate.

This is more or less the classic situation in which the inspector in his view and in his judgment, based upon his experience and knowledge, [determined] that such line should have been protected by a disconnect switch.

On the other hand, Mr. Henderson testified at least as I understood it that the switch on this particular circuit was not necessary.

My finding is that this did violate the regulation as charged and I would give my reason as I view it. The mandatory standard does require that every circuit be provided

with a switch. Now, this may not have been a highly vital or important circuit. I really don't know that. But it was, as I understand it, an unprotected circuit. This may be for all I know an area in which we are talking about something that becomes quite technical in electrical terms. That is certainly possible. But at least strictly speaking, as I understand it, the standard does require such a switch and I therefore find the violation as alleged.

The gravity of that violation. As the inspector testified, in the case of a short there was a possibility of electrical shock. I find the violation to be moderately serious. On negligence, this is a condition which the operator knew or should have known about and I find it to be slightly negligent. Under all of the circumstances mentioned and because of the disagreement about the strict need for the switch, I find that only a nominal penalty should be assessed. The Secretary has recommended \$36, which under the circumstances may be too large. In my view the penalty should be \$18.

And in summation I find that the operator violated the regulation charged and that an appropriate penalty, taking into account all of the statutory criteria, is \$18.

This decision is hereby affirmed.

Citation No. 350064

A decision was rendered orally from the bench as to this citation and is found at pages 162-164 of the transcript as follows:

ALJ: The inspector in this instance charged a violation of 30 CFR 57.9-110, which reads as follows: "Shelter holes shall be provided to ensure the safety of men along haulageways where continuous clearance of at least 30 inches from the farthest projection of moving equipment on at least one side of the haulageway cannot be maintained."

In his citation the inspector charged the condition or practice to be as follows, "Shelter holes were not provided along the main haulageway to ensure the safety of men along the haulageway. At least 30 inches of clearance must be provided from the farthest projection of moving equipment on at least one side of the haulageway."

On this alleged violation we have the testimony of the inspector, Mr. Moore, and also of Mr. Henderson. Mr. Moore has indicated that he did not actually make any of the measurements but that it was his view that at times the clearance would be less than 30 inches because of his experience and because of his estimate of the size of the entry.

Mr. Henderson has testified on the other hand that the entry would be at least 108 inches and more, possibly another foot, to make it 120 inches, and that based upon the manufacturer's design, the scoop is 61 inches wide, which would leave in actuality a total of approximately 5 feet at the maximum.

In looking at the standard, I observe that it does state that shelters are required where clearance of at least 30 inches on one side of the haulage way cannot be maintained.

Now, it would be apparent if the measurements mentioned by Mr. Henderson are true, that certainly 30 inches could be maintained. It is a question of whether they were. I believe that the inspector's belief was that with the conditions of the mine, the nature of the rubber tired vehicle and so forth, that they were not being maintained. The testimony does indicate his view that this would be a safety measure regardless of the regulation. I don't believe that I would be able nor would I want to rule on whether it should be a safety measure regardless of the regulation. My function would be to look at the regulation and see if it comes within it.

My holding is that there is insufficient evidence here to prove the violation. That is based mainly on the fact that the inspector did not have accurate measurements. So it does provide a certain amount of uncertainty. It is perhaps likely that when you consider rubber tired vehicles going down that entry, that maybe 30 inches was not maintained at all times on one side, but the main point that I would rely on is that we just simply don't know from the testimony that we have.

So, accordingly, I would find in this citation that there is no violation and that citation will be vacated. And hereby it is vacated.

This decision is hereby affirmed and the petition as to this citation is dismissed.

The assessments for the above citations are summarized as follows:

<u>Citation Nos.</u>	<u>Assessments or other disposition</u>
350060	\$18.
350061	10.
350062	10.
350063	18.
350064	vacated
Total Assessment	\$56.

ORDER

It is ordered that Respondent pay the penalty of \$56 within 30 days of the date of this decision.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VINC 79-107-PM
Petitioner : A.C. No. 20-01047-05001
v. :
: Docket No. VINC 79-191-PM
SUPERIOR SAND & GRAVEL, INC., : A.C. No. 20-01047-05002
Respondent :
: Superior Wash Plant

DECISION

Appearances: Karl Overman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Norman McLean, Esq., Houghton, Michigan, for Respondent.

Before: Administrative Law Judge Michels

These proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitions for assessment of civil penalty were filed in VINC 79-107-PM on January 4, 1979, and in VINC 79-191-PM on February 15, 1979. Timely answers and a motion to consolidate the above proceedings were filed by the Respondent. A hearing was held in Houghton, Michigan, on September 27, 1979, at which both parties were represented by counsel.

VINC 79-107-PM concerns five alleged violations. VINC 79-191-PM concerns six alleged violations. Evidence was received as to each citation except for two that were settled and decisions thereon were rendered from the bench. These decisions as they appear in the record, with certain necessary corrections or changes, are set forth below. In some instances it has been necessary to slightly alter sentence structure for clarity. Also certain deletions and additions have been made which are generally indicated by appropriate markings.

VINC 79-107-PM

Citation Nos. 286419, 286420, 286821, 286825, issued September 7, 1978

The following is the bench decision on the above citations found at pages 94-103 of the transcript:

I am deciding the issue presented here in Docket 79-107-PM with respect to four berm citations

numbered 286419; 286420; * * * 286821; and 286825. In each of these citations the inspector alleged a substantially similar practice or condition, except that each citation is related to a particular part of the pit or mine. I will read into the record only the allegation in the first citation which is 286419. "A berm of mid-axle height of the largest vehicle using the elevated roadway leading into the crusher area was not provided along the right side for a distance of approximately 100 feet marking this roadway. This roadway was being used by heavy-duty mobile equipment." This concerns a violation in each instance of 30 CFR 59.9-22, which states as follows: "Adequate berms or guards shall be provided on the outer banks of elevated roadways." Berms are defined as follows: Berm means "a pile or mound of material capable of restraining a vehicle." * * *

As to this fact of violation, it seems to me the evidence is reasonably clear that there were no berms as defined by the regulation. A berm means a pile or mound of material capable of restraining a vehicle. I believe it is quite clear from the inspector's testimony, and I rely on that, that there were some piles of dirt in at least three locations.

Other testimony indicates that due to apparent washouts, the piles or mounds were not continuous. It seems to be quite clear that that would create an opportunity for a vehicle to leave that roadway and those mounds would fail to prevent it from going over the side. I want to at this point make clear that at present, I am only talking about the first three citations. I am going to disregard for the moment, the last citation which is 286825 because I believe it is in a slightly different category. Furthermore, as to those first three citations it does appear that the berms, where they did exist, were neither substantial enough nor high enough to prevent or to deflect a vehicle of the size being used on the roadways.

That is not to say that the evidence as to washouts or other problems is not relevant and important and would be taken into account in an assessment of the penalties. However, as to the first three citations, based on the inspector's testimony, which I believed as far as the nature of the berms or the nature of the mounds was concerned, was not seriously contested. I find a violation of 56.9-22.

As to the last citation which is 286825, the circumstance is slightly different. The evidence indicates the road at the time was being widened and improved. There was a berm on the road, but part of the berm had been removed in the course of repairing or widening the road. The inspector's testimony is that he did not know and had no reason to know that the road was being widened or improved. There is

some conflict about what he knew and what he said, however, I don't know that I have to consider that in making this decision. It seems to me on the basis of what we now know, which is that the road was being repaired, that had the inspector known this he might very well not have issued that citation.

I am not finding fault with the inspector for issuing [the citation], however, on the basis of this whole record, we now know it was being repaired. It would be an unusually harsh interpretation to require the road, under those circumstances, to have a berm of the size and type set forth. Accordingly, I find that the last berm citation, 286825, is not a violation of the standard as charged. * * *

My findings on the statutory criteria are as follows: The size of the company. The testimony was that there are [approximately] five employees, and in my judgment I think this is a small company. No evidence was presented as to history of past violations. There is a substantial amount of evidence, however, as to the company's safety record. They have had a good safety record and appear to be safety conscious. I will certainly take that into account. There is no evidence that the penalty to be assessed will restrict the operator's ability to continue in business. There is no evidence of any lack of good faith to achieve rapid compliance. So I assume that good faith compliance was achieved.

I have taken into account all of the following various circumstances: * * * Only one man principally used this road or these roads. The road was generally or fairly wide and there is a relatively small chance [of] an accident; yet, if a truck did get into trouble or did go over these relatively high banks there could be a serious accident. So I find [these violations were] moderately serious in the circumstances mentioned.

On negligence, the law requires proper berms. The evidence is clear that the company continued to operate without full berms after some had been washed out. In the circumstances, I find some degree of negligence for the assessment of these three citations.

The assessment officer has assessed various amounts, the lowest being \$20. I believe for the most part the assessment officer has taken into account some of the [mitigating] factors that were here mentioned. * * * [I assess] \$20 for each of the three violations for a total of \$60. That will complete my decision on the berms.

The above bench decision is AFFIRMED.

Citation No. 286822, issued September 7, 1978

The following is the bench decision on the citation set forth at pages 128-131 of the transcript:

This is the last citation in this docket. It is 286822. The inspector cited improper guarding for the drive coupling on the portable generator plant. * * * He alleged this to be a violation of 30 CFR 56.14-6. This standard reads as follows: "Except when testing the machinery, guards shall be securely in place while the machinery is being operated."

The first question is the fact of the violation. The inspector testified and there seems to be no question at all that the screen guard was in place, but not bolted. The issue is whether it was securely in place. There is also testimony that this screen is heavy, weighing something like 30 pounds. It would not be easily moved. If [the screen] were pushed, it would simply push into the coupling machinery. Based on all of the evidence on the probability of an accident, the nature of the conditions which existed and so forth, it seems to me that this would be no more than what might be described as a technical violation, if it is a violation at all.

I don't know whether this particular law requires securing by bolting in every instance. In this case and under these circumstances, and based on the testimony here I am going to give the benefit of the doubt to the operator. [The screen] was standing on legs which were stuck into the floor. From the testimony * * * it seems to me almost impossible, if not impossible, that that screen could be moved so that somebody could come in and fall into the coupling. So, for the purpose of this machine, it was securely in place. * * *

I find that there is no violation of [30 CFR 56.14-6] as charged in Citation 286822. Accordingly, the citation * * * is hereby vacated, and there will be no penalty assessed.

The above bench decision is AFFIRMED.

VINC 79-191-PM

Citation Nos. 286417 and 286418, issued September 7, 1978

The following is the bench decision on the above citations found at pages 158-163 of the transcript:

This involves Citations 286417 and 286418. In 286417, the inspector found as the condition or practice that an automatic audible warning device was not provided on a Michigan 175 front-end loader, serial 13AHG306. The loader was used to feed the rock crusher in the pit. An observer to

signal when it was safe to back up, was not present. In 286418, an audible automatic warning device was not provided on the Koering dumpster, D5711. The dumpster was used to haul material from the crusher loadout to a stockpile. An observer to signal when it was safe to back up was not provided as set forth in 30 CFR 56.9-87. * * *

In both instances it is clear from the inspector's testimony, [upon which I rely] that there was no automatic reverse warning device on the machines. * * * The mandatory standard involved which is 56.9-87, [requires] that heavy-duty mobile equipment shall be provided with audible automatic 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 audible above the surrounding noise level of the machine or a signalman to signal when it is safe to back up. In this instance, the inspector testified, and there was no contrary testimony, that the equipment was heavy-duty mobile equipment * * * and that there were no audible warning devices. That testimony is not contested. Accordingly, I find that in each of the two instances, violations of 56.9-87 occurred.

It is unnecessary to make findings on the criteria as to the history, size of the company, and ability to pay since these have already been made in this record. It appeared to me from the testimony that the company did use good faith efforts to achieve rapid compliance. So as far as the gravity is concerned, I think it is clear from the testimony and I believe experience in this area bears this out, that the lack of audible warning signals is a grave hazard. The mere fact that men might not always be behind the machines is not really too relevant because there is always that one rare instance where somebody would be in back of the machine and become gravely injured or die. I find that [these are] grave violations.

Now, as the first citation, namely 286417, witnesses for the Respondent testified that they had a [corrective] device ordered and that when they received and placed it on the machine, it failed to function properly. It was taken off the machine with the object of returning it [to the manufacturer]. I believe that this is a mitigating circumstance as far as the negligence is concerned. However, * * * somebody could have been injured when the device was not on the machine and I find some negligence [in 286417. In Citation 286418 I find ordinary negligence.]

Taking into account the mitigating circumstances in 417, I will reduce that penalty by one-half which will make it \$28. [In Citation 286418, I believe the proposed penalty is appropriate and I hereby assess \$56 for it].

My bench decision is hereby AFFIRMED.

Citation Nos. 286823 and 286824, issued September 7, 1978

The following is the bench decision on the above citations found at pages 206-213 of the transcript:

This part of the decision deals with two citations, numbers 286823 and 286824. The inspector charges the following: The stairway leading into the parts and lube van in the pit was not provided with handrails in violation of 30 CFR 56.11-27. In 824, the inspector cited as a condition or practice the following: elevated walkways on both sides of the Cedar Rapids Wash Plant were not provided with handrails. The walkways are approximately 10 feet above the ground level. That is charged as a violation of 30 CFR 56.11-27, a mandatory standard which [requires that] adequate crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided.

The first violation to [which] I address myself is 823. The testimony demonstrates clearly that there was a stairway and that it had no handrails. There is some evidence to the effect that it is a relatively short stairway and also that it was not used except infrequently to obtain materials within the van. Nevertheless, the inspector testified, and there is no evidence to the contrary, that there was grease on the stairway. It is the type of situation that could provide the background for an accident even though it is a relatively small stairway. The men going in and out could easily slip and fall and be seriously hurt. * * * [1/]

The next citation is 286824. * * * So far as the actual standard is concerned, it does, as I have interpreted it here, require a handrail for obvious safety reasons, so I therefore, find a violation in 286824.

1/ The Respondent argued at the hearing that in abating the violation it installed two handrails and that as a result the door of the van could not be opened without removing the rails. The inspector testified that one handrail is sufficient (Tr. 176). This would permit the door to open. Accordingly, I held that only one rail was needed on the lube van (Tr. 210).

The violation in both cases, [concerns] standard 56.11-27. There being no evidence to the contrary, I find abatement in good faith was rapidly achieved. The gravity, I think, has already been referred to in part. There is a very good likelihood of injury from men stepping off or accidentally falling off such a walkway or stairway. Accordingly, I find that it is a serious violation. Insofar as negligence is concerned, the testimony demonstrates disagreement as to an absolute need for such handrails in both of these instances. The company honestly and in good faith apparently did not believe they were needed. However, the standard does require it and it is negligent not to comply with the standard. So I find * * * a slight degree of ordinary negligence.

It seems to me as far as assessments are concerned, the assessment officer's penalties took into account the factors I have been talking about. These are not high penalties. In the circumstances, I will assess those penalties * * *. For 286823 I assess the penalty of \$36 and for 286824 I assess the penalty of \$34.

The above bench decision is hereby AFFIRMED.

Citation No. 286826, issued September 7, 1978

Citation No. 286826 alleges a violation of 30 CFR 56.14-1 which requires that gears, sprockets, chains, drive, head, tail and takeup pulleys; flywheels, couplings, shafts, sawblades, fan inlets; and similar exposed moving machine parts which may be contacted by and cause injury to persons be guarded. The parties have agreed to settle this citation because there is a factual dispute as to whether the employees were actually exposed to the hazard. The proposed assessment is \$66. The settlement is \$14. Considering the circumstances, I approved this settlement and hereby incorporate it as part of my decision.

Citation No. 286400, issued September 8, 1978

Citation No. 286400 alleges a violation of 30 CFR 56.5-20 which sets forth permissible exposure to noise according to the American National Standards Institute (ANSI). The parties have agreed to settle for the proposed amount, \$26. I approved this settlement and hereby incorporate it as part of my decision.

A summary of the dispositions in this case are as follows:

<u>Citation</u>	<u>Action/Assessment</u>
286419	\$ 20
286420	20
286821	20
286825	vacated
286822	vacated

286417	28
286418	56
286823	36
286824	34
286826	14
286400	26
Total	<u>\$254</u>

ORDER

IT IS ORDERED that Respondent pay the penalties totaling \$254 within thirty (30) days of the date of this decision.



Franklin P. Michels
Administrative Law Judge

Distribution:

Karl Overman, Esq., Office of the Solicitor, U. S. Department of Labor, 231 W. Lafayette St., 657 Federal Building and U. S. Court-house, Detroit, MI 48226 (Certified Mail)

Norman McLean, Esq., McLean & McCarthy, P. O. Box 65, Houghton, MI 49931 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 78-578-PM
Petitioner : A/O No. 04-01036-05001
v. :
: Red Lava Pit & Mill
RED LAVA PRODUCTS OF CALIFORNIA, :
Respondent :

DECISION APPROVING SETTLEMENTS ORDER TO PAY

The Solicitor has filed a motion to approve settlements in the above-captioned proceeding.

This case involves four citations. The citation numbers, the mandatory standards, the original assessments, and the proposed penalties are set forth below.

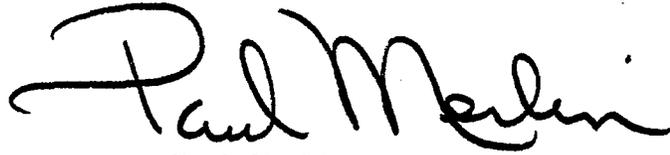
Citation No.	Date	Health or Safety Standard Violated (CFR Title 30)	Proposed Penalty	Proposed Amended Penalty
00374661	5-31-78	55.9-54	\$60.00	\$51.00
00374663	5-31-78	55.12-13	84.00	62.00
00374664	5-31-78	55.9-22	28.00	24.00
00374665	5-31-78	55.9-22	44.00	39.00

The Solicitor advises in her motion that further investigation leads her to believe that negligence is less than was originally assessed. In addition, the Solicitor advises that there is no prior history of violations and that these violations were abated in good faith.

The Solicitor's motion is deficient because it discusses all the violations as a group. Each alleged violation should be discussed individually and the reason for each proposed settlement should be discussed item by item. Nevertheless, in this case, since the proposed reductions are not large I have reviewed the citations, the assessment sheet and the attached inspector's statements. I particularly note that the operator has no history of prior violations. Based upon my review of pertinent materials I conclude that the recommended settlements are consistent with and will effectuate the purposes of the Act. However, the Solicitor should not submit a motion such as this in the future because I will not approve it.

ORDER

In light of the foregoing the recommended settlements are approved and the operator is ORDERED to pay \$176 within 30 days from the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Judith G. Vogel, Esq., Office of the Solicitor, U.S. Department of
Labor, 10404 Federal Bldg., 450 Golden Gate Avenue, Box 36017,
San Francisco, CA 94102 (Certified Mail)

William L. Feeney, Esq., Windrem, Feeney, Wood and Williams, 301 North
Forbes Street, Lakeport, CA 95453 (Certified Mail)

(a) 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.

* * * * *

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

* * * * *

(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall 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.

Section 110 of the Act provides in part:

(a) 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.

* * * * *

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Regulatory Provisions

30 CFR, Part 56 provides in part:

56.4-9 Mandatory. All heat sources, including lighting equipment, capable of producing combustion shall be insulated or isolated from combustible materials.

* * * * *

56.4-33 Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used.

* * * * *

56.9-87 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.

* * * * *

56.11-1 Mandatory. Safe means of access shall be provided and maintained to all working places.

* * * * *

56.12-8 Mandatory. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

* * * * *

56.12-32 Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

* * * * *

56.12-34 Mandatory. Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

Issues

1. Whether the violations described in the citations occurred or existed as alleged?
2. In each instance where a violation is found, what is the appropriate penalty for each violation?
3. In each instance where a violation is found, was the additional finding that it could have significantly and substantially contributed to the cause and effect of mine health or safety hazards properly made?

Findings of Fact and Conclusions of Law

Penalty Proceedings Before the Review Commission

A civil penalty proceeding before the Commission is in no sense a review of the actions or determinations of the MSHA inspectors or Assessment Office. It is in fact a de novo proceeding in which the Secretary seeks to have the Commission impose civil penalties for what he contends were violations of mandatory safety standards contained in the Act or in regulations promulgated pursuant to the Act. The Commission must determine on the basis of the evidence presented at a hearing before an Administrative Law Judge, whether the alleged violations occurred. For those found, the Judge will impose a penalty based on the six criteria in 110(i) of the Act. The burden of proof is on the Secretary to establish the existence or occurrence of the violations and, to the extent that he urges that any of the statutory criteria should increase the penalty, he has the burden of establishing the existence of the aggravating factor. The important factors concerning which the parties to these proceedings disagree are gravity and negligence.

The gravity of a violation depends upon the possible hazard to miners and the likelihood that the hazard will result in injury. Robert G. Lawson Coal Company, 1 IBMA 115. A violation is the result of the operator's negligence if he knew or should have known of the condition and failed to take corrective action. The knowledge of a foreman may be imputed to the operator. The Valley Camp Coal Company, 3 IBMA 463.

Significant and Substantial

Each of the citations involved in this proceeding contain a finding that the condition is "significant and substantial." This phrase I take to be shorthand for a finding that the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a * * * mine safety or health hazard." Section 104(d)(1). In its answer, Respondent challenged these findings. At the hearing, the parties stipulated that the propriety of these findings is properly an issue in the present civil penalty proceeding. In its posthearing brief, Respondent argues that such findings are not proper in a citation issued under section 104(a) and therefore should be vacated. It cites the decision of Judge Koutras in Secretary v. Lone Star Industries, Docket No. VINC 79-21-PM, issued July 3, 1979, as standing for the proposition that such findings are only properly made in a 104(d)(1) citation for unwarrantable failure to comply with a standard.

Petitioner moved "to strike" Respondent's argument because it was not raised prior to the filing of its posthearing brief. The motion is DENIED and the request for additional time to respond is DENIED.

Respondent's position overlooks, however, the fact that under section 104(e), sanctions may be applied for a pattern of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of a mine health or safety hazard. There is no requirement in section 104(e) that the violations be caused by unwarrantable failure. I conclude that findings in a 104(a) citation that the violation is significant and substantial are not improper provided the findings are supported by the facts.

In a decision under the Coal Mine Safety Act, the Board of Mine Operations Appeals interpreted the phrase "significantly and substantially contribute to the cause and effect of a mine safety or health hazard" to include all violations except "violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." Alabama By-Products Corporation (On Reconsideration), 7 IBMA 85, 94. This tortured construction of language was said by the Board to have been compelled by the decision of the Court of Appeals in International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. den., 429 U.S. 858 (1976). In fact, the court's opinion did not construe the language in question at all, but merely held that the Board had mistakenly read in a significant and substantial

requirement for a section 104(c)(1) withdrawal order when no such requirement was contained in the statute. 30 U.S.C. § 814(c)(1). When it was issued, I thought the Board's interpretation was wrong and I think it wrong today. However, the Senate Committee on Human Resources in its Report on S. 717, which became the Federal Mine Safety and Health Act of 1977, stated:

The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1).

S. Rep. No. 95-181, 95th Cong., 1st Sess. 31 (1977), reprinted in U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 619 (1978).

Therefore, although I would not so interpret the language if it were a matter of first impression, I feel constrained to follow the Board's construction, and conclude that only purely technical violations, and violations which have only a remote or speculative chance of causing any injury, cannot be cited as significant and substantial.

The Violations

(1) Citation No. 288294 charged a violation of 30 CFR 56.9-87 which requires that heavy duty mobile equipment be provided with audible warning devices. When the operator of such equipment has an obstructed view of the rear, the standard requires that the equipment 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. Respondent had a 120 Hough bulldozer which had an inoperative reverse alarm at the time of inspection. The bulldozer is a large vehicle with an obstructed view. No observer was present. The inspector testified that an individual in the vicinity of the bulldozer could be hurt if that person did not hear the alarm. I find that a violation was established and that it is moderately serious; however, there is no evidence of negligence. Because the violation could result in injury, I find that it was significant and substantial.

(2) Citation No. 288295 alleged a violation of 30 CFR 56.4-9 which requires that all heat sources, including lighting equipment capable of producing combustion, be insulated or isolated from combustible materials. The inspector testified that a foreign substance, possibly oil or grease, contacted the insulation around the number one cyclone duct, causing the insulation to smolder. The inspector stated that the fire was extinguished and the machinery was repaired to prevent any further overheating. The duct was located approximately 4-6 inches from the travel pattern of the

walkway. The duct was a source of heat and it was not sufficiently separated from combustible materials, namely, oil or grease. A violation was established which was moderately serious. No evidence was presented to show how or when the oil or grease came to be on the duct and therefore negligence was not established. Since the violation could have resulted in injury, I find that it was significant and substantial.

(3) Citation No. 288296 alleged a violation of 30 CFR 56.12-32 which requires that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairing. The inspector testified that the paddle switch junction box at the No. 14 conveyor was not provided with a cover. Due to the location of the box, near an elevated walkway, a person who contacted the wires in the box could get a shock and fall 30 to 40 feet. A violation was established and it was serious. The evidence establishes that the condition had existed for some time and should have been known to Respondent. Respondent was negligent. Since an injury could have occurred, the violation was significant and substantial.

(4) Citation No. 288297 alleges a violation of 30 CFR 56.11-1 which requires that safe means of access be provided and maintained to all working places. I find that spillage up to 24 inches existed on the walkway around the head pulley of the #14 conveyor. This spillage created a tripping hazard. The inspector testified that an employee could fall 30 to 40 feet from the walkway to the ground below. The inspector also stated that the spillage was impacted, indicating that it had been present for some period of time. I find that a violation existed. It was moderately serious and was caused by Respondent's negligence. I further find that this violation was significant and substantial.

(5) Citation No. 288298 alleges a violation of 30 CFR 56.12-34 which requires that portable extension lights and other lights that by their location present a shock or burn hazard be guarded. A 200-Watt bulb at the No. 3 high line conveyor was not provided with a guard. The light could have been broken and caused injury to an employee. A violation of the standard was established. The Respondent abated the violation by placing a guard on the bulb. I find that the violation was caused by Respondent's negligence since the condition was obvious to visual observation. However, the evidence does not establish that it was a serious violation. I find that because the violation could contribute to a health or safety hazard, it was significant and substantial.

(6) Citation No. 288721 charges a violation of 30 CFR 56.12-8 which requires that power wires and cables be insulated adequately when they pass into or out of electrical compartments. When insulated wires pass through metal frames, the regulation requires that the holes be substantially bushed with insulated bushings. The electrical power wires entering the switch box at the impactor floor hydraulic cylinder

did not have a bushing. The inspector stated that the wires could rub against the bare metal and cause an electrical short. He also stated that the weight of the cable could pull the wire free, also causing a short. There is both a burn hazard and a shock hazard. The Government conceded that the violation was not significant and substantial. I find that a violation was established. The violation was not serious. The condition was apparent, should have been known to Respondent and therefore was caused by its negligence. The violation was not significant and substantial.

(7) Citation No. 288722 alleges a violation of 30 CFR 56.11-1 which requires that a safe means of access be provided and maintained to all working places. The evidence established that there was excessive buildup of limestone dust at the top raw grind silo between the 29 and 33 conveyor belts. The evidence further shows, however, that the area in question is not used by workmen, nor is it a means of access to any working place.

Therefore, I find that the Government has failed to sustain its burden of proof and that no violation has been established.

(8) Citation No. 288827 alleges a violation of 30 CFR 56.4-33 which requires that valves on oxygen and acetylene tanks be kept closed when the contents are not being used. The oxygen and acetylene cylinders in the #2 storeroom were in an open position at the time of inspection. There were ignition sources close by and there was a possibility of explosion. A violation was established and was moderately serious. The condition was known or should have been known to Respondent. Therefore, it was caused by Respondent's negligence. Because the violation could have resulted in injury, it was significant and substantial.

(9) Citation No. 288826 charges a violation of 30 CFR 56.12-34 which requires that portable extension lights and other lights that by their location present a shock or burn hazard be guarded. There was an unguarded light bulb in Respondent's carpenter's shop. This is a violation of the standard. Since the condition was obvious, it was due to Respondent's negligence. It was not serious. However, it could have resulted in injury and therefore was significant and substantial.

(10) Citation No. 288566 was issued for an alleged violation of 30 CFR 56.11-1 which requires that a safe means of access be provided and maintained to all working places. An accumulation of limestone was present along the walkway to the tail pulley of the #41 conveyor belt. The accumulation was up to 2 feet deep and covered an area 30 feet long. I find that a violation was established which was moderately serious. Because the condition was evident, I find that Respondent was negligent. I also find that the violation was significant and substantial.

(11) Citation No. 288567 alleges a violation of 30 CFR 56.11-1, which is set forth in the preceding paragraph. A hole measuring 6 inches

by 8 inches was present at the low end of the #16 walkway. The condition was apparent and obvious to the Respondent. The violation was due to Respondent's negligence and was moderately serious. I further find that the violation was significant and substantial.

Conclusions of Law

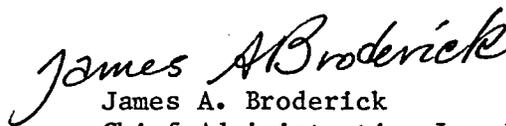
1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. At all times relevant to this proceeding, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.
3. Except as otherwise found herein, Respondent violated the mandatory health and safety standards as charged in the notices of violation.
4. The penalties hereafter assessed are based on my findings that the violations occurred, and on a consideration of the following criteria with respect to each violation: The operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations and the demonstrated good faith of the operator in attempting to achieve rapid compliance.

ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent is assessed the following penalties:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
288294	04/18/78	56.9-87	\$ 150
288295	04/25/78	56.4-9	75
288296	04/25/78	56.12-32	150
288297	04/25/78	56.11-1	250
288298	04/25/78	56.12-34	50
288721	04/25/78	56.12-8	50
288722	04/27/78	56.11-1	0
288827	05/09/78	56.4-33	150
288826	05/09/78	56.12-34	50
288566	05/02/78	56.11-1	150
288567	05/04/78	56.11-1	150
		Total	<u>\$1,225</u>

Respondent is ORDERED to pay penalties in the total amount of \$1,225 within 30 days of the date of this decision.


James A. Broderick
Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 10 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PITT 79-132-P
Petitioner : A/O No. 36-00963-03002
v. :
: Mathies Mine
MATHIES COAL CO., :
Respondent :

DECISION APPROVING SETTLEMENTS

ORDER OF VACATION

ORDER TO PAY

The Solicitor has filed a motion to approve settlements for five citations and to approve the vacation of one citation in the above-captioned proceeding.

Citation No. 233436 was issued for an alleged violation of 30 CFR 75.1720(a). According to the Solicitor this citation was issued when an inspector observed a miner driving an electric motor car without adequate eye protection. The Solicitor further states that discussions with the operator indicate that the miner had been provided with the required safety glasses and had them in his pocket at the time the citation was issued. The Solicitor states that since this violation was due primarily to the employee's negligence rather than a lack of diligence on the part of the operator no penalty should be assessed. The Solicitor is correct that the citation should be vacated but he gives the wrong reason. The former Board of Mine Operations Appeals held that where a miner intentionally failed to wear goggles the operator is not guilty of a violation where it has diligently enforced the requirements of the regulation. North American Coal Corp., 3 IBMA 93 at 106-108 (April 17, 1974). This appears to be the case here. Accordingly, there is no violation. See also the recent decision of Administrative Law Judge Koutras in Peabody Coal Company, DENV 77-77-P (August 30, 1978). Lack of negligence is not, and never has been, a basis for vacating a citation.

The Solicitor recommends a settlement of \$150, the originally assessed amount, for Citation 233435 which was for a failure to provide adequate separation between explosives and detonators, a violation of 30 CFR 75.1306. This settlement appears reasonable and is approved.

Settlements are recommended for the remaining four citations in amounts only slightly less than the originally assessed amounts. The

settlements appear reasonable in light of the gravity of the conditions presented. However, the Solicitor is advised that the fact that the operator abated the violations immediately is not a ground for reduction of the original assessment. Presumably the Assessment Office took into account rapid abatement in determining the original assessments. The Solicitor should not use this reason again as a basis for recommending any reduction. If he does so in the future in any case of mine, the settlement will be disapproved.

ORDER

The operator is ORDERED to pay \$995 within 30 days from the date of this decision. Citation No. 233436 is VACATED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michel Nardi, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-189-P
Petitioner : A.O. No. 34-00676-03001
v. :
: McCurtain No. 2 Mine
GREAT NATIONAL CORPORATION, :
Respondent :

DECISION

Appearances: David S. Jones, U.S. Department of Labor, Office
of the Solicitor, Dallas, Texas, for Petitioner;
Jerry D. Pruitt, Fort Smith, Arkansas, for Respondent.

Before: Judge Stewart

PROCEDURAL BACKGROUND

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a) (1978). Petitioner filed a petition for assessment of civil penalties for the three violations included under this docket number on January 9, 1979. Respondent answered this petition on February 5, 1979.

The hearing in this matter was held on September 19, 1979, in Fort Smith, Arkansas. Petitioner and Respondent each called a single witness. Petitioner introduced five exhibits. At the conclusion of the hearing the parties waived their right to file proposed findings of fact and conclusions of law.

Findings of Fact and Conclusions of Law

The violations alleged herein were observed by Inspector Farrin E. Walker during the course of inspections of Respondent's McCurtain No. 2 Mine. These inspections were conducted in June of 1978. In each instance, the inspector issued a section 104(a) citation.

At the hearing, the parties stipulated that Respondent's McCurtain No. 2 Mine was a small mine. Thirty-three employees work at the mine, producing approximately 250 tons of coal per day and 80,000 to 90,000 tons per year.

There is nothing on the record which would indicate that any penalty assessed herein would have an adverse effect on Respondent's ability to remain in business. MSHA's proposed assessment form indicates that Applicant had no relevant history of prior assessed violations.

Citation No. 00391338

The inspector issued Citation No. 00391338 on June 1, 1978, citing a violation of 30 CFR 77.1605(a). He described the relevant condition or practice as follows: "The left cab window in the Trojan Front-end loader, Model 254 (Company No. 22), was broken and shattered. The loader was in operation at the loading tipple." The window was replaced within the time set for abatement by the inspector. The inspector testified that the operator took immediate action, thereby demonstrating good faith.

Section 77.1605(a) requires that cab windows shall be in good condition and shall be kept clean. Both Inspector Walker and Jim Beam, manager of the McCurtain No. 2 Mine, testified that the left cab window of the front-end loader had been broken. The inspector added that dust had gathered on the window. This uncontradicted testimony-- that the windshield was broken and dirty-- established that a violation of section 77.1605(a) existed as alleged.

The operator was negligent in that this condition was readily observable, yet no corrective action was taken prior to the issuance of the citation.

It was improbable that this condition would result either in accident or injury. Although he testified that 90 percent of the windshield had shattered, the inspector admitted that a collision was unlikely. The front-end loader transported waste material between the tipple and a dump, a distance of approximately 100 feet. It operated 5 days per month, making four or five trips per day. It was unlikely that another vehicle would be operating at the same time in this area. The inspector observed coal haulage trucks at the tipple but noted that they did not cross the front-end loader's path. The inspector also admitted that injury would be improbable even if an accident were to occur.

Citation No. 00391340

Inspector Walker issued Citation No. 00391340 on June 13, 1978, again citing a violation of 30 CFR 77.1605(a). He described the

relevant condition or practice as follows: "The No. 12 service-truck front -cab -window was broken and shattered. The truck is used to service the equipment in the pit areas." The operator abated the condition within the time set by the inspector for abatement, thereby demonstrating a normal degree of good faith.

As noted above, section 77.1605(a) requires that cab windows shall be in good condition. Both Inspector Walker and Mr. Beam testified that the window directly in front of the driver's seat, was broken. This condition was in violation of section 77.1605(a).

The operator was negligent in its violation of the mandatory standard. The condition was readily observable, yet the operator did not take steps to replace the window prior to the issuance of the citation.

It was improbable that the condition would lead to an accident or injury. The cracks in the windshield were on the driver's side of the vehicle. The inspector testified only that the vision of the driver would be obstructed. Mr. Beam testified, on the other hand, that the window had six to eight cracks in it, and that the vision of the driver was unobstructed. It is found that the cracks in the windshield slightly interfered with the driver's vision. Because the vehicle was used primarily between the hours of 4 p.m. and midnight, the likelihood that an accident would occur was further reduced. Other vehicles were not operated on a regular basis when the service truck was in use. The inspector testified that he observed the vehicle in operation between the shop and pit during regular working hours. Mr. Beam testified that it only did so when emergency repairs were necessary. The inspector testified that the vehicle traveled very slowly. Therefore, even if an accident were to occur, the injury expected to result, if any, would be nondisabling.

Citation No. 391341

The inspector issued Citation No. 391341, on June 14, 1978, citing a violation of 30 CFR 77.400(a). He described the relevant condition or practice as follows: "The drag drum mechanism on the 2400 Lima Drag line operating at the Pit No. 002 was not provided with a guard to prevent contact of the exposed moving machine-parts which may cause injury to persons." The condition was corrected within the time set by the inspector for abatement, thereby demonstrating a normal degree of good faith.

Section 77.400(a) requires that moving machine parts which may be contacted by persons and which may cause injury to persons shall be protected. In this instance, the upper half of a drag drum was unprotected. This drum was located within the outer body

of the dragline. The inspector testified that a person on the walkway inside the body of the dragline would be standing within 4 inches of the drum. This testimony was contradicted by that of Mr. Beam who stated that a person would be approximately 30 inches away from the drum. Despite this inconsistency, the testimony of both witnesses established that a person could make injurious contact with the moving drum. The condition was, therefore, in violation of the mandatory standard.

The operator was negligent in its failure to guard the drum. The condition was readily observable, but steps were not taken to guard the drum until after the issuance of the citation.

It was probable that this condition would lead to an accident. The inspector observed one of Respondent's employees--presumably the oiler--inside the dragline. Mr. Beam testified that the oiler who was normally on duty inside the machine while it was in operation had been instructed to use the outside walkway to get from one part of the machine to the next. It was not established that he complied with these instructions, and there was nothing to prevent him from using the inside walkway for this purpose. It was not established that this oiler did not pass on the walkway, alongside the drum, in the course of his duties. If an accident were to occur, permanently disabling injury would be expected to result.

ASSESSMENTS

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

<u>Citation No.</u>	<u>Penalty</u>
00391338	\$ 50
00391340	50
00391341	150

ORDER

The Respondent is ORDERED to pay the amount of \$250 within 30 days of the date of this decision.



Forrest E. Stewart
Administrative Law Judge

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

DEC 5 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 79-58-M
Petitioner : A/O No. 30-00989-05002
v. :
W. F. SAUNDERS & SONS, : Nedrow Plant
Respondent :

DECISION

Appearances: Jonathan Kay, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Sherman V. Saunders, Jr., Nedrow, New York, for Respondent.

Before: Administrative Law 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., hereinafter referred to as the "Act"). On August 20, 1979, Petitioner filed a proposal for assessment of civil penalty, for an alleged violation on March 21, 1979, of mandatory safety standard 30 CFR 56.2-3(a), charging that Respondent's shop and adjacent storeroom were in a cluttered condition. In its notice of contest filed August 31, 1979, Respondent challenged the jurisdiction of Petitioner to inspect and to cite violations in this shop and storeroom. A hearing was held in Syracuse, New York, on November 21, 1979, at which the parties appeared and presented evidence.

The issues in this case are (1) whether Petitioner, the Mine Safety and Health Administration (MSHA), has jurisdiction under the Act to inspect and to cite violations in Respondent's truck shop and storeroom, and, if so, (2) whether Respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed herein, and, if so, (3) the appropriate civil penalty to be assessed for the alleged violation. Respondent concedes in this case that if MSHA had jurisdiction over his truck shop and storeroom then he was admittedly in violation of the cited standard.

I. Jurisdiction

The essential facts are not in dispute. Respondent operates a sand and gravel pit in Nedrow, New York, and, a few miles away, operates a preparation plant for the crushing, cleaning and sorting of the sand and gravel, a concrete plant where the sand is mixed with cement and the truck shop and storeroom at issue. The storeroom, about 30 feet wide and 100 feet long, is used primarily to store new replacement parts for the operator's trucks and conveyor systems. James Woods, plant superintendent, conceded that the truck parts stored therein could be, and were in fact, used for the belly dump trucks, the trucks used to haul sand and gravel from the pit area to the preparation plant. Woods also conceded that the rollers and electric motors stored therein could be, and were in fact, used on the conveyor system in the sand and gravel preparation plant. Woods did not deny that certain screens described by the inspector were in the storeroom at the time of the cited violation and admitted that such screens could only have been used in the sand and gravel preparation plant. Woods emphasized, however, that most of the parts in this storeroom were used in connection with the cement plant and for the "10 wheeler" trucks, not used in the pit operation.

The parties have stipulated that Respondent's operations affect interstate commerce and there is no disagreement that sand and gravel are "minerals" for purposes of the Act. MSHA's jurisdiction over the storeroom in question thus depends on whether that area comes within the definition of "mine" as set forth in the Act. Section 3(h)(1) of the Act, as relevant herein, provides as follows:

"Coal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads pertinent to such area; and (C) lands, excavations * * * and workings, structures, facilities, equipment, machines, tools, or other property * * * on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form * * * or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals * * *.

Commenting on this definition, the Senate Human Resources Committee in the report on Senate Bill 717, which was the basis for the 1977 Act, stated that:

[I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent

of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. [1/]

In this regard a preparation plant for the processing of sand and gravel has been found to be within the jurisdiction of the Act as a mineral preparation facility. Cf. Secretary of Labor v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (1979).

In the case at bar, it is undisputed that at least some of the equipment and machinery kept in the storeroom was to be used in the belly trucks used to haul sand and gravel from the pit area, where it was extracted, to the preparation plant and that at least some of the rollers kept in the storeroom were to be used in the sand and gravel preparation plant. There can no question then that this equipment and machinery was to be used in the work of extracting sand and gravel from their natural deposits and to be used in the work of milling or preparing the sand and gravel in the preparation plant. I have no difficulty in finding therefore, that the "structure" and "facility" at issue herein, the storeroom in which such equipment and machinery was kept, similarly was "used in" and "resulted from" the work of extracting the sand and gravel from its natural deposits, and in the work of milling or preparing the sand and gravel in the preparation plant. It is immaterial that some of the equipment and machinery, or even most of it, may have been used in areas that may not have been under MSHA's jurisdiction. It is of course also immaterial for purposes of this decision that an MSHA inspector may have expressed an opinion that the subject storeroom was not within MSHA's jurisdiction. Under all the circumstances, I find that the storeroom in question is subject to MSHA's jurisdiction under the Act.

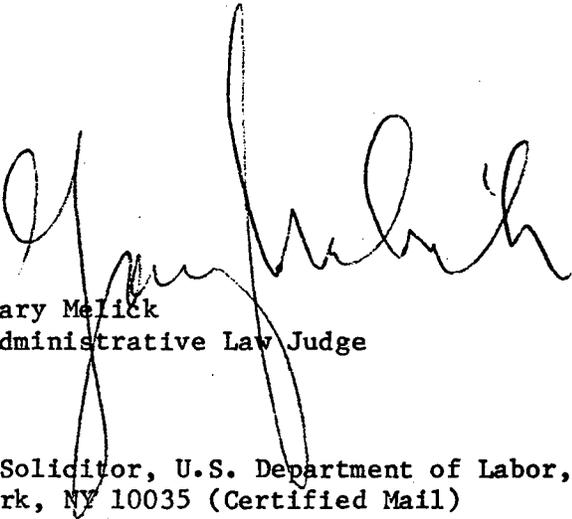
II. The Alleged Violation and Penalty

The citation at bar charged a violation of 30 CFR 56.2-3(a) which requires that work places, passageways, storerooms, and surface rooms be kept clean and orderly. Specifically, the uncontradicted evidence shows that when the citation was issued the storeroom was cluttered, with sundry equipment and machine parts strewn about the floor. The passageway was obstructed and a tripping hazard existed. MSHA inspector Robert Kinterknecht had previously warned Superintendent Woods of cluttered conditions in the storeroom and had asked him to clean it up. Woods admitted that he was aware of the problem but claimed that the person in charge of area maintenance had been absent from work. The inspector thought it probable that a man could trip over the objects on the floor, but that the potential injuries would not be serious or fatal, resulting in only 1 or 2 days of lost work. The evidence shows that the condition was corrected "well within" the specified time for abatement.

1/ Senate Report 181, 95th Cong., 1st Sess. 1, 14, reprinted in U.S. Code. Cong. and Admin. News, 3401, 3414 (1977).

The operator in this case is small in size and had three previous unrelated violations (on September 13, 1978), with penalties totaling \$90. As previously noted, Respondent does not take issue with the fact of the violation or the amount of the penalty assessed, assuming jurisdiction under the Act. Under all the circumstances and considering the evidence presented in light of the criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977, I find that the penalty of \$84, originally assessed in this case, is appropriate.

Wherefore the Respondent is ordered to pay a penalty assessment of \$84 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. HOPE 78-690-P
Petitioner : A/O No. 46-01576-02021
v. :
Itmann No. 3 Mine
ITMANN COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

A petition for assessment of civil penalty was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. An answer was filed and a prehearing order was issued. Subsequent thereto, various motions and related documents were filed requesting approval of a settlement and dismissal of the proceeding. The statements contained in these filings are set forth below.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

An agreed settlement has been reached between the parties in the amount of \$229. The assessment for the alleged violations was \$310.

The alleged violations and the settlement are identified as follows:

<u>Notice or Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>	<u>Settlement</u>
7-0056	4/12/77	70.100(b)	\$90	\$ 9
7-0139	7/22/77	75.200	220	220

The initial motion to approve settlement and dismiss was filed by the Petitioner on January 2, 1979, proposing to settle Notice No. 7-0056, April 12, 1977, 30 CFR 70.100(b) (alleged respirable dust violation) for \$9 and Order No. 7-0139, July 22, 1977, 30 CFR 75.200 (alleged roof violation) for \$110. On January 31, 1979, an order was issued indicating that the proposed settlement for the alleged respirable dust violation could be approved 1/, but that the information contained in the record was insufficient for purposes of determining that the public interest would be adequately protected by approval of the settlement for the alleged roof violation. Accordingly, the request for approval of settlement was denied. The motion set forth the following reason in support of the settlement of the alleged respirable dust violation: "1. The respirable dust standard violation * * * is covered by the blanket agreement approved by Judge Kennedy in May of 1978."

The Petitioner filed its second motion for approval of settlement on July 19, 1979, reiterating the previously submitted settlement proposal for the alleged respirable dust violation, but proposing to settle the alleged roof violation for \$220. On September 12, 1979, an order, similar to the January 31, 1979, order, was issued denying the Petitioner's request for approval of settlement.

Since the alleged roof violation has been the sole impediment to a disposition of this case short of an evidentiary hearing, it is appropriate to set forth the allegations pertaining to it contained in the petition for assessment of civil penalty. The order of withdrawal, a copy of which accompanied the petition, states the following:

Loose, inadequately supported roof and loose overhanging brows were observed at numerous locations along the sugar run track haulageway from survey station spad 3977 inby for approximately 650 feet to an area near station spad 4260. Several areas along the above-mentioned haulageway were observed where bolt spacing exceeded 10 feet and some of the installed bolts were ineffective due to sloughing. The ribs in three fallen areas were not supported. Numerous crossbars (6 inches by 8 inches by varying lengths) installed in the affected area were broken and/ or sagged (to what appeared to be a maximum load) due to excessive weight. Four men were working approximately 200 feet inby the beginning of the affected area and the operator stated that they had closed the area for rehabilitation purposes; however, no danger signs were observed and the conditions were not listed in the preshift examiner's book on this date.

On October 5, 1979, the Respondent filed a motion to approve settlement and dismiss stating, in part, as follows:

1/ The attached copy of a decision in Secretary of Labor, Mine Safety and Health Administration v. Consolidation Coal Company, Docket No. MORG 78-339-P (September 29, 1978) sets forth the reasoning for such settlement approval.

1. On or about December 28, 1978, the original motion to approve settlement was filed by MSHA. On January 31, 1979, the Judge issued a decision disapproving the proposed settlement. Since then the parties reviewed the entire matter in light of the Judge's disapproval. They believed that a second proposed settlement would have been an appropriate disposition of the case. However, they recognized that reasonable men might differ and there might be more than one proper disposition for any case. Therefore, on July 18, 1979, a different settlement was proposed.

The Judge, in his decision disapproving the original proposed settlement, stated that the proposed settlement of the alleged violation of 30 CFR 70.100(b) could be approved as proposed. Therefore, the second motion dealt only with the settlement of the alleged violation of 30 CFR 75.200. The Judge disapproved the second settlement on September 12, 1979.

This, the third proposed settlement of the alleged violation of 75.200 is for \$220, i.e., 100 percent of the amount proposed by the Office of Assessments.

2. This amount is proper. (At any hearing the operator would produce testimony that only men working to correct the condition went in by the beginning of the affected area.) MSHA could produce no testimony to the contrary. The inspectors who signed the Order would testify that the miners they observed in by were working to correct the condition.

3. Respondent is a large operator.

4. Payment of the proposed assessment will have no effect on Respondent's ability to remain in business.

5. Respondent's history of previous violations has been submitted in prior proposals by MSHA.

6. Respondent demonstrated good faith in attempting to achieve rapid compliance.

7. The alleged violation was the result of ordinary negligence.

8. The alleged violation was not serious under the circumstances.

9. The previously submitted Proposed Assessment and Inspector's Comment Sheets are hereby incorporated by reference.

NEW MATTER

10. The mine was on vacation from July 3, 1977, through July 17, 1977.

11. Shortly after vacation, management became aware of the roof and rib conditions in the general area from spad 3977 through spad 4260 along the Sugar Run Track Haulageway. Management does not agree that the entire area presented a problem. There were only a few areas where work had to be done.

12. Management closed what it considered to be the affected area on or about July 19, 1979. No persons except those authorized by the operator to enter the place to work at eliminating the condition traveled into the subject area.

13. A plan was posted describing the rehabilitation work being done.

14. On Wednesday, July 20, 1979, Inspector Sammy Bell inspected the Itmann No. 3 B Mine. Before the inspector went underground, Superintendent Glen Blankenship informed him that an area of the Sugar Run Track Haulageway had been closed for repairs. Only experienced and certified people were working in the area under the supervision of a certified foreman. The track was closed not being used [sic] for any reason. Inspector Bell and Lee Stewart, mine foreman, traveled to the subject area. When he returned to the surface, Mr. Bell discussed the situation with Superintendent Blankenship and Mine Foreman Stewart. Inspector Bell stated that he knew the area was closed and work was already being performed to rehabilitate the area. However, Mr. Bell said that he intended to discuss the situation with the MSHA roof control experts at his office. Inspector Bell left the mine without issuing any notices or orders in the subject area.

15. Two days later, on Friday, July 22, 1977, Inspector Bell returned to the mine followed by Inspectors Charles Hambric and Hubert McKinney. All inspectors were told by Superintendent Blankenship that the area was closed and that work was already being performed to correct the condition. The three inspectors, Superintendent Blankenship and Mine Foreman Stewart traveled to the subject area. After observing the subject area for about thirty (30) minutes the Inspectors verbally issued a closure order. They came to the surface and after calling their MSHA supervisor, wrote the subject 104(a) Order.

16. The allegation that men were working two hundred (200) feet inby the beginning of the affected area is totally false. The operator had already rehabilitated the first two hundred (200) feet of the area to the point where the men were working. A difference of opinion arose as to whether more work was needed on certain brows found outby where the men were working.

17. There were no other crews working anywhere near the area of the mine.

18. Since the operator had complied with the roof control plan by posting a plan for the rehabilitation work, it did not feel that hanging a danger sign and making an entry in the pre-shift examination book were necessary. MSHA agreed with this argument at the time or they would have issued an additional notice of a violation of 30 C.F.R. Section 75.303.

19. Respondent strenuously contends that a violation of Section 75.202 may have existed but that alleged violation was certainly not an imminently dangerous condition as evidenced by the fact that Inspector Bell himself permitted the same conditions, practices and procedures to exist for over two (2) days from the time he first observed them.

Paragraph Nos. 2, 3, 4, 5, 6, 7 and 9 merely restate the justifications advanced by the Petitioner in its July 19, 1979, motion. In paragraph No. 8, supra, Respondent classifies the alleged violation as "not serious under the circumstances," whereas the Petitioner's July 19, 1979, motion classified it as "moderately serious in the circumstances."

On October 18, 1979, the Petitioner filed a motion requesting that the Respondent's settlement motion be approved, stating, in part, as follows:

The Respondent, Itmann Coal Company, has moved that §104(a) Order of Withdrawal No. 1 SRB/HM/SRB (7-0139) which issued on July 22, 1977, citing 30 CFR 75.200, be approved by Respondent's payment of \$220.00 (which amount was received by the Office of Assessments on August 7, 1979). The payment is in the same amount as that proposed by the Assessment Officer, see Form AO-21c attached, which shows the points assessed pursuant to 30 CFR 100.3 in each of fifteen categories by which the proposed civil penalty of \$220.00 was determined. The Office of the Solicitor by reference adopts the allegations and attachments contained in its previous two motions for approval of settlement, which show the Respondent is a large operator, payment will have no effect on its ability to remain in business, that there have been 478 previously paid violations and 34 paid 30 CFR 75.200 violations, that a normal degree of good faith was demonstrated in abating the condition after the order of withdrawal issued, that the violation was the result of ordinary negligence, and, in view of the fact that the area had been closed, that the violation was only moderately serious.

The Office of the Solicitor notes the new material submitted by the Respondent and deems it additional reasons why the settlement in the amount of \$220.00 should be approved as being a reasonable amount under the facts shown.

On November 27, 1979, an order was issued noting that the last paragraph in the above-quoted passage appeared to be an adoption of the "new matter" submitted by the Respondent on October 5, 1979.

The order stated that:

[i]f the Petitioner intends this as an adoption, then the Petitioner is ORDERED to file with the undersigned Administrative Law Judge, within 20 days of the date of this order, an affirmative statement that it adopts the "new matter" submitted by the Respondent on October 5, 1979, as an accurate statement of facts and as additional reasons in support of the proposed settlement.

On December 5, 1979, the Petitioner responded to the November 27, 1979, order as follows:

The undersigned attorney on behalf of the Mine Safety and Health Administration (MSHA) responds to the Order that MSHA either expressly adopt or reject the various Respondent's "new matter" quoted in the Order as follows:

1. The Order quotes a statement by the Petitioner reading, "The Office of the Solicitor notes the new material submitted by the Respondent and deems it additional reasons why the settlement in the amount of \$220 should be approved as being a reasonable amount under the facts shown." This statement was intended only as acknowledgement that at a hearing Respondent's witnesses would testify as alleged in support of the allegations designated by the Respondent as "new matter", so it is appropriate to consider in approving settlement. The Petitioner had already stated its position in two motions to have the settlement approved, and had indicated in a telephone conference call that there was little more it could offer. The Respondent at that time offered to reveal its position and subsequently by the "new matter" did so.

2. Federal Coal Mine Inspectors Charles D. Hambric, Jr., and Herbert (not Hubert) McKinney have each communicated by telephone more than once with the undersigned attorney and we have discussed in depth the quoted material in the above mentioned Order, and the undersigned attorney has read to each Inspector the Response to each statement and MSHA's comment which the Inspectors have agreed is, in their respective opinion, true. Sammy R. Bell is a former Federal coal mine inspector no longer employed by the Federal Government. Mr. Bell is believed to reside in Crab Orchard, West Virginia, and so he should be available as a witness in response to an appropriate subpoena. Nevertheless, since Mr. Bell is not a

present employee of MSHA, the Office of the Solicitor has at present only office records and the recollection of Messrs. Hambric and McKinney and other MSHA personnel to develop Mr. Bell's position concerning the issuance of the subject order of withdrawal.

3. Brief Statement of Facts: (According to Inspectors Hambric and McKinney): There had been a substantial unplanned roof fall in the underground bituminous coal mine and Respondent's personnel, as a result, had hauled away a substantial amount debris. The area was along a rail haulageway used, or to be used, at least after the unplanned roof fall as a haulageway for supplies only. Inspector Bell had briefly observed the beginning of the area where the unplanned roof fall has occurred [sic] a few days prior to July 22, 1977 (the day the subject order of withdrawal issued), and had been concerned with the manner in which the roof had been and was planned to be rehabilitated. There appears to have been a discussion between former Inspector Bell and unknown Management personnel in which the latter justified the roof rehabilitation plan posted for the reasons that only supplies would be hauled on the travelway and miners had verbally been ordered to stay out of the area. Mr. Bell took no action at that time based upon his cursory view of the scene, but obviously he was concerned because he, upon returning to the MSHA Office, through office channels, requested a roof control specialist be assigned to return with him to the mine while an inspection was made of the entire area affected by the unplanned roof fall. In response to former Inspector Bell's request, Mr. Hambric and Mr. McKinney (roof control specialists) returned with Mr. Bell to the mine on July 22, 1977, where a careful inspection of the entire area taking several hours (not thirty minutes, as suggested by the Respondent) was made by the three inspectors. The Inspectors are looking for, but have not located, a mine map which would show the distance of the area affected by the roof fall but suggests that as much as 1,000 feet was involved. The Inspectors were alarmed to observe that there was a power center at the rear of the area where the roof was substandard. Under certain conditions mine personnel must go to the power center to inspect equipment and possibly reset breakers and perform other services. True, the power center can be reached by traveling in a long loop so it can be entered from the rear, but this route is so much longer and more difficult than passing under the area where the roof was substandard that all three MSHA inspectors were concerned that mine personnel would use the haulageway to reach the power center instead of using the haulageway only to haul supplies as the Mine Operator insisted it would be used. The Respondent was only

opening up the area by removing debris and taking down roof where necessary so track haulage equipment could pass, insisting that that was all that was necessary since the area would only be used to haul supplies. The three inspectors required that loose brows be supported by roof bolts or taken down, and other work, as described in the order of withdrawal, be done. We emphasize that Mr. Bell had not previously inspected the area, other than superficially, before the three inspectors on July 22, 1977, went over every bit of it. The three inspectors were unanimous in the opinion that the roof and rib conditions observed by them during the inspection constituted an imminent danger. The area had not been posted with a danger sign although the miners had verbally been told to stay away from the area unless authorized to work on the roof rehabilitation. The three inspectors verbally issued a §104(a) order of withdrawal after completing their inspection. Then, the inspectors returned to the surface where a discussion was had with mine personnel who, although recognizing that the roof presently posed a danger, were of the opinion that the verbal orders issued to prevent employees from entering the area were adequate and no danger sign need be posted, and Management was of the opinion that its posted plan to rehabilitate the area was sufficient. The Inspectors and MSHA take the position that, since the roof and ribs were admittedly inadequately supported, there was a violation of 30 CFR 75.200 in the absence of dangering off the area. A verbal order to prevent entrance to the area is only effective as to miners who hear the order, so a physical sign is necessary warning miners to stay away. In this connection, the two Inspectors (Messrs. Hambric and McKinney) agree that an experienced miner should have been able to look at the mine roof after the fall and know enough not to continue under it. The witnesses agree that the roof control plan to rehabilitate the area was posted as required by the roof control plan whenever there had been an unplanned roof fall; however, MSHA is uncertain as to the relevancy of this fact since the Respondent has not been charged with violating this part of the roof control plan.

MSHA's Position on Each Allegation Under "New Matter" and Our Comment:

4. Responding to paragraph numbered ten of Respondent's Motion, Inspectors Hambric and McKinney state they have no exact recollection but the allegation is probably true.

COMMENT: A miners' vacation is normally taken about this time of the year.

5. Concerning paragraph numbered eleven of Respondent's Motion, the Inspectors agree that the allegations therein are

true except the two MSHA employees consider that several areas rather than "a few areas" had to have work done, and refer to the order of withdrawal for a description of what had to be done.

COMMENT: The difference of opinion appears to be a difference of opinion as to whether the area had to be made safe for pedestrian traffic or merely safe as a haulageway for supplies. There does not appear to be much difference between the parties as to the physical condition of the area, merely a difference of opinion among experts as to what was needed to be done.

6. Concerning paragraph numbered twelve, MSHA agrees that Management had verbally ordered that no one except authorized personnel enter the area, and we do not know when or how that order issued, so the allegations are true.

COMMENT: The area had not been dangered off and MSHA urges that, in view of the dangerous condition of the roof and ribs, a danger sign must be posted to prevent a violation of 30 CFR 75.200. Furthermore, MSHA is concerned that the verbal order would not preclude persons from approaching the power station by traveling under the roof area under discussion.

7. Concerning the allegation contained in paragraph numbered thirteen, as stated previously, MSHA agrees that such a plan was required after a roof fall and it had been posted. The allegation is true.

COMMENT: Posting of such a plan would not be in lieu of posting a danger sign.

8. Concerning the allegations in paragraph numbered fourteen of Respondent's Motion, because Mr. Bell is no longer a Government employee we were unable to discuss the matter with Mr. Bell. However, the allegations are supported in part by certain MSHA records, and we believe the allegations are probably true.

9. Concerning the allegations in paragraph numbered fifteen, the two Inspectors are uncertain as to what day Mr. Bell first saw the area of the unplanned roof fall, but agree it could have been July 20, 1977. The three inspectors went over the entire area so it took several hours rather than thirty minutes. The other allegations in the paragraph are true.

COMMENT: The reason the inspectors telephoned the MSHA office for advice was because, although they agreed the condition constituted an imminent danger, they were uncertain whether to follow through with what they had verbally told Respondent's personnel underground and issue a written §104(a) imminent danger order of withdrawal or instead to issue an order of withdrawal under §103(f) of the 1969 Coal Mine Act since there had been an unplanned roof fall which is an accident. The three inspectors were properly instructed by Mr. Bell's supervisor that where an inspector considers a condition of imminent danger exists, it is mandatory that a §104 (a) order of withdrawal issue even though the situation also meets some other provision of the Act (such as §103(f)). Thus, the three inspectors drafted and each signed and issued the subject order of withdrawal.

10. Concerning paragraph numbered sixteen of the Motion, the two inspectors insist that they observed four miners working approximately 200 feet in by the beginning of the area affected by the unplanned roof fall, so MSHA denies all but the last sentence of that paragraph.

COMMENT: The Inspectors were dissatisfied with some of the work which Management considered completed, which would be the reason for the above disagreement. The Inspectors observed loose bolts and loose brows (see order of withdrawal) and insisted the same be corrected. Management insisted that since the area would be used only to haul supplies, such work was unnecessary.

11. The allegation in paragraph numbered seventeen of the Motion is true.

COMMENT: Nevertheless, the two Inspectors were concerned that at some time miners may travel the haulageway to obtain access to the power center, so they insisted that places dangerous to pedestrian traffic in the area be corrected.

12. Concerning paragraph numbered eighteen, MSHA agrees, as stated previously, that the required plan to rehabilitate the area where the unplanned roof fall had occurred had been posted. MSHA agrees that Respondent's personnel did sincerely believe that it was not necessary to post a danger sign and make an entry in the preshift examination book, but the opinion of Respondent's personnel was erroneous and contrary to law. MSHA denies the allegation or reasoning of the second sentence of paragraph numbered eighteen.

COMMENT: Even though the conditions were less than an imminent danger, the fact that dangerous roof and rib conditions existed caused there to be a violation of 30 CFR 75.200 since no danger sign was posted. This is true even though the condition was being corrected before the inspection. Concerning the second sentence of paragraph numbered eighteen, inspectors often have a choice of mandatory safety standards that can appropriately be cited as a result of a particular condition or practice observed, and sometimes an inspector will cite only the standard of standards most pertinent or best supported by what the inspector personally observed. Since the three Inspectors did not have personal knowledge as to when the mine roof fell, the Inspectors cited 30 CFR 75.200 based on the conditions which each inspector had personally seen rather than the circumstantial evidence which would be required under the circumstances to support 30 CFR 75.303. Furthermore, a 30 CFR 75.303 violation would not have been an imminent danger. The failure to cite 30 CFR 75.303 is not evidence that the Inspectors did not consider that a danger sign must be posted. The Respondent's reasoning lacks validity.

13. Concerning paragraph numbered nineteen, MSHA denies the allegations contained therein.

COMMENT: Obviously Inspector Bell did not recognize that a condition of imminent danger existed when he observed the area earlier, but he did not proceed far enough into the area to recognize the potential of the problem. Mr. Bell merely saw enough to recognize that a MSHA mine roof control specialist should inspect the area, and then he left. Whether there was a 30 CFR 75.202 violation is not relevant to this proceeding. This is not a face area or near a face area, and even the administrative law judges are divided on the issue as to whether other than the first sentence of 30 CFR 75.202 relates to a mine area other than "at or near each working face." There was a violation of 30 CFR 75.200 which requires that 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. Obviously, Respondent recognized the roof and ribs in this area were inadequately supported or the verbal order requiring the miners to not enter without authorization would not have issued, but the area should have been dangered off so there is a violation of the mandatory safety standard. Considering the speed with which a loose brow can fall, we consider there was an imminent danger if pedestrian traffic were present, not otherwise. In this connection we note that the Respondent's personnel did assure the Inspectors that the area would only be used to haul supplies, but

the Inspectors were not satisfied because of the location of the power center and required additional work to be done.

14. The Office of the Solicitor suggests that \$220.00 is a reasonable amount to assess as a civil penalty for these reasons:

a. The Respondent is correct that there is no imminent danger in the event there is no pedestrian traffic, and Respondent insists that the haulageway would only be used to haul supplies.

b. MSHA inspectors admit that the power center can be reached by a route other than passing under the standard roof.

c. The Respondent was attempting to correct the condition before any inspector observed it.

d. There was a question between MSHA experts and Management experts as to whether the work was being done properly; however, the fact that Inspector Bell had to obtain the aid of MSHA roof control specialists demonstrates that the problem was somewhat complicated and lent itself to a difference of opinion among experts.

e. The Respondent was sincere in its erroneous belief that the verbal instructions to stay out of the area sufficed, without a danger sign.

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

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that the Respondent be, and hereby is ASSESSED a civil penalty in the agreed-upon amount of \$229.

Since the Respondent has paid the agreed upon settlement amount of \$220 for the alleged violation of 30 CFR 75.200, IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such alleged violation.

IT IS FURTHER ORDERED that the Respondent pay a civil penalty in the agreed-upon amount of \$9 for the alleged violation of 30 CFR 70.100(b) within 30 days of the date of this decision if such amount has not been paid to date.



John F. Cook
Administrative Law Judge

Distribution:

John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Karl T. Skrypak, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

September 29, 1978

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. MORG 78-339-P
Petitioner : A/O No. 46-01455-02001
v. :
: Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Michael V. Durkin, Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
Karl T. Skrypak, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

The Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. Subsequent thereto, MSHA filed a motion requesting approval of a settlement.

Counsel for MSHA stated in part as follows in its motion:

2. MSHA submits the assessment file which contains the order of assessment, the notices of violation, the computer printouts, the notices of termination, and the inspector's statements for all of the violations alleged herein.

3. Consolidation has already paid \$9.00 for the violation of Section 70.100(b) on January 30, 1976 as part of a general settlement of all respirable dust cases. Said settlement was negotiated through the Office of the Solicitor. This penalty has already been paid.

4. Consolidation Coal Company has agreed to pay \$160.00, the full proposed assessment, for the violation of § 75.309 on March 17, 1976.

Pursuant to an order of the Administrative Law Judge, information as to the six statutory criteria contained in section 110 of the Act was submitted. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

As stated by counsel for MSHA in the motion the settlement as to the notice of violation citing 30 CFR 70.100(b) is a part of a general settlement of many respirable dust cases.

A settlement statement was filed by counsel for MSHA in a number of prior cases, one of which is entitled Secretary of Labor, Mine Safety and Health Administration (MSHA), v. Bishop Coal Company, Docket No. HOPE 76X459-P, setting forth some of the background of these cases and reasons for approval of settlement. These cases have a long history, some of which is alluded to in the settlement statement of MSHA which refers to the case entitled Eastern Associated Coal Corp. (On Reconsideration En Banc), 7 IBMA 133 (1976); Eastern Associated Coal Corp., 7 IBMA 152 (1976), and a later Department of the Interior Secretarial stay of that decision. (This stay was later dissolved by an order of the Secretary of the Interior.)

In view of the background of these cases as reviewed in the above-described documents and the Board of Mine Operations Appeal's decisions referred to above, the actions of the Secretary of the Interior as relates to those decisions, the action of Congress in the passage of the Federal Mine Safety and Health Amendments Act of 1977, P.L. 95-164, and the stipulation for settlement, it is considered that it would be in the public interest, and in the interest of the parties hereto, to approve the proposed settlement.

As relates to the proposed settlement concerning an alleged violation of 30 CFR 75.309, in view of the fact that the proposed settlement is in the same amount as the original assessment of penalty, thus constituting no reduction in penalty, and in view of the disclosure as to the elements constituting the foundation for the applicable statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement as outlined above be, and hereby is, APPROVED.

Counsel for MSHA states that the proposed settlement penalty as to the alleged violation of 30 CFR 70.100(b) has been paid.

IT IS THEREFORE ORDERED that Respondent within 30 days of the date of this decision pay the agreed upon penalty of \$160 assessed in this proceeding as relates to the alleged violation of 30 CFR 75.309.



John F. Cook
Administrative Law Judge

Date Issued: September 29, 1978

Distribution:

Michael V. Durkin, Esq., Office of the Solicitor, Mine Safety
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-315-PM
Petitioner : A/O No. 34-00919-05001
v. :
: Portland Pit
GENERAL MATERIALS, INC., :
Respondent :

DECISION

Appearances: Barbara G. Heptig, Esq., Office of the Solicitor, U.S.
Department of Labor, Dallas, Texas, 75202
for the Petitioner;
Leroy Powers, Esq.,
Oklahoma City, Oklahoma, 73102 for the Respondent.

Before: Judge Stewart

Procedural Background

The above-captioned proceeding is brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act) 30 U.S.C. § 820(a) (1978). The hearing in this matter was held on September 17, 1979, in Oklahoma City, Oklahoma. Petitioner called one witness and introduced five exhibits. Respondent called a single witness. Both parties waived the rights to submit posthearing briefs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The two violations of mandatory safety standards at issue herein were alleged to have occurred at Respondent's Portland Pit on July 26, 1978. Inspector Russell Smith observed the alleged violations during the course of a regular inspection and in both instances he issued a section 104(a) citation.

The parties offered the following stipulations at the hearing:

(a) The number of annual man hours worked at the Portland Pit in 1977 was 18,110, and

(b) General Materials, Inc., has received no previous citations under the Mine Safety and Health Act of 1977.

There is no indication on the record that any penalty assessed in this proceeding would adversely affect Respondent's ability to remain in business.

Citation No. 00166186

Inspector Smith issued citation No. 00166186 alleging a violation of 30 CFR 56.14-1. 1/ He described the pertinent condition as follows: "V-Belt drive on #3 stacker conveyor was not guarded to protect workers." The operator placed a guard over the V-belt drive within the time set for abatement by the inspector, thereby demonstrating a normal degree of good faith.

The V-Belt drive observed by the inspector was located at the top of a conveyor. To reach this drive, a person would climb a 4-or-5 foot ladder and proceed approximately 120 feet up a walkway adjacent to the conveyor belt. A double railing extended along the walkway. The bottom railing was 18 inches and the top railing was 42 inches above the walkway.

Section 56.14-1 requires that drive pulleys and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded. The condition at issue was in violation of the mandatory standard as alleged. Inspector Smith and Naaman Gentry, Respondent's plant manager, agreed that the pulley in question was unguarded. Moreover, the pinch point was located where the V-belt rotated over the pulley, 10 inches above and out from the top railing. A person could contact this pinch point and suffer injury.

The respondent was negligent in that the condition was readily observable, but corrective action was not taken until after the issuance of the citation.

It was improbable that this condition would result in an accident or injury. Respondent's employees had occasion to work in the vicinity of the V-Belt drive only when repair or maintenance was necessary. The company rule on these occasions forbade work on conveyors or equipment when such machinery was in operation. Before such work was undertaken, a disconnect switch in the control tower

1/ 30 CFR 56.14-1 reads as follows:

Gears; sprockets; chains; drive, head, tailm 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.

was locked out. A second disconnect switch located rear the drive was also pulled. Since Respondent's employees were in the area only when the machinery was inoperative it was unlikely that the lack of a guard would result in an accident. If an accident were to occur, however, it could result in the severing of a hand or fingers.

Citation No. 00166187

The inspector issued Citation No. 00166187 alleging a violation of 30 CFR 56.11-12. ^{2/} He described the pertinent condition as follows: "One stand for guardrail on dredge was broken leaving an area without protection." The operator replaced the broken stanchion within the time set by the inspector for abatement, thereby demonstrating a normal degree of good faith.

The guardrail or barrier at issue was comprised of a chain supported by stanchions which had been placed at intervals of 8 feet. Because the stand was broken, the chain was hanging at a height of 18 to 24 inches, 16 to 18 inches lower than it would have otherwise, for a distance of 16 feet.

The guardrail and broken stand at issue were located along a walkway on the outer perimeter of a dredge. This walkway was used by the dredge operator when boarding and leaving the dredge. It was also used once every 2 weeks when the dredge was refueled.

Section 56.11-12 requires that openings near travelways through which men may fall shall be protected by railings or barriers. The condition was in violation of this mandatory safety standard as alleged. Because the stanchion had been broken, the chain would not protect those who used the walkway from falling into the water.

The operator was negligent in that the condition was known, yet corrective action had not been taken. The dredge operator told the inspector that repair efforts had already been contemplated. Even if mine management did not have actual knowledge, they should have known of the condition because it was visually obvious. The chain was hanging at a noticeably lower height.

It is probable that this condition would result in accident. The operator of the dredge walked through the area on a daily basis to get on and off the dredge and he had occasion to work in the area at least one every two weeks while refueling the dredge. It is

2/ 30 CFR 56.11-;2 reads as follows:

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.

unlikely that injury would result, however, if an accident were to occur. The inspector testified that an uninjured man would have no problem climbing back onto the barge. The dredge was stationery when in operation and there was no appreciable current in the pond. In addition, a company rule in effect at the time required that life jackets be worn to and from the dredge. Mr. Gantry testified that this rule was generally observed.

ASSESSMENTS

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

<u>Citation No.</u>	<u>Assessment</u>
00166186	\$35
00166187	30

ORDER

The Respondent is ORDERED to pay the amount of \$65 within days of the date of the decision.



Forrest E. Stewart
Administrative Law Judge

Distribution:

Barbara Heptig, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 501, 555 Griffin Square Building, Griffin and Young Streets, Dallas, TX 75202 (Certified Mail)

Leroy Powers, Esq., 620 100 Park Avenue Building, Oklahoma City, OK 73102 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 79-24
Petitioner : A/O No. 36-00823-03016
v. :
: Jane Mine
KEYSTONE COAL MINING CORPORATION, :
Respondent :

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, MSHA;
Jerome H. Simonds, Esq., Freedman, Levy, Kroll and Simonds, Washington, D.C., for Respondent, Keystone Coal Mining Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Mine Safety and Health Administration against Keystone Coal Mining Corporation. A hearing was held on December 13, 1979.

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

- (1) The operator is the owner and operator of the subject mine.
- (2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) I have jurisdiction.
- (4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.
- (5) A true and correct copy of the subject citation was properly served upon the operator.

(6) Copies of the subject citation and termination of the violation at issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance but not for purposes of establishing the truthfulness or relevancy of any statements asserted therein.

(7) The alleged violation was abated in good faith.

(8) Imposition of any penalty in this proceeding will not affect the operator's ability to continue in business.

(9) The operator is large in size.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. Vol. I, 1-103). 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. Vol. I, 103). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. Vol. II, 2-6).

Bench Decision

The bench decision is as follows:

This case is a petition for the assessment of a civil penalty under Section 110 of the Act. The alleged violation is of 30 CFR 75.807. This mandatory standard provides:

All underground high-voltage transmission cables shall be installed only in regularly inspected air courses and haulageways, and shall be covered, buried, or placed so as to afford protection against damage, guarded where men regularly work or pass under them unless they are 6-1/2 feet or more above the floor or rail, securely anchored, properly insulated, and guarded at ends, and covered, insulated, or placed to prevent contact with trolley wires and other low-voltage circuits.

The citation sets forth, in part, that the 4160 volt high-voltage cable was not protected from damage nor was it guarded where persons were required to cross under it. At issue here is the provision in 75.807 that guarding be provided "* * * where men regularly work or pass under" the high-voltage cable.

There is no dispute that the cable in question was high voltage within the purview of the mandatory standard. In addition, there is no dispute that the cable was 4 feet from the floor. During the course of the hearing, I earlier ruled that "regularly" modified both "work" and "pass under." I adhere to that ruling.

The travelway in question, along which this high-voltage cable was hung, passes by two crosscuts identified as "C" and "D" on Respondent's Exhibit No. 1. The evidence shows that in crosscut "D," there was a supply car with some roof bolts and also some other junk in it. In crosscut "C," there were 15 posts.

The inspector testified that he cited these areas as ones where men regularly worked or would pass under the cable because miners would go into these crosscuts to get the materials there. However, the operator's safety inspector testified that by the time the citation was issued, the working face had advanced 200 more feet beyond this area and that there were crosscuts further inby where posts and other materials were stored. Accordingly, the operator's safety inspector testified that even if these crosscuts previously had been supply areas, they no longer were so. Moreover, the operator's safety inspector testified that on the day before the subject citation was issued, the inspector had traveled further inby the cited area past new crosscuts which now constituted present supply areas. I accept the testimony of the operator's safety inspector.

It appears, therefore, that at the time the subject citation was issued, the inspector actually knew that the areas cited here were not places where men working in the section would ordinarily go to get supplies. The Solicitor expressly admitted that the fact that the posts or other materials in crosscuts "C" and "D" might be obtained in an emergency or when other supplies ran out would not bring those crosscuts within the scope of the mandatory standard.

In light of the foregoing, I conclude that men did not regularly work or pass under the high-voltage cable with respect to crosscuts "C" and "D."

The high-voltage cable entered the transformer box in the crosscut identified as "B" on Respondent's Exhibit 1. I reject, as unpersuasive, evidence that either a man or a toolbox was in that crosscut on the day the citation was issued. No such contention is made in the citation itself. The allegation made at the hearing is belated and not probative. Men could conceivably go under the high-voltage cable to reach the transformer box, although this would be very unlikely because, as the operator's safety inspector testified, the cable was 4 feet off the ground at the entrance to this crosscut and then ran down to 2 feet from the ground where it entered the supply car in the crosscut. Even more importantly, the operator's safety inspector testified that although the transformer could malfunction, it rarely breaks down. I found the operator's safety inspector a persuasive witness. I accept his testimony.

Based upon the testimony of the operator's safety inspector and upon his description that a breakdown in the transformer box is a rare occurrence, I find that men would not regularly work or pass under the high-voltage cable in order to reach the transformer box. Accordingly, I find that there was no violation of this mandatory standard with respect to crosscut "B."

On the basis of the foregoing, the citation must be vacated.

There is, however, another basis for vacating the citation. The mandatory standard requires that the high-voltage cable be guarded unless it is 6-1/2 feet or more above the floor. The inspector testified that at the dinner hole and other places, high-voltage cables are "additionally" guarded. However, no sample of a high-voltage cable was introduced into the record and there was no evidence from MSHA as to precisely how much or what kind of guarding is required by 75.807. From the record MSHA has made before me, it does not appear what 75.807 requires of the operator in the form of guarding; whether the operator knows what these requirements are; whether any guarding was present here and, if so, why it did not satisfy the standard; and finally whether any requirement of additional guarding can be read into the standard. On this basis also, the citation would have to be vacated.

In light of the foregoing, I conclude there was no violation. The citation is vacated, the Solicitor's petition is dismissed.

The foregoing bench decision is hereby AFFIRMED.

ORDER

It is hereby ORDERED that Citation No. 229408 be VACATED and the instant petition be DISMISSED.



Paul Merlin
Assistant Chief 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)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 79-0029-P
Petitioner : A.O. No. 44-05007-03002 V
v. :
: Mine No. 1
GRUNDY RED ASH COAL COMPANY, :
Respondent :

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania, for the
Petitioner;
Terry L. Jordan, Esq., Grundy, Virginia, for Respondent.

Before: Judge Stewart

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a). The Petition for Assessment of Civil Penalty alleged two violations by Respondent. A hearing was held on these matters in Grundy, Virginia, on September 26, 1979. Two exhibits were admitted in regard to Citation No. 318796 and two witnesses were called. Citation No. 00318796 had previously been assessed at \$600 and Citation No. 00318797 had previously been assessed at \$500 by the MSHA office of assessments.

Citation No. 00318796 issued on December 8, 1978, alleging a violation of 30 CFR 75.200. The inspector described the condition or practice at issue as follows:

Roof bolts were being spaced 5 to 8 feet apart lengthwise and crosswise beginning at the faces of the No. 1, 2, and 3 entries and extending outby for a distance of 24 feet in the No. 1 entry, and 40 feet in the No. 2 and 3 entries of the 001 section. Mountain cracks were present in the No. 1 entry and mine roof was being shot down by explosives in the No. 2 entry which was in a roll. The approved roof control plan requires that roof bolts be installed on 4 feet centers lengthwise and crosswise.

A notice of subsequent action, issued on December 11, 1978, stated: "The mine was flooded by water during the weekend of December 9, and 10, 1978, and had to be pumped before work could begin to abate this citation. Therefore more time is granted."

The citation was terminated by a notice issued on December 18, 1978, which stated: "Roof bolt spacing in the No. 1, 2, and 3 entries of the 001 section was reduced to 4 feet centers lengthwise and crosswise by installing addition roof bolts where required."

Citation No. 00318797, issued on December 8, 1978, alleging a violation of 30 CFR 75.316, stated:

Line brattice or other approved devices was not provided in the No. 1 entry which had been developed 66 feet, the No. 2 entry which had been developed 60 feet, and the No. 3 entry which had been developed 40 feet from the last open crosscut's of the 001 section. The approval ventilation plan requires that line brattice or other approved devices be continuously used from the last open crosscut in crosscuts to the face of the 001 section.

This violation was abated on December 11, 1978, by a notice of subsequent action stating: "Line brattice was installed from the last open crosscut of the No. 1, 2, and 3 entries of the 001 section to within 10 feet of the face of each place."

The testimony regarding the financial condition of the mine along with the statutory criteria to be considered in the assessment of a civil penalty indicated that the operator was \$150,000 in debt and had lost \$300,000 on the mine. Some of the mine equipment had been repossessed and the mining of the 25 inch coal seam was unprofitable. After this testimony concerning the effect of a civil penalty on Respondent's ability to remain in business had been given, the parties entered into further settlement negotiations and agreed upon the payment of \$300 for each violation.

Petitioner moved on the record that the agreement be approved because:

The operator's ability to continue in business would be questionable should the entire amount of the penalties originally assessed for the violations be affirmed and the Respondent ordered to pay. Although the operator was negligent and the gravity was high in both instances, Mine No. 1 was a small mine employing three or four men and producing only 8,750 tons of coal per year. The operator demonstrated good faith in abatement of the violation.

At the conclusion of the hearing the settlement negotiated by the parties was approved by the Administrative Law Judge. The approval from the bench of the settlement agreement is hereby affirmed.

ORDER

The operator is ordered to pay MSHA the amount of \$600 within 30 days of the date of this order.



Forrest E. Stewart
Administrative Law Judge

Distribution:

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(Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 28 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-69-PM
Petitioner : A.C. No. 06-00018-05001
v. :
Respondent : Docket No. WILK 79-70-PM
OTTAWA SILICA COMPANY, : A.C. No. 06-00018-05002
Respondent : Lantern Hill Mine and Mill

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Richard E. Blodgett, Division Manager, Ottawa Silica Company, Ledyard, Connecticut, for Respondent.

Before: Administrative Law Judge Michels

These proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitions for assessment of civil penalty were filed by MSHA in both dockets (WILK 79-69-PM; WILK 79-70-PM) on January 18, 1979, and timely answers were filed by Respondent. The cases were heard on both docket numbers in Middletown, Connecticut, on October 18, 1979, at which both parties were represented.

Docket No. WILK 79-69-PM involved 20 alleged violations. Docket No. WILK 79-70-PM involved two alleged violations. Evidence was received as to each citation and a decision was rendered from the bench. These decisions as they appear in the record, with certain necessary corrections or changes, are set forth below.

Preliminarily, the Petitioner moved to withdraw its petition with regard to Citation No. 212903 (Docket No. WILK 79-69) because the citation was vacated. The motion was granted and the petition was withdrawn. Petitioner then moved to amend Citation Nos. 212894, 212895, 212904, 212906, and 212908 to read 56.12-30 instead of 56.12-2. The Respondent moved to dismiss those citations. The Petitioner's motion was denied and it moved to withdraw its petitions with respect to those five violations. The motion to withdraw the petition was granted and as to those citations the petition was dismissed with prejudice.

Citation Nos. 212896, 212898, 212899, 212900, 212907, 212909, and 212911, issued July 11, 1978

The following is the bench decision on these citations found at pages 54-60; 79-82; 91-93; 102-104; 112-113; 123-124; and 139-142 of the transcript:

Citation No. 212896

This concerns Citation No. 212896.

The inspector charged as the condition or practice: "Mandatory standard 56.12-32 was not being complied with in that the electrical cover plates were not replaced in storage building by shop." The standard cited reads: "Inspection for cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

The first question is whether or not there has been a violation. I believe that the facts in this are practically undisputed. The evidence and the testimony shows that there was a cover plate missing on a particular junction box, as charged. Accordingly, I find a violation of mandatory standard 56.12-32 * * *.

First, as to the history of violations, a document has been received, P-36, which shows that for the Lantern Hill Mine and Mill, the Ottawa Silica Company was assessed on a total of 24 citations in 1978. I will find that this is no appreciable history of past violations. I also note, in connection with this case * * * that 1978 was the first year that the law became applicable to this operation.

The next criterion is the appropriateness of the penalty to the size of the operator. The evidence shows that in this operation there were 27 people or miners engaged in the work, and 65,000 tons of material were produced annually.

Counsel for MSHA has indicated that this was a medium-sized company. He has presented no particular evidence by which I can measure the difference between companies, but in the circumstances, I will find, at least for the purpose of these violations, that this is a small-to-medium size, and may well be a medium-sized company.

No evidence was adduced that the penalties to be assessed here, or this penalty, will affect the operator's ability to continue in business.

It was further stipulated that the operator abated this, as well as all the citations which will be considered in these dockets, rapidly and in good faith, and I so find.

The fifth criterion would be with regard to gravity. Normally, the fact a cover is off from an electrical appliance or enclosure would be considered a serious violation. I will take into account the fact that the evidence shows that this receptacle or container was out of the practical reach of a miner standing on the floor. Of course, it is always possible for someone, under some circumstances, to stand on a chair or other object and to reach it. In the circumstances, however, I would find that it is slightly serious.

The final criterion is negligence. In this case the evidence shows that prior inspections under the predecessor Act did not reveal the existence of this lack of a cover. The testimony further shows that it is in an out-of-the-way spot that would be easily overlooked. Furthermore, the inspector, while he did testify that the operator should have known, is, I believe, a little unclear in this regard. And his observations, made in his report, may even show the inconsistency. Accordingly, and in these circumstances, especially since this was the first inspection made under the new Act, I would find a small degree of negligence.

The assessment is as follows: Taking into account the good faith and rapid compliance shown by the operator, the fact that this was the first inspection under the Act then recently made applicable to the operator, and the further facts that there were, as I have found, only a small degree of gravity as well as negligence, I will assess only a nominal penalty in this instance, which will be \$10.

That completes my decision on this citation.
(Tr. 54-60).

Citation No. 212898

This is the decision on Citation No. 212898.

And if I didn't say so in the beginning, I should state here and now that all of these citations are in WILK 79-69-PM.

The inspector charged as follows: "Mandatory standard 56.12-32 was not being complied with in that the cover plates on the electrical equipment were not replaced in electric motor storage area." This charges the violation of the same mandatory standard as the previous citation, and I will not repeat the standard.

Again, there is no dispute about the fact of the violation. The inspector has charged the lack of cover plates, and it was his testimony that there were two junction boxes involved. The evidence suggests that in the area there were three junction boxes, and there is no dispute that none of these had cover plates on them. And, moreover, there is no dispute about the testimony that there was no testing taking place at the time.

And in light of these circumstances, and without repeating my previous remarks, but which are also applicable here, I find that in this citation there is a violation, as charged, of 30 CFR 56.12-32.

It is unnecessary to repeat my findings as to the criteria that are generally applicable. I need find, in addition here, only specifically as to gravity and as to negligence.

So far as the gravity is concerned, it appears to me that the seriousness is somewhat greater, in that, as pointed out by counsel, three junction boxes were involved. It is also shown that some of these junction boxes are out on the outside of the wall of the shed, and were accessible to a miner, which, in my view, would make it a more serious violation.

Furthermore, at some point consideration should be given to the fact that there were relatively large numbers of similar conditions which have been charged in this proceeding. I could not take that into account in the first citation because there was no evidence as to other violations at that point. However, at this time it is beginning to show more of a picture of a failure to replace or to install cover plates on these junction boxes. I will take that into account. I will find, as to this citation, that it was serious.

So far as negligence is concerned, my comments about the fact that the showing is now of a failure in a number of instances to have the cover plates installed, and thus I think would show somewhat more negligence than it was possible for me to find on the previous citation. Nevertheless, and in spite of all that, I will continue to take into account the fact that the operator did show rapid good faith in compliance, and furthermore, and which I think is important, that this was the first occasion in which the mine was inspected under the Act recently made applicable. I think that is important as a mitigating circumstance because, in these circumstances, the mine and the operator is being for the first time advised precisely and concretely as to what the requirements are.

Now, that's not a complete defense, because the law doesn't allow such a defense, but it is a mitigating circumstance, in my view.

Taking all those factors into account, I will assess the penalty of \$25 for this violation.

That completes my decision on this citation.
(Tr. 79-82).

Citation No. 212899

This is Citation No. 212899.

The inspector found as the condition or practice as follows: "Mandatory standard 56.12-32 was not being complied with in that an electrical cover plate was not replaced in upper storage shed."

The mandatory standard cited is the same as that previously quoted in the record, and I won't repeat that.

The evidence presented shows that there was a violation of this mandatory standard in that in the upper storage shed an electric cover plate was either not replaced or missing. The operator does not dispute the evidence. Accordingly, I find that on this citation there was a violation of 30 CFR 56.12-32.

I need make findings on only two of the criteria which, are gravity and negligence, since the findings on the other criteria are applicable to this citation also.

Gravity. In this instance, since the testimony shows that the particular junction box was not readily accessible, in fact almost inaccessible, I find that there is a slight degree of gravity or seriousness.

So far as negligence is concerned, the box was located in a relatively remote location. For that reason, ordinarily this would not be, in my view, a high degree of negligence. However, I do have to take into account that there is a pattern shown in this record of a number of such boxes. I agree with counsel that a thorough inspection should have revealed these violations or these conditions.

Nevertheless, I still continue to take into account the fact that the operator did comply in good faith rapidly, and also the fact that this was an initial inspection under a newly applicable Act. It is true, of course, that the law was previously applicable under the old "Metal/Nonmetal" Act,

but it did not carry the penalty. For such reason, I believe that the enforcement procedures may have been somewhat different, and that is the reason for my view that, in a sense, the operator was newly brought under an Act for which MSHA had adopted new procedures for enforcement.

Under all these circumstances, I would find ordinary negligence.

The penalty I will assess is, in this instance, \$20. That completes my decision on this citation. (Tr. 91-93).

Citation No. 212900

This is my decision on Citation No. 212900.

The inspector charged as the condition or practice he saw: "Mandatory standard 56.12-32 was not being complied with in that the cover plate was not replaced on electrical equipment over Flour Bagger." I have previously quoted the standard referred to and I will not repeat that.

As to the fact of the violation, the only evidence received shows that the cover plate was not in place, as alleged, on the box over the Flour Bagger. Accordingly, I find that there was a violation of 30 CFR 56.12-32. The prior findings on the points applicable have already been made and they would not be repeated here. They are applicable to this citation.

As has been pointed out, this violation is very similar to the previous citation, and I will decide it on the same basis, and I will not repeat all of the comments that I have made there.

I think this should be noted, however. I agree with counsel to an extent that as we proceed, a picture of a large number of violations seems to be emerging. However, I think it should be noted that these violations, so far as I can see, are all found on the same date. If the conditions were such that they were found over a period of time, I think it would be much more significant. I agree, however, that there is some significance in the large number, but not to the extent it would be had this been a continuous series of violations over a period of time.

Accordingly, as to gravity, I find a slight seriousness, and as to negligence, ordinary negligence.

Taking into account all the facts that I have previously mentioned, I hereby assess the same penalty as I did for the previous citation, namely, \$20. (Tr. 102-104).

Citation No. 212907

This decision is on Citation No. 212907.

The condition or practice cited by the inspector was as follows: "Mandatory standard 56.12-32 was not being complied with in that the cover plates were not replaced on electrical equipment in dryer control room." The standard cited has been previously quoted.

The evidence shows, and there has been no evidence to the contrary, that the cover plate was missing as charged. Accordingly, I find a violation of 30 CFR 56.12-32.

As noted by counsel for MSHA, this violation is more serious than the others in that the electrical junction boxes were accessible, and there was more than one involved. I find, in the circumstances, it was a serious violation. For reasons previously stated, I find, in this instance, ordinary negligence. However, I do take into account in the assessment those factors previously mentioned as to other citations where applicable.

In all the circumstances, I find and assess a penalty for this violation of \$35. (Tr. 112-113).

Citation No. 212909

This is Citation No. 212909.

The inspector charged as the condition or practice as follows: "Mandatory standard 56.12-32 was not being complied with in that the cover plates were not replaced on electrical equipment at dryer." I have already quoted the standard referred to and will not repeat it here.

The evidence shows, and there has been no evidence to the contrary, that there was a violation as charged in this citation, namely, that a cover plate was not in place on the electrical equipment at the dryer. Accordingly, I find, as to this citation, a violation of 30 CFR 56.12-32, as charged.

A finding as to the generally applicable criteria are incorporated with reference to this citation.

On "gravity," it appears that this may not have been quite as serious a violation, due to the fact that the electrical box was relatively inaccessible. I will take that into account. Nevertheless, I find this to be a relatively serious violation. I include in this finding, however, my remarks previously made as to the gravity of these junction box violations.

On "negligence," I also include my prior remarks. In general, it is the kind of violation which the operator knew or should have known about, and I find ordinary negligence.

Taking into account the various considerations mentioned, I hereby assess the penalty for this violation of \$25.

(Tr. 123-124).

Citation No. 212911

This is the decision on Citation No. 212911.

The inspector charged as the condition or practice as follows: "Mandatory standard 56.12-2 was not being complied with in that the electrical cover plates were not replaced on electrical equipment in hawk shed." It should be noted here that the inspector testified that citation 56.12-2 was an error. The number "3" was omitted, and it should read, "56.12-32."

This standard has already been quoted and will not be repeated here.

The first question is whether or not there was a violation of the standard. I accept the evidence, there being nothing to the contrary, that this was an inactivated or deenergized circuit. It had no electricity in it, and, therefore, could not have harmed any miner. The issue, obviously, is the fact of violation, however, and whether that takes it outside of the standard. Counsel for MSHA contends that even though the circuit is inactive, the standard continues to apply, and Mr. Blodgett's safety director for the operator contends that it should not apply in such circumstances.

It seems to me that the clear wording of the standard would make it applicable to a deactivated circuit. If the circuit is abandoned, as I understand it, it should be removed, otherwise the standard does apply. I can appreciate that that may appear to be a strict interpretation--perhaps it might even be described as technical. However, I would note that we are here dealing with a number of

instances in which electrical boxes have been removed and not replaced. There is, therefore, considerable reason to believe that had this circuit been reactivated, it would have been without the cover box. Thus, it is not as technical as it may seem.

I do find, therefore, under those circumstances, that that standard is applicable, even to a circuit that is temporarily out of use. The evidence is, and there is no dispute, that the cover plate or cover plates were missing. And I find that to be a violation as charged of 30 CFR 56.12-32.

I need not repeat here my finding on all those criteria generally applicable. I will mention only those having to do with gravity and having to do with negligence. As to gravity, it is clear, as I found, that the circuit was inactive, that there was no hazard. Accordingly, I find this to be nonserious.

As to negligence, I find that, in general, it was either known or should have been known that this cover was missing. However, I incorporate my previous findings, which include certain mitigating factors as far as negligence is concerned.

In light of all those circumstances, I don't believe that the full penalty requested by the Assessment Office or that requested by counsel is merited. The fact that there was no likelihood of injury is a direct factor in this instance, and I will fine the nominal penalty of \$10 for this violation.
(Tr. 139-142).

The above bench decision with reference to citations 212896, 212898, 212899, 212900, 212907, 212909 and 212911 is hereby AFFIRMED.

Citation Nos. 212897 and 212912, issued July 11, 1978

The following is the bench decision on these citations found at pages 183-189 of the transcript.

The citations here being considered are Nos. 212897 and 212912.

In the first such citation, the inspector charged: "Mandatory standard 56.4-11 was not being complied with in that the abandoned electrical wiring in the oil storage shed was not removed." He charged a violation of mandatory standard 56.4-11.

In Citation No. 212912, the inspector charged: "Mandatory standard 56.4-11 was not being complied with in that the abandoned electrical wiring was not removed from the hawk shed."

The standard so referred to reads as follows: "Abandoned electrical circuits shall be de-energized and isolated so that they cannot become energized inadvertently."

The inspector, as to both of these citations, testified in effect, at least to his view, that these were abandoned electrical circuits. Furthermore, there appears to be no dispute that the circuits in question in both of the citations were deenergized.

The inspector further testified that in his view, the circuits should have been completely removed to be considered as isolated. There is testimony, and I don't believe it is disputed, that in both instances there was a separation between what you might call the incoming energized wires and the circuits that are in question. In one instance it is not clear whether energy was coming into that particular building or not. And in the other instance--that is, 897--it is clear that there were live wires in the building.

In the case of Citation No. 212912--that is the circuit in the hawk shed--the evidence is that it was, subsequent to this citation, activated and put in service. The initial question, therefore, is whether, in that instance, that was an abandoned circuit. It is evident, I think, that whether or not a circuit is abandoned would have to be judged on the circumstances of a case involving, I suppose, circumstances like the length of time it had been not used and other circumstances which would indicate the likelihood it would ever be used. We have few, if any, such circumstances as shown here except the time it had [been out of use which was], as I understand it, or at least counsel argued--for something like 6 months. The fact of the matter is that it was not ultimately abandoned, because it was restored to use.

It would be my conclusion as to that citation that there is just not a sufficient preponderance of the evidence to show the abandonment at the time the citation was made. In fact, I would think that the evidence would tend to show to the contrary, that it was not abandoned.

Accordingly, as to Citation No. 212912, I find there was no violation, and that citation should be vacated, and the petition dismissed as to that citation.

Citation No. 212897 is in a different category. There is no evidence that it was restored to use. I don't recall there being any real dispute that this, in fact, was an abandoned circuit, and I will so find.

It was deenergized. The sole question is then, whether in these kind of circumstances, with the separations involved, and considering that it had not been removed, was it, in fact, isolated?

I suppose I would have to agree with counsel for MSHA that the circumstances would surely vary as to whether or not a particular abandoned circuit was, in fact, isolated or not isolated. The situation that he mentioned of wires actually crossing each other would not strike one as isolation, even though they might be separated by some insulation. In this case, there was a much greater gap. The live circuit was separated from the deenergized and abandoned circuit by about a foot or foot and a half of space. Now, the energized circuit was in a conduit, and as I understood the testimony, which was not disputed, covered by some sort of a plate.

Preliminarily, I would find--and this is subject to reconsideration if cases are found to the contrary--but I would find that the isolation required is not necessarily removal. I would concede that in perhaps some cases removal would be the only way to complete the isolation. But the question is whether that was required in this instance. I further note that the standard, itself, does not absolutely require removal, nor should it.

It seems to me that the operator in this instance had, at least in a certain sense, isolated--that is, separated--quite clearly the energized from the abandoned circuit. The question is, had it been isolated sufficiently to satisfy this particular standard? I don't think the showing here is adequate to show, by a preponderance of the evidence, that it had not been so isolated sufficiently. In other words, the two circuits were clearly separated. It would, in all probability, take an electrician to rewire--and the evidence supports that--the particular circuitry.

The circuitry in this instance was, according to the testimony--not hidden or concealed. It is difficult for me to understand how, at least in the kind of circumstances, MSHA could reasonably justify that this could be inadvertently energized. My ultimate or general conclusion would be that if MSHA would require a greater isolation than was employed in this instance, that the regulations would have to be made clearer.

Accordingly, in light of that, I find also that Citation No. 212897 was not proved, and I therefore vacate that citation and dismiss the petition as to it.

As I stated, however, I make that decision subject to a reconsideration if there is a body of law holding to the effect that, in general, isolation means a complete removal.

If I am asked to reconsider this, it should be brought to my attention as quickly as possible, and before the transcript is finished and received.

That completes my decision on these two citations.

The above bench decision is hereby AFFIRMED.

Citation No. 212901, issued July 11, 1978

The following is the bench decision on the above citation found at pages 199-201 of the transcript.

This is Citation No. 212901.

The inspector found the condition or practice as follows: "Mandatory standard 56.9-11 was not being complied with in that the P & H crane had cracked windows." And the mandatory standard cited reads as follows: "Cab windows shall be of safety glass or equivalent, in good condition, and shall be kept clean."

The evidence received, which has not been disputed, shows that the window in the crane was shattered. That, therefore, is a violation of this standard, and I so find. In other words, I find a violation of 30 CFR 56.9-11.

The finding as to the general criteria has already been made.

I have limited this to findings on criteria and gravity, and what degree. First, the gravity.

The inspector testified that this could affect a miner or the operator of the machine in two ways. He could be cut from broken glass. Also, it could affect his visibility. It seems to me that in the circumstances, and based on the testimony, this is a serious violation. On "negligence," the inspector testified that, in his view, the operator should have been aware of the condition. This is somewhat inconsistent with his statement made on his report at the

time of the citing of the citation, in which he stated that it could not have been known or predicted. The inspector, as previously noted, has explained this or attempted to explain this difference or inconsistency.

It seems to me that, in general, the fact of the shattered glass is readily noticeable, and should be observed or made known by someone. In this instance, the inspector did not know how long the glass had been shattered. There is the possibility that this may have happened just before it was observed and had not been reported, although there is no evidence to that effect.

But considering all the circumstances, and also taking into account the good faith and rapid abatement, it would be my belief that the sum assessed by the Assessment Office would be appropriate, and I hereby assess a fine of that amount, namely, \$26.

That ends my decision on this citation.

The above bench decision is hereby AFFIRMED.

Citation No. 212902, issued July 11, 1978

The following is the bench decision on the above citation found at pages 245-249 of the transcript.

This concerns Citation No. 212902, wherein the inspector testified that he found a condition or practice as follows: "Mandatory standard 56.12-68 was not being complied with in that the transformer enclosure was not locked."

The standard so referred to reads as follows: "Transformer enclosure shall be kept locked against unauthorized entry."

The first consideration is whether or not a violation occurred. The testimony received indicates that there was a large overall enclosure, and as I understand it, it was separated into two parts by a fence. On one side, which is owned and operated and maintained by the power utility company, there was what might be described as a transformer. I don't think that it is really disputed. On the other side, which is operated and maintained by the company, there is other equipment, and this has been generally described as a cutoff switch. The inspector did not go into the enclosure. He did not feel it was safe to do so and so he did not testify as to what precise equipment was on either side. That information comes from the testimony of Mr. Partridge, a witness for the operator.

The testimony further shows, and there is no dispute, that the utility side of the enclosure was locked, and on the company side of this fence or outside enclosure, the lock was not secured. In other words, it was open to entry. However, the equipment within that company side, according to the testimony, was in a locked container or separate enclosure.

I suppose the issue becomes perhaps somewhat technical at this point. I think that the argument of the representative of the operator here is ingenious, in a way, although I would say that I could not accept that, in my view. This general enclosure was a transformer enclosure within the meaning of this Act. It is true that there was this separation, but I don't believe, and I so find, that that keeps it from being an enclosure as defined in or within the meaning of the regulation.

There is some testimony that there would be no danger in going into that enclosure on the company side. However, that testimony came from Mr. Partridge, who is not an electrician. I have to believe that that entire apparatus was enclosed for a purpose, and that was to keep people out from possible danger, and of course, in addition to that, to the general security of the area.

I think it is an integrated whole. I don't see how you could separate the elements of this whole in this kind of a situation. There has to be some connecting link. I don't think the evidence is clear as to what the dangers might or might not be on that connecting link, should there be an unauthorized entry. But even so, as counsel for MSHA has stated, the general danger around such an installation is so great that it would seem to me that it would be flirting with possible injury to construe this regulation so narrowly that it would not cover such an enclosure as a transformer enclosure.

In other words, to be more specific, I would interpret it as the transformer and all appurtenances thereto, as covered by this regulation. Since it was not locked, it did violate the standard, and I so find.

I find here that the failure to keep this enclosure locked violates 30 CFR 56.12-68.

There are only two criteria I have to make findings on, the others having already been made heretofore. The first is the gravity. I believe it is very serious, and I so find, because of the danger of electrocution.

So far as negligence is concerned, it is a condition which I believe the operator knew or should have known in such enclosures. There would seem to me to be very few excuses for it remaining unlocked. Accordingly, I find that this was more than ordinary negligence on the part of the operator.

I should add, as far as the negligence is concerned, there was no evidence put in as to why this particular enclosure remained unlocked, or any information which might tend to mitigate the negligence.

In all those circumstances, I would not assess as high a penalty as the Government counsel has asked. I again consider the operator's good faith and rapid abatement in this matter. I will assess a penalty of \$100 for this violation.

The above bench decision is hereby AFFIRMED.

Citation Nos. 212905, 212910, issued July 11, 1978, and Citation No. 212913, issued July 13, 1978

Citation No. 212905 alleged a violation of 30 CFR 56.12-2 which states that electrical equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed. The parties agreed to settle this case for the amount originally assessed, \$24. I hereby approve the settlement.

Citation No. 212910 alleged a violation of 30 CFR 56.11-2 which states that crossovers, elevated walkways, elevated ramps and stairways shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided. The parties agreed to settle this case for \$24, the amount originally assessed. I hereby approve the settlement.

Citation No. 212913 alleged a violation of 30 CFR 56.4-23 which states that firefighting equipment which is provided on the mine property shall be strategically located, readily accessible, plainly marked, properly maintained, and inspected periodically. Records shall be kept of such inspections. The parties agreed to settle this case for \$26, the amount originally assessed. I hereby approve the settlement.

I hereby REAFFIRM my approval from the bench of these settlements.

Docket No. WILK 79-70-PM

Citation No. 212914, issued July 13, 1978

The following is the bench decision on this citation found at pages 264-266 of the transcript.

This is Citation No. 212914.

The inspector cited, as the condition or practice, the following: "Mandatory standard 56.14-1 was not being complied with in that the guard for the flour screw V-belt drive was not guarded completely."

The inspector cited 56.14-1, which reads as follows: "Gears, sprockets, chains, drive, head, tail and take-up pulleys, fly wheels, 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."

As I previously indicated, the only evidence received is the testimony of the inspector, as well as the documents and that indicates that a part of the V-belt on this flour screw drive--V-belt drive--that is the motor end of the drive, was not guarded. Clearly, it seems to me the standard covers that. There was an exposure of moving parts, which, if contacted by persons, could cause injury.

Accordingly, I find there was a violation of mandatory standard 30 CFR 56.14-1, as charged.

These are consolidated dockets. I have already made the findings as to all of the statutory criteria except for gravity and for negligence.

On gravity, I agree with counsel for MSHA that this is a serious type of violation, and I so find, that it is serious, because an operator or any miner or person near the machine may become entangled, either through his clothing or his person, and become injured seriously. The inspector testified that the operator should have been aware of the violation, because a complete inspection had been made previously. I do note the comments and contentions of Mr. Blodgett, that the operator did have some question under some circumstances about the parts of the machines to be covered. And he does--and he also emphasized the fact that this V-belt was partly covered. However, on the basis of the evidence that has been received in this record, it seems clear to me that it should have been covered, and I find no ambiguity, really, in--or any question, really, about whether or not that end should have been covered. And under the circumstances, the operator should have known about it, and I find, therefore, ordinary negligence.

I take into account those factors of mitigation applicable that I previously mentioned. I believe that the penalty assessed by the assessment officer, which was \$38, is appropriate for this violation, and I will make the same assessment.

That completes the decision on this citation.

The above bench decision is hereby AFFIRMED.

Citation No. 212915, issued July 13, 1978

The following is the bench decision on the above citation found at pages 320-323 of the transcript.

This is Citation No. 212915. The inspector cited as the condition or practice the following: "Mandatory standard 56.5-3 was not being complied with in that the loose material on the quarry face was not scaled after blast."

I have to make a correction on that. As I read the inspector's condition or practice statement, it starts, "Mandatory standard 56.5-5." The inspector has testified that that is not a 5, and should read "56.3-5."

Now, then, that particular standard reads: "Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the area shall be barricaded and posted." That's the end of the quotation.

The first question is the fact of the violation. The evidence that has been received on this was described by Mr. Kramer as somewhat confusing, and I will agree with that. I think it is confusing, and in some respects contradictory and difficult to follow. However, it seems to me that there is no doubt that on this quarry face there was, at some point, loose material, and that was recognized by the operator. The evidence shows, by the testimony, as well as in documentary form, that a backhoe on the 12th did do some scaling work. The inspector also testified that he did see a backhoe on the 12th.

Furthermore, as I understand the inspector, there was a backhoe on the 13th, when he wrote his citation. The citation was written on the 13th at 9:30, and it was abated on the 13th at 1500 hours, which would mean 3 o'clock. In order for that to be done, it was necessary to have heavy equipment on the face. I have to deduce from the circumstances or imply from the circumstances that the equipment had already been ordered and was there. In fact, the inspector did testify that when he observed the condition, the operator was in the process of correcting the condition.

I should note, or I should have noted previously, that there is no question concerning the part of the standard which would require, in the alternative, that areas shall be barricaded and posted. The inspector made clear that was not applicable, because no one could get near, in the circumstances, and this apparently would have been an unnecessary action.

The only issue, therefore, is whether the correction was promptly done.

The only questions at all that I can see, in considering the question of promptness, was the fact that some day or so had elapsed, which is the point made by counsel for the Government. In the circumstances, it does not seem to me that that little time span is that significant. The testimony and the evidence, in general, strikes me as indicating that the operator was doing all that it could reasonably be expected to, in the circumstances, and was in the process of correcting this loose material on the quarry face.

In light of those circumstances, I conclude that the Petitioner has not carried its burden in this particular instance, and, accordingly, I would vacate this citation and dismiss the petition as to Citation No. 212915.

The above bench decision is hereby AFFIRMED.

A summary of the dispositions in this case follows:

<u>Citation No.</u>	<u>Action Taken or Assessment</u>
212903	withdrawn
212894	dismissed with prejudice
212895	dismissed with prejudice
212904	dismissed with prejudice
212906	dismissed with prejudice
212908	dismissed with prejudice
212896	\$ 10
212898	\$ 25
212899	\$ 20
212900	\$ 20
212907	\$ 35
212909	\$ 25
212911	\$ 10
212897	vacated
212912	vacated
212901	\$ 26
212902	\$100
212905	\$ 24

212910	\$ 24
212913	\$ 26
212914	\$ 38
212915	<u>vacated</u>
Total	\$383

ORDER

IT IS ORDERED that Respondent pay the penalties totaling \$383 within thirty (30) days of the date of this decision.


Franklin P. Michels
Administrative Law Judge

Distribution:

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

Richard E. Blodgett, Division Manager, Ottawa Silica Co., Connecticut Division, 154 Lantern Hill Road, Ledyard, CT 06339 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

CLIMAX MOLYBDENUM COMPANY, : Application for Review
Applicant :
v. : Docket No. DENV 78-581-M
: :
SECRETARY OF LABOR, : Order No. 333638
MINE SAFETY AND HEALTH : August 31, 1978
ADMINISTRATION (MSHA), :
Respondent : Climax Mine

DECISION

Appearances: William F. Schoeberlein, Esq., Charles W. Newcom, Esq., Dawson, Nagel, Sherman & Howard, Denver, Colorado; and W. Michael Hackett, Esq., and James F. Engelking, Esq., Climax Molybdenum Company, Golden, Colorado, for the Applicant;
Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for the Respondent.

Before: Judge Cook

I. Procedural Background

On September 29, 1978, Climax Molybdenum Company (Climax) filed an application for review pursuant to section 107(e)(1) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e)(1) (1978) (1977 Mine Act).

1/ Section 107(e)(1) provides:

"Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a)."

The application seeks review of an imminent danger withdrawal order issued by a Federal mine inspector under section 107(a) 2/ of the Act. The application for review states as follows:

COMES NOW Climax Molybdenum Company, a division of AMAX Inc. (hereafter "Climax"), by and through its attorneys, pursuant to Section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e), and hereby makes application for review of Order Number 333638, issued on August 31, 1978, a copy of which is attached hereto. Climax respectfully requests that a hearing be held in Denver, Colorado. At that hearing, Climax intends to contest the merits of the above-referenced order. Climax respectfully requests that said order be vacated and declared void because there was no imminent danger in that there was no condition or practice in existence which could reasonably be expected to cause death or serious physical harm before such condition or practice could be abated.

An answer was filed by the Mine Safety and Health Administration (MSHA) on October 12, 1978. The answer states as follows:

The Secretary of Labor (Secretary) by undersigned counsel admits to the issuance of withdrawal order No. 333638 and states that it was properly issued pursuant to Section 107(a) of the Federal Mine Safety and Health Act of 1977.

The Secretary also denies all other allegations made by the applicant not herein specifically admitted to be true.

Wherefore, the Secretary requests that the relief requested by climax be denied and that withdrawal order no. 333638 be affirmed.

Certificates of service attached to both pleadings indicated that service had been made upon Local No. 1823, International Brotherhood of

2/ Section 107(a) provides:

"If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110."

Electrical Workers and Local No. 2-24410, Oil Chemical and Atomic Workers International Union. No answer was filed by either organization.

Orders were issued on November 7, 1978, and November 20, 1978, granting Climax's motions requesting extensions of time for the commencement of discovery.

Various notices of hearing were issued as well as an order for continuance pursuant to a motion by the Applicant. The hearings were conducted between November 28, 1978, and November 29, 1978, and between January 30, 1979, and February 1, 1979, in Denver, Colorado. 3/ Representatives of Climax and MSHA were present and participated. No persons acted as representatives of the miners at the hearing. 4/

At the conclusion of the hearing on February 1, 1979, a schedule for the submission of posthearing briefs was agreed upon. However, difficulties experienced by counsel necessitated a revision of this schedule. MSHA and Climax submitted their posthearing briefs on March 23, 1979, and April 2, 1979, respectively. On April 6, 1979, Climax submitted an errata correcting certain typographical errors in its posthearing brief. Climax submitted its reply brief on April 16, 1979. MSHA did not submit a reply brief.

II. Issue

The issue presented is whether the imminent danger order of withdrawal was properly issued under section 107(a) of the Act.

Did the conditions which existed as to the starter leg wire to the slusher at 615-14 while the slusher was energized in the Climax Mine at about 12:42 p.m., on August 31, 1978, constitute an "imminent danger."

3/ The transcript consists of two parts. Part I records the proceedings of November 28 and November 29, 1978, while Part II records the proceedings of January 30, 31, and February 1, 1979. Part I and Part II are not consecutively numbered. Accordingly, references to the transcript in this decision will make reference to both the page on which the cited information is contained and the part of the transcript containing that page. For example, a citation to page 308 of Part I of the transcript will be made as follows: (Tr. I at 308). A series of references to the transcript will be made as follows: (Tr. I at 51, 79, 97-102, 311-319; Tr. II at 63, 87, 108-115).

4/ Mr. Edward Farley, president of Local No. 2-24410, Oil, Chemical and Atomic Workers' International Union was present at the hearing on November 28, 1978. Mr. John L. Reddington, a member of Local No. 1823, International Brotherhood of Electrical Workers was present at the hearing on January 30, 1979. Aside from Mr. Reddington's status as a witness, both men acted as union observers during the hearing. They did not attend as advocates for their respective unions (Tr. I, 4-6; Tr. II 2-5).

III. Evidence Contained in the Record

A. Stipulation

During the course of the hearing, the parties stipulated that in order for a slusher machine to be operable, it would have to be bolted into the rock as well as sitting in a concrete pad (Tr. II at 114).

B. Witnesses

MSHA called as its witnesses Dennis Martinez, an employee of Climax; James Enderby and Frederick Joseph Freilino, MSHA inspectors.

Climax called as its witnesses Walter Joseph Florence, Jr., an industrial hygiene technician at the Climax Mine; James S. Keith, Climax's director of health and safety; George E. Pupera, electrical superintendent at the Climax Mine; John Reddington, an electrician on the 600 level of the Climax Mine; and Harden Williams, the underground electrical foreman at the Climax Mine.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

M-1 is a copy of Order No. 333638, issued by inspector James Enderby on August 31, 1978, pursuant to section 107(a) of the 1977 Mine Act.

M-2 is a modification of M-1.

M-3 is a map of the 600 level of the Climax Mine.

M-4 is a sketch, prepared by an MSHA artist, of the area around the 615-14 slusher as it appeared on August 31, 1978.

M-5 is a cross-sectional sketch of the 615-14 slusher dash.

M-10 is a drawing produced during the hearing by witness Dennis Martinez.

M-10-A is Mr. Martinez' redrawing of M-10.

M-11 contains copies of notes written by witness Walter Joseph Florence on August 31, 1978.

M-12 is a drawing of the electrical system drawn during the hearing by witness Frederick Joseph Freilino.

M-13 is a photograph taken by Inspector Enderby on December 13, 1978.

M-14 is a photograph taken by Inspector Enderby on December 13, 1978.

M-15 is a photograph taken by Inspector Enderby on December 13, 1978.

M-16 is a photograph taken by Inspector Enderby on December 13, 1978.

M-17 is a photograph taken by Inspector Enderby on December 13, 1978.

M-18 is a copy of an extract from the "American National Standard Guide for AC Motor Protection," ANSI/IEEE C37.96-1976.

M-19 is a copy of an extract from Title 30 of the Code of Federal Regulations.

M-20 is a copy of an extract from the IEEE "Recommended Practice for Grounding of Industrial and Commercial Power Systems," ANSI C114.1-1973/IEEE Standard 142-1972, also called the "Green Book."

M-21 is a copy of the front page of the IEEE "Guide for Safety in Substation Grounding," IEEE Standard 80-1976.

M-22 is a copy of an extract from the IEEE "Recommended Practice for Protection and Coordination of Industrial and Commercial Power Systems," IEEE Standard 242-1975, also called the "Buff Book."

M-23 is a copy of an extract from the IEEE "Recommended Practice for Electric Power Distribution for Industrial Plants," IEEE Standard 141-1976, also called the "Red Book."

M-24 is a copy of an extract from the "American Electrician's Handbook," 9th edition.

M-25 is a copy of an extract from "Industrial Power Systems Handbook," [D. Beeman, editor] (McGraw-Hill Book Company, Inc., 1955).

M-26 is a copy of the front page from the "Electrical Protection Handbook."

M-27 is a copy of a page from a book published by the Bureau of Mines, U.S. Department of the Interior, dated June 30, 1972, with reference to metal and nonmetal mines.

M-28 is a copy of a memorandum dated March 11, 1976, from the Assistant Administrator for Metal and Nonmetal Mine Health and Safety of the Mining Enforcement and Safety Administration, U.S. Department of the Interior, to district and subdistrict managers, metal and nonmetal mine safety and health.

M-29 is a copy of an extract from the "National Electrical Code" (1978), admitted into evidence for the purpose of illustrating types of cable jackets and material classification numbers.

M-30 is a chart containing a circuit breaker current characteristic curve reflecting the maximum/minimum allowable tripping time for circuit breaker types EB, EHB and Mark 75 Type HFB.

M-31 is a chart similar to M-30 for the following circuit breaker types: QUICKLAG Types HQP, QC, QPH, QBH, QCH, and Type BAB Standard Frames; MARK 75 Frames HBA, QHC and QHP.

M-32 is a copy of an extract from "Inspection and Test of Electrical Equipment."

M-34 is a copy of an extract from the IEEE "Recommended Practice for Emergency and Standby Power Systems," IEEE Standard 446-1974, also called the "Orange Book."

2. Climax introduced the following exhibits into evidence:

0-1 is a copy of Inspector Enderby's deposition taken on November 21, 1978.

0-1-A is a copy of the cover letter that accompanied 0-1.

0-2 is a manufacturer's photograph of a slusher machine similar to the machine that was in 615-14.

0-2-A is a photocopy of 0-2.

0-2-B is a photocopy of 0-2.

0-3 is a nomenclature chart for 150-horsepower slushers.

0-4 is a section of cable containing the defect cited by Inspector Enderby on August 31, 1978.

0-5 is a section of cable.

0-6 is a three-page reproduction from Inspector Enderby's notes.

0-7 is a brochure.

0-8 is a brochure.

0-9 is a schematic drawing showing the electrical key to a slusher installation from a main substation.

0-11 is a copy of Article 90 of the 1978 version of the "National Electrical Code."

0-12 is a copy of the Applicant's requests for admissions, production of documents and interrogatories.

O-13 is a copy of MSHA's response to O-12.

O-14-A is a copy of an extract from the IEEE "Recommended Practice for Protection and Coordination of Industrial and Commercial Power Systems," IEEE Standard 242-1975.

O-14-B is a copy of an extract from the IEEE "Recommended Practice for Grounding of Industrial and Commercial Power Systems," ANSI C114.1-1973/IEEE Standard 142-1972.

D. Posthearing Receipt of Exhibits into Evidence

On February 27, 1979, Climax filed a motion with respect to the submission of additional documents. This motion states the following:

COMES NOW Climax Molybdenum Company, a division of AMAX Inc. (hereinafter "Climax"), by and through its attorneys, pursuant to the Interim Procedural Rules of the Federal Mine Safety and Health Review Commission, 29 C.F.R. §2700.13, and moves for the admission of Exhibits O-14(A) and O-14(B). Climax further states that it has no exhibits to be introduced as O-10 in connection with the taking of photographs by inspectors.

In support thereof, Climax would state as follows:

1. Although Counsel for Climax has yet to receive Respondent's response to its request for production of documents and interrogatories, Climax understands from conversations with counsel for Respondent that no documents dealing with the issue of taking of photographs are in existence. Accordingly, no documents will be proposed for admission under Exhibit O-10.

2. At the time of the hearing it was agreed that Climax would have until and including February 27 to submit any additional documents bearing on issues of the applicability of the National Electrical Code to underground mines. Additionally, as a part of those exhibits Climax has included as it was discussed at the hearing, certain pages of those documents which were used in Mr. Freilino's cross-examination.

3. O-14(A) consists of pages 25 and 233 of the "Buff Book." Exhibit O-14(B) consists of pages, 13, 14, 49, 58 and 59 of the "Green Book."

WHEREFORE Climax moves for the introduction [sic] and admission of Exhibits O-14(A) and O-14(B) for the purpose of showing the inapplicability of the National Electrical Code

to underground mines and for purposes of placing in the record pages of publications which were ready in [sic] the record by Mr. Freilino on his cross-examination.

At the hearing, it was agreed that objections to the admission into evidence of the above-noted exhibits would be set forth in the posthearing briefs (Tr. II at 446-457). No objections are set forth in MSHA's post-hearing brief.

Accordingly, Climax's motion for the introduction and admission of Exhibits O-14-A and O-14-B for the above-stated purpose is GRANTED, and the exhibits are hereby RECEIVED in evidence.

Exhibits M-13 through M-17 are photographs of the slusher at 615-14. These photographs were taken by MSHA inspector James Enderby on December 13, 1978, at a time when he was at the mine lawfully during the course of his inspection duties. MSHA seeks to have these exhibits received into evidence, while Climax interposes strenuous objections to their admission (Tr. II at 238, 240, 270-274, 446-457; MSHA's Posthearing Brief at pp. 8-9; Climax's Posthearing Brief at pp. 22-24).

Climax notes that the issue presented is not whether the photographs are accurate representations of what the inspector observed at the time they were taken. Instead, Climax phrases the issue as "whether photographs or other evidence obtained after litigation on a citation or order is begun can properly be admitted when those photographs are not obtained in compliance with the Discovery Rules" (Climax's Posthearing Brief at p. 22). In support of its position, Climax argues:

Climax has no right of access to either interview inspectors or obtain copies of inspector's notes outside of the context of the Discovery Rule. MSHA must be required to follow those rules also and the only suitable means for requiring that is to exclude from evidence all documents, photographs, or similar materials which are obtained outside the bounds of the Commission's Discovery Rules. This is not to say that MSHA inspectors should be prohibited from returning from the scene of alleged violations after a citation has been issued is [sic] a part of determining whether abatement has been accomplished. It is to say however that if that matter is in litigation that any photographs or statements taken by an inspector after the application for review has been filed or any documents which are obtained by inspector requests after litigation has been initiated should not be admitted into evidence unless those documents are obtained through the Discovery processes provided for in the Rules. To rule otherwise would establish an unfair and arbitrary scheme which cannot be sustained, particularly in view of the presence of the Discovery Rules. Climax is obligated to

comply with the Commission's Rules and MSHA must comply with them as well. It would clearly be inappropriate to give MSHA this unfair advantage in administrative litigation.

No effort was made to comply with the Discovery Rules in taking the photographs. Because litigation was pending and those rules were not complied with, and further because in addition Climax was given no opportunity to have either a knowledgeable electrician or its attorneys involved in the taking of the photographs, Exhibits M-14 [sic] through M-17 inclusive should not be admitted into evidence.

(Climax's Posthearing Brief at pp. 23-24).

MSHA's counter-arguments state, in pertinent part, as follows:

* * * * *

2. There has been no showing that the Applicant has been in any way prejudiced by the introduction of these photographs, which are offered solely as an aid to the court in perceiving the work area of the mine involved.

3. The talking [sic] of photographs [sic] does not involve an attempt to question applicant's agents without the presence of counsel.

* * * * *

5. At the time the photographs were taken, MSHA personnel were present in the mine lawfully during the course of normal inspection duties.

Climax's objection presents a question of first impression. Climax has not cited any points and authorities in support of its position so as to provide the Judge with guidance in addressing this novel question. However, it does present a meritorious question which can be addressed with reference to existing law on the use of photographic evidence. Due consideration must be given to both the conduct complained of and the nature of the evidence and its proffered use in determining whether it is admissible.

Under the Commission's Interim Procedural Rules, in effect at all times relevant to this proceeding, "[a]ny relevant evidence may be received at the discretion of the Judge. The Judge may exclude evidence which he finds to be unreliable or unduly repetitious." 29 CFR 2700.50 (Interim Rules).

The use of photographic evidence in judicial proceedings is discussed in McCormick, Handbook of the Law of Evidence, § 214 at 530-531 (2nd ed., E. Cleary, 1972), as follows:

The principle upon which photographs are most commonly admitted into evidence is the same as that underlying the admission of illustrative drawings, maps and diagrams. Under this theory, a photograph is viewed merely as a graphic portrayal of oral testimony, and becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness. Accordingly, under this theory, the witness who lays the foundation need not be the photographer nor need he know anything of the time, conditions, or mechanisms of the taking. Instead he need only know about the facts represented or the scene or objects photographed, and once this knowledge is shown he can say whether the photograph correctly and accurately portrays these facts. Once the photograph is thus verified it is admissible as a graphic portrayal of the verifying witness' testimony into which it is incorporated by reference. [Footnotes omitted.]

Under the principles cited in the above-quoted passage, a photograph serves merely as a graphic portrayal of a witness' oral testimony, into which the photograph is incorporated by reference. Unlike evidence submitted under an exception to the hearsay rule, a photograph is not introduced ordinarily as independent proof of the truth of the matters asserted therein.

The subject photographs were offered as graphic aids in interpreting what Inspector Enderby and Mr. Martinez observed on August 31, 1978 (Tr. II at 239-240). To the extent that they set forth an accurate graphic portrayal of the conditions observed by the witnesses on August 31, 1978, they are relevant to the subject matter of this proceeding within the meaning of 29 CFR 2700.50 (Interim Rules).

There is no indication in the record that Inspector Enderby interrogated or attempted to interrogate Climax's agents on December 13, 1978, in connection with the subject matter of this proceeding. As the photographs merely relate back to conditions already observed on August 31, 1978, I am unable to characterize the circumstances surrounding their taking as an interrogation of the Applicant's agents.

30 CFR 2700.46 of the Commission's Interim Procedural Rules provided in part that: "For good cause shown, the Judge may order a party to produce and permit inspection, copying or photographing of designated documents or objects relevant to the proceeding." MSHA accordingly should have followed this rule. However, we are now faced with an accomplished fact and a consideration of whether evidence which would be helpful to the ultimate determination of the case should now be received in evidence. It could be argued that MSHA's request for admission of the pictures in evidence is in effect a motion for ratification of the act of obtaining discovery by photographing of objects.

It does not appear that the Applicant will be prejudiced by the admission of the pictures, while on the other hand they are very helpful in understanding the issues in this case.

Accordingly, the Applicant's objection is OVERRULED and Exhibits M-13 through M-17 are hereby RECEIVED in evidence.

During the course of the hearing, Climax interposed objections to the admission into evidence of Exhibit Nos. M-18 through M-28. It was agreed that objections to the receipt of the documents would be argued in the briefs (Tr. II at 446-457). In addition, it was agreed that MSHA would be granted until February 20, 1979, to file any additional subparts to those exhibits, and that MSHA would be granted until such date to file a copy of parts of the "Orange Book" as Exhibit M-34 (Tr. II at 453-454).

On February 22, 1979, MSHA filed a motion to admit and substitute exhibits. This motion stated, in part, as follows:

Now comes the Mine Safety and Health Administration, MSHA, through its undersigned attorneys and files this motion to:

1. Admit attached exhibit M-34 (orange book).
2. Substitute the attached copy of exhibit M-24 for the one submitted at hearing.
3. Substitute the attached copies of exhibits M-20, M-22, and M-23 for those submitted at hearing.

The grounds for this motion are that the record was expressly left open for the receipt of these documents. In addition, substitution of exhibit M-24 is necessary in that the copy submitted at hearing is partially illegible due to xeroxing.

Please note that although the NEC is not specifically mentioned in M-34, the emphasized paragraph references publications which do reference the NEC.

In its posthearing brief, Climax states, in part, as follows:

Climax has no objection to the admission of exhibit no. 18 [sic] through M-28, inclusive, and M-34, for the limited purpose of dealing with the issue of whether the National Electrical Code is or is not applicable to underground mines. As noted in Part III, Climax maintains that the Code is not applicable to underground mines. Those

exhibits only reenforce that position. They reference the Code but never as being applied wholesale, or in pertinent part here, in underground metal-nonmetal mines.

(Climax's Posthearing Brief at p. 24).

Climax's brief interposes no objection to the substitution of copies of Exhibits M-20, M-22, M-23, and M-24.

Accordingly, MSHA's motion to admit and substitute exhibits is GRANTED. IT IS THEREFORE ORDERED that the copies of Exhibits M-20, M-22, M-23, and M-24, which were submitted in conjunction with the motion, be, and hereby are, SUBSTITUTED for the copies of those exhibits marked for identification during the hearing. IT IS FURTHER ORDERED that Exhibits M-18 through M-28 and Exhibit M-34 be, and hereby are, RECEIVED in evidence.

During the hearing, MSHA reserved its right to object to the receipt into evidence of Exhibits O-12 and O-13. It was agreed that any objections would be argued in the briefs (Tr. II at 448-452).

In support of its motion to admit these documents into evidence, Climax states: "With respect to Exhibits O-13 and O-14, [sic], those exhibits should be admitted. It is hornbook law that interrogations [sic] and answers are validly used for impeachment purposes. 8 Wright & Miller, Federal Practice & Procedure, Civil, § 2180, p. 573 (1970)" (Climax's Posthearing Brief at p. 24).

MSHA's posthearing brief interposes no objections to the receipt of these documents in evidence.

Accordingly, IT IS ORDERED that Exhibits O-12 and O-13 be, and hereby are, RECEIVED in evidence.

IV. Opinion and Findings of Fact

A. The Applicability of the National Electrical Code to Underground Metal and Nonmetal Mines

A question is presented as to whether the National Electrical Code (NEC), portions of which are incorporated by reference into other privately-published associated publications (Exhs. M-18, M-20, M-21, M-22, M-23, M-24, M-25, M-26, M-34, O-14-A, O-14-B), sets forth an industry standard for the grounding of electrical systems in underground areas of metal and nonmetal mines. MSHA argues that the question should be answered in the affirmative (MSHA's Posthearing Brief at p. 9), while Climax argues that it should be answered in the negative (Climax's Posthearing Brief at pp. 20-22; Climax's Reply Brief at p. 7). For the reasons set forth below, I conclude that the NEC does not specifically set forth the governing industry standard for the grounding of electrical systems in the underground areas of metal and nonmetal mines.

It should be pointed out that, in view of the foundation for the decision in this case, as set forth later, the determination of this question has no effect upon the outcome; however, despite this, the issue has been analyzed.

The resolution of this inquiry requires a two-pronged analysis making reference to both the appropriate provisions of the Code of Federal Regulations (Code) and the appropriate provisions of the NEC (Exh. O-11) and associated works.

According to Inspector Freilino, the NEC requirements for adequate grounding would have required the starter leg wire to have a third conductor, i.e., a ground conductor (Tr. I at 263-264, 361). This requirement would have been deemed fulfilled by MSHA by either the presence of a third wire inside the cable or, alternatively, by the presence of a third wire somehow attached to the cable (Tr. I at 263-264, 329). The inspector opined that Exhibit O-4, a segment of the subject starter leg wire, was not in compliance because it had only two cables (Tr. I at 263). Specifically, he testified that Exhibit O-4, by itself, could not properly ground the equipment (Tr. I at 327). The inspector further testified that his opinion was based on the grounding requirements set forth in sections 1250-42 and 1250-59 of the NEC (Tr. I at 285-287).

The scope of the NEC is set forth in Article 90 of that publication which states, in pertinent part, as follows:

90-2. Scope.

(a) Covered. This Code covers:

(1) Electric conductors and equipment installed within or on public and private buildings or other structures, including mobile homes and recreational vehicles; and other premises such as yards, carnival, parking and other lots, and industrial substations.

(2) Conductors that connect the installations to a supply of electricity.

(3) Other outside conductors on the premises.

(b) Not Covered. This Code does not cover:

(1) Installations in ships, watercraft, railway rolling stock, aircraft, or automotive vehicles other than mobile homes and recreational vehicles.

(2) Installations underground in mines.

(3) Installations of railways for generation, transformation, transmission, or distribution of power used exclusively for operation of rolling stock or installations used exclusively for signaling and communication purposes.

(4) Installations of communication equipment under the exclusive control of communication utilities, located outdoors or in building spaces used exclusively for such installations.

(5) Installations under the exclusive control of electric utilities for the purpose of communication, or metering; or for the generation, control, transformation, transmission, and distribution of electric energy located in buildings used exclusively by utilities for such purposes or located outdoors on property owned or leased by the utility or on public highways, streets, roads, etc., or outdoors by established rights on private property.

(Exh. 0-11).

As revealed in the above-quoted passage, section 90-2(b)(2) excludes installations in underground mines from the NEC's coverage. However, in spite of this disclaimer, MSHA electrical inspector Frederick Freilino testified as an expert that the NEC grounding provisions were applicable to underground metal and nonmetal mines (Tr. I at 276-277). Also, he referred to other publications as incorporating by reference select provisions of the NEC (e.g., Exhs. M-18, M-20, M-21, M-22, M-23, M-24, M-26, M-34, 0-14-A, 0-14-B; Tr. I at 276-282), which he described as applicable to underground mines because they apply to "all power distribution systems regardless of their use" (Tr. I at 281).

I am unable to accept the inspector's opinion in this matter because his testimony differs from both the tenor of the exhibits upon which he relied and the very language of the NEC. None of these exhibits sustain the assertion that the NEC is specifically applicable to underground mines. Those documents incorporate select NEC provisions only in the context of commercial and industrial applications that are well within the scope of section 90-2(a) of the NEC (Exh. 0-11). Accordingly, it cannot be found that the NEC and the associated exhibits establish the standards for adequate electrical grounding systems for the underground metal and nonmetal mining industry.

A review of the appropriate provisions of the Code of Federal Regulations (Code) fails to disclose a wholesale incorporation by reference of the NEC. Part 57 of Title 30 of the Code sets forth the health and safety standards for underground metal and nonmetal mines. Electrical matters are addressed in 30 CFR 57.12. References to the NEC can be found at a few places therein. These sections are applicable to both the underground and surface installations of underground mines. 30 CFR 57.1. Neither section specifically mentions the NEC in connection with grounding.

By way of illustration, Inspector Freilino testified that if given the opportunity to observe a slusher installation at the Climax Mine with a starter leg wire containing two conductor cables such as Exhibit O-4, he would consider the operator in violation of 30 CFR 57.12-25 5/ (Tr. I at 270-271). This section of the Code embodies a mandatory standard requiring all metal enclosing or encasing electrical circuits, except as relates to battery-operated equipment, to be grounded or provided with equivalent protection. The inspector described the allegedly applicable NEC requirements (Tr. I at 286-287), and opined that the failure to adhere to those requirements renders a grounding system inadequate within the meaning of 30 CFR 57.12-25 (Tr. I at 270-289).

At this point, it is important to bear in mind the limited purpose for which the inspector's testimony has significance. It is not being used to determine whether the condition or practice cited in the imminent danger order of withdrawal constitutes a violation of 30 CFR 57.12-25. Whether the cited condition or practice fits the technical definition of a codified violation is not an issue in a proceeding to review an imminent danger withdrawal order. Freeman Coal Mining Corporation, 2 IBMA 197, 80 I.D. 610, 1973-1974 OSHD par. 16,567 (1973). His testimony merely reflects the opinion of an expert in the field of electrical matters in underground metal and nonmetal mines as to which provision of the Code requires adequate grounding and as to why adequate grounding should be evaluated under that section with reference to the NEC. Although this determination presents a question of law, the inspector's opinion gives some guidance as to how experts in his field view the practical difficulties encountered in determining whether a given grounding system is adequate.

A review of the various standards codified under 30 CFR 57.12 leads to the conclusion that those provisions of the NEC addressing the grounding of electrical systems have not been incorporated into the Code, and hence are not specifically applicable to underground metal and nonmetal mines. The fact that portions of the NEC are both mentioned by and incorporated into certain provisions of 30 CFR 57.12 indicates that the drafters were aware of the NEC and its various provisions. The fact that their informed judgment led them to include portions of it in certain contexts compels the conclusion that the failure to incorporate its provisions in other contexts resulted from a conscious determination that no specific requirements as to the unmentioned provision were to apply.

Exhibits M-27 and M-28 do not support the proposition that the inspectors have been directed to apply the NEC grounding standards in assessing the adequacy of grounding systems. Exhibit M-27 makes reference to it only

5/ 30 CFR 57.12-25 provides: "Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment."

in connection with section 12-1 of Part 57, the Code standard which states that "[c]ircuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity."

Exhibit M-28 is a more complex document. Its references to 30 CFR 57.12-20 and 57.12-25 are significant in the instant case. With respect to 30 CFR 57.12-20, it cautions that "[r]eferences for application of insulating mats or platforms should not be deemed an exemption by not conforming with established rules of the 'National Electrical Code.'" However, its discussion of 30 CFR 57.12-25 makes no affirmative reference to the NEC, but merely states that "[a]ll grounding shall conform to accepted electrical standards and codes." It is unclear whether this statement reflects an intent on the administrator's part to apply the NEC or not as relates to grounding. A permissible interpretation of it would be that all grounding shall conform to accepted electrical standards and codes applicable to underground mining. As noted previously, the NEC specifically exempts from its coverage electrical installations underground in mines. Accordingly, Exhibit M-28 cannot be construed as specifically requiring the application of the NEC in such case.

Accordingly, for the reasons set forth above, I conclude that the NEC is not specifically applicable to grounding requirements for installations underground in metal and nonmetal mines.

B. The Imminent Danger

MSHA inspector James Enderby visited the Climax Mine at approximately 6:45 a.m. on August 31, 1978, to do asbestos fiber sampling in one of the slusher dashes on the 600 level of the mine (Tr. I at 81, 107-108). The inspector proceeded to the 615-14 slusher dash, arriving there at approximately 8:20 a.m. (Tr. I at 118). Mr. Dennis Martinez, the union representative, Mr. Andy Burkhart, the slusher operator, and Mr. Walter Florence, Climax's industrial hygiene technician, accompanied him (Tr. I at 118). At approximately 12:40 p.m., Mr. Martinez observed the slusher's starter leg wire, a cable running from the starter switch on the rib across to and between the driveguard and the main part of the slusher. The cable ran over the driveshafts located between the driveguard and the main part of the slusher (Tr. I at 45-47; Exhs. M-4, M-10, M-10-A).

According to Mr. Martinez, the cable was touching the motor driveshaft and was resting on a "lightly rounded" edge of the driveshaft (Tr. I at 47, 50-51, 69). This driveshaft was turning when the motor was in operation (Tr. I at 51). Mr. Martinez described the cable as having what appeared to be a cut or groove worn in it. He concluded that this defect had been caused by the cable being in contact with the rotating driveshaft (Tr. I at 48, 53-54). His observations led him to conclude that the cable was unsafe because he thought that he could see something white on the cable, which indicated to him that the insulation was almost ready to wear through (Tr. I at 54, 69).

Mr. Martinez testified that he first observed the cable when the last car of the muck train had been approximately half filled by the slusher (Tr. I at 57-58). He thereupon attempted to attract the inspector's attention (Tr. I at 59-63). However, the high noise level prevented the inspector from immediately understanding what Mr. Martinez' signal related to (Tr. I at 62-64). Consequently, the slusher was not turned off until the last car on the muck train had been filled (Tr. I at 63, 147-148).

Immediately after the slusher was switched off, Inspector Enderby turned around to see what Mr. Martinez wanted (Tr. I at 148-149). The inspector testified that Mr. Martinez told him that the cable appeared to have a "hole" in it (Tr. I at 149). The inspector looked between the drive-guard and the slusher body from the draw hole side of the slusher, but was unable to see the worn spot (Tr. I at 149). Mr. Martinez then picked up the cable, turned it over and laid it atop the driveguard to show the inspector the worn spot (Tr. I at 149-150). The inspector testified that he got to within approximately 12 to 15 inches of the subject portion of the cable and that he thought he saw a bare wire (Tr. I at 150). He described what he observed as "a cut or worn section with a slightly black spot inside the filler, which is on the underside of the outer insulation jacket" (Tr. I at 150). The inspector stated that the perceived possibility of electrocution would have prevented him from placing his hand on the bare spot (Tr. I at 252). Thereafter, the inspector informed Mr. Florence that he was going to issue an order closing the dash until the wire was fixed (Tr. I at 155). The order was issued at 12:42 p.m. (Exh. M-1). He returned to the area at approximately 1:32 p.m. and observed the electrician finish wrapping the outer jacket of the cable with electrical tape (Tr. I at 158-159). The order was abated at 2 p.m. (Exh. M-1).

The question presented is whether the subject order of withdrawal was validly issued. The controlling issue is whether the condition cited by Inspector Enderby constituted an imminent danger within the meaning of section 107 of the 1977 Mine Act, as that term is defined by section 3(j) of the Act.

Section 3(j) of the 1977 Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Both the Interior Board of Mine Operations Appeals (Board) and the Federal courts had occasion to address the term "imminent danger" in a series of decisions arising under the Federal Coal Mine Health and Safety Act of 1969 (1969 Coal Act). In Freeman Coal Mining Company, 2 IBMA 197, 80 I.D. 610, 1973-1974 OSHD par. 16,567 (1973), the Board interpreted it as follows:

It bears repeating that the statutory definition of the term "imminent danger" is "the existence of any condition or practice in a coal mine which could reasonably be expected

to cause death or serious physical harm before such condition or practice can be abated." The word "reasonably" necessarily means that the test of imminence is objective and that the inspector's subjective opinion need not be taken at face value. It also suggests that each case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

This decision was subsequently affirmed by the United States Court of Appeals for the Seventh Circuit. Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974).

In Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975), the Petitioner, Old Ben, argued that the term "imminent danger" was intended to apply only to situations presenting an actual, immediate danger. The court declined to adopt this interpretation, noting that in Freeman, supra, it had "rejected the contention that 'imminent danger' was intended to apply only to situations involving immediate danger." 523 F.2d at 33.

In rejecting the Petitioner's contention that the test for "imminent danger" should be limited to a "reasonable likelihood" of danger, the court noted that a similar contention had been considered and rejected by the United States Court of Appeals for the Fourth Circuit in Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th Cir. 1974), aff'g Eastern Associated Coal Corporation, 2 IBMA 128, 136, 80 I.D. 400, 1971-1973 OSHD par. 16,187 (1973). The court observed that Eastern had argued in the Fourth Circuit that a "danger is imminent only if there is a reasonable likelihood that it will result in injury before it can be abated." 523 F.2d at 33. The Old Ben court quoted with approval the following passage from the Fourth Circuit's opinion:

The 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." [Emphasis in original.]

Administrative Law Judge Fauver was presented recently with an opportunity to address the subject of imminent danger withdrawal orders issued

pursuant to the Federal Mine Safety and Health Act of 1977. Consolidation Coal Company, Docket No. MORG 78-355 (February 28, 1979). Although the language of the 1977 Mine Act is the same as the language of the 1969 Coal Act as relates to the subject of "imminent danger," the legislative history of the 1977 Mine Act disavows any intent on the part of Congress that the Commission adhere to that portion of the Board's requirement in Freeman, supra, that "it is at least as probable as not that the feared accident or disaster would occur before elimination of the danger." The Senate Committee Report states:

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.

S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 626 (1978).

Additionally, the legislative history makes it equally clear that the "imminent danger withdrawal order is designed to afford miners immediate protection in those situations where a condition or practice in a mine could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 626 (1978) (emphasis added). The fact that such orders are intended to provide miners with immediate protection under the above-described conditions, indicates that the benefit of any doubt should be resolved in favor of withdrawal. See, District 6, United Mine Workers of America v. United States Department of the Interior Board of Mine Operations Appeals, 562 F.2d 1260, 1267 (D.C. Cir. 1977).

In a review proceeding involving an imminent danger withdrawal order, MSHA is under an obligation to go forward with the evidence and make out a prima facie case. Thereafter, under the rules of procedure in effect when this proceeding was commenced and at the time of the hearing, the ultimate burden of proof was placed on the operator to overcome MSHA's case by a preponderance of the evidence with respect to each element of proof in dispute, except as relates to a violation of law. Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975); Old Ben Coal Corporation, 523 F.2d 25, 39-40 (7th Cir. 1975). Accordingly, the ultimate burden of proof with respect to the lack of imminence in the danger was upon the operator in this review proceeding.

It is my opinion that such rule of law is applicable to the ultimate determination of this case. However, beyond this, MSHA has not only presented a prima facie case, but it has also preponderated over the evidence of the Applicant.

Exhibit 0-9 is a schematic drawing of the electrical system for a typical slusher at the Climax Mine installed after 1971 or 1972 (Tr. II at 61, 125, 131). Mr. Pupera indicated that the electrical system shown in Exhibit 0-9 was the same as the electrical system on the 615-14 slusher, although he was not completely certain (Tr. II at 131-132). Since Mr. Williams testified that the 615-14 slusher was installed in late 1976 or early 1977 (Tr. II at 221), I find that it is more probable than not that they are the same.

The slusher had a 150-horsepower motor (Tr. I at 262, Exh. 0-9). Inspector Freilino testified that he believed the slusher installations were 460 or 480, three-phase, 60-cycle AC (Tr. I at 322, 350). ^{6/} The slusher motor was provided with electricity through a 2-0 cable containing three interspersed No. 6 ground wires. These ground wires are connected to the frame of the slusher and back to the grounding conductors that run through the drift of the mine. This grounding conductor runs through the drift of the mine and returns to the substation power source and is connected to the grounding point of the entire power system (Tr. II at 60, 70-71; Exh. 0-9). Power was provided from a 480-volt substation located 1,000 feet down the drift from 615-14 (Tr. II at 63-64). According to Inspector Freilino, these 150-horsepower slusher installations have motor speeds of 900 rpms (Tr. I at 261-262).

The starter leg wire runs from a switch on the mine wall to the transformer in the switch vault (Exh. M-4, 0-9). This switch operates a coil or an electric magnet, described as the motor control relay, which supplies power to the slusher motor (Tr. I at 265, 316). The starter leg wire carries approximately 120 volts (Tr. II at 208). The control circuit has a 15-amp circuit breaker located in one wire coming from the secondary to the transformer (Tr. II at 67, 91, 177, 217, Exh. 0-9). There are two 600-volt, 3-amp fuses in the wires to the H-480 volt transformer (Tr. II at 67, 92). These fuses were in each leg of the wire coming from the phase conductors on the primary side of the transformer (Tr. II at 67). This transformer reduces the voltage entering the control circuit from 480 volts to 120 volts (Exh. 0-9). Grounding is provided by a bare, external No. 4 copper wire running from the slusher frame back to the switch vault and from the slusher frame to the slusher starter switch (Exh. 0-9; Tr. II at 60, 64, 68).

^{6/} The precise voltage of the slusher motor is not clearly revealed by the record. The best available evidence indicates that its voltage lies between 440 and 480 volts (Tr. I at 322; Tr. II at 66-67, 92, Exh. 0-9). Exhibit 0-9 reveals that power was transmitted from the 480 volt substation to the slusher motor along cables denominated at one point as 440 volt power cables. Presumably, this means that the slusher motor operates on 440 volts, although neither Exhibit 0-9 nor the testimony of the witnesses reveal the significance, if any, arising from connecting the slusher to the 480 volt substation via a 440 volt cable. In view of the other evidence contained in the record, this ambiguity does not affect the ultimate disposition of this case.

The starter leg wire (red line on Exhibit O-9) was a No. 12, two-conductor, CV-type, SO cord (Tr. II at 217, 373). It was described as being a 20-amp cable (Tr. II at 217). Mr. Williams testified that the outer jacket was composed of neophrene and that he believed the inner insulation was composed of a butyl-type rubber (Tr. II at 217). Mr. Pupera testified that the cable's inner and outer insulation were flame-retardant (Tr. II at 105). Mr. Williams stated that since the inner insulation was 600-volt insulation, it would be three sixty-fourths of an inch thick (Tr. II at 371).

The outer jacket is comprised of considerably stronger material than the inner insulation (Tr. I at 342). Accordingly, the inner insulation is damaged more easily than the outer jacket (Tr. II at 119).

Mr. John Reddington, the electrician who abated the condition cited by Inspector Enderby, inspected the ground connections visually after the order was issued (Tr. II at 159). He found the ground wires both intact and tight in the lugs. They were described as tight on both the frame and the toggle switch (Tr. II at 157-159). He inspected the No. 4 ground wire and found it properly attached to the motor frame (Tr. II at 158). The No. 6 ground wires and the 2-0 cable were properly attached (Tr. II at 158-159).

Mr. Martinez testified that when he first observed the starter leg wire, it was in contact with a flange located on the motor driveshaft (Tr. II at 295-298, 303-308; Point A on Exh. M-13). The cable was being supported by the 90-degree edge of the flange (Tr. II at 295-298; Point A on Exh. M-13). The best available evidence indicates that the flange rotated with the driveshaft (Tr. I at 50-51; 68; Tr. II at 298, 301-302). The driveshaft rotated at approximately 875 to 900 rpms (Tr. I at 261-262; Tr. II at 211-212). Mr. Williams testified in behalf of the Applicant that, assuming the wire was in the position indicated on Exhibit M-13 with the driveshaft turning, it would have taken the cable (Exh. O-4) 4 to 6 weeks of continuous contact with the flange to develop the amount of wear present (Tr. II at 368-369). Similarly, he testified that it would have taken an additional 3 weeks for the cable to wear through the remainder of the inner and outer insulation and expose a bare conductor (Tr. II at 365-370). Additionally, he indicated that the presence of oil or lubricants would decrease the rate of wear (Tr. II at 367-368). According to Mr. Williams, oil does not have an immediate deteriorating effect on the outer jacket of the SO-type cable. He did not know whether the inner insulation of such cable is oil resistant (Tr. II at 374-375). Contrary to the position of the Applicant's witnesses, Mr. Freilino, on behalf of MSHA, was of the opinion that the insulation on the wire could wear through at any time (Tr. I at 345).

In view of the actual condition of the cut in the wire, the claims of Applicant's witnesses that the wire would not constantly remain in the same place on the shaft, and also in view of the requirement of the Applicant that the slusher operator check the electrical cable, ground wires and insulated conductors for damage, to report any damage to the electrician, it seems incredible that the cutting of the wire took place over a long period of time without detection sooner.

The inspector thought that the inner conductors were bare, and issued the order of withdrawal in accordance with this belief (Tr. I at 150, 152, 187; Exh. M-1). However, after examining the cable at the hearing, he admitted that bare conductors were not exposed (Tr. I at 250). The outer jacket had been worn through and part of the inner insulation had been worn (Tr. I at 295; Exh. O-4). Accordingly, the question of imminent danger must be evaluated with reference to the actual condition of the cable on August 31, 1978, in determining whether a reasonable man, given a qualified inspector's education and experience, would objectively estimate that if normal mining operations in the disputed area continued, the feared accident or disaster would occur before elimination of the danger. In the instant case, this requires an evaluation of both the electrocution hazard and the fire hazard.

The testimony of three expert witnesses, Inspector Freilino, Mr. Pupera, and Mr. Williams, provides the most probative evidence of the electrocution hazard.

The first consideration is the two-part grounding system described above. The first part of the system entails the bare No. 4 copper wire used to ground the 120-volt control circuit, while the second part refers to the three No. 6 wires used to ground the slusher. With respect to the former, Inspector Freilino characterized it as inadequate because it failed to comply with the NEC requirements. Therefore, in assessing his answers to various hypothetical questions in which he was asked to assume that the grounding on the control circuit was either inadequate or adequate, it must be borne in mind that the inspector defines the term "adequate," at the very least, as a grounding system in compliance with the NEC, while defining an "inadequate" system as one that is not in compliance with the NEC. Mr. Pupera, on the other hand, viewed the control circuit grounding system as adequate. In his opinion, the location of the wire did not create a problem by way of increasing the impedance to the ground (Tr. II at 69-70). In this regard, it should be borne in mind that the basic purpose of a ground wire is to provide the lowest possible impedance for the flow of fault current (Tr. II at 69-70). 7/

7/ According to Mr. Pupera, a grounding system is basically for the purpose of returning current to its power source. There are two types of grounding systems--an equipment ground and a system ground. Equipment grounding is installed to protect personnel from shock hazards. This is accomplished by providing a path of very low resistance in comparison to the human body, since current will follow the path of least resistance. If the grounding system is properly set up, electricity will take the path through the grounding system rather than through the human body because the resistance within the grounding system will be lower than the resistance of the human body (Tr. II at 58-59). According to Mr. Pupera, the electrical systems on the slushers are equipment-grounded and are connected to the system ground (Tr. II at 59).

With respect to the three No. 6 wires used to ground the slusher, the record reveals that they were interspersed throughout the 2-0 cable that provided power to the slusher motor. Assuming that Inspector Freilino adequately described all of the relevant NEC grounding requirements, then this system is adequate even under the NEC's allegedly more stringent provisions. Therefore, in assessing his answers to hypothetical questions, it must be assumed that this portion of the grounding system was viewed as adequate by the inspector. These factors have been taken into consideration in assessing the various hypothetical questions addressed to the witnesses. They are too numerous to repeat. The portions material to the resolution of this matter have been taken into account in the passages appearing below.

The fact that the inner insulation had not been completely worn through so as to expose a bare conductor does not preclude the existence of a shock or fire hazard. One of the key factors is the dielectric strength of the insulation. Inspector Freilino described the concept of dielectric strength as "the insulating ability of a material that can be determined through laboratory test, and it is usually assigned a value of so many volts per thousandths of an inch" (Tr. II at 398). A fault condition exists whenever current flows through a circuit in an undirected or unintentional path (Tr. II at 398). In order "to get into" a fault condition, the dielectric strength would have to be lower than the voltage passing through the circuit (Tr. II at 399). Once the dielectric strength is less than the voltage being carried in the cable, the insulation breakdown is almost instantaneous (Tr. II at 401-402). The wire need not be bare, but merely reduced to the point where the insulation would be insufficient to restrain the 120 volts from leaking through to the grounded object (Tr. II at 398). At this point, the cable would become, in effect, a bare conductor even though some insulation remained. At this point, a person could receive a shock from touching the worn area (Tr. II at 402). The same holds true for the fire hazard (Tr. I at 293-294).

At one point in his testimony, Mr. Pupera testified that no shock hazard would be present if the insulation had worn off and a bare conductor made contact with either the slusher motor frame or the driveshaft. He attributed this to the grounding system on the slusher which would trip the circuit breaker on the secondary of the control transformer (Tr. II at 90). Mr. Pupera stated that the 15-amp circuit breaker on the 120-volt starter leg wire would trip in approximately 1/120th of a second. This would occur if the bare conductor made contact with either point as long as the circuit was solidly grounded to the slusher frame, i.e., in "good contact" with the slusher frame (Tr. II at 91, 138-139). Mr. Pupera stated that if the circuit breaker failed to trip under the ground fault condition, one or both of the 3-amp fuses on the lines to the 480-volt transformer would blow open and deenergize the circuit (Tr. II at 92).

As for the grounding protection, he testified that if a bare conductor made contact with one of the two above-mentioned points, the ground would provide a low impedance path back to the power source lower than the human body's impedance (Tr. II at 92). Mr. Pupera claimed that no shock hazard would be present for a person touching the slusher frame (Tr. II at 93).

He further testified that if none of the ground wires were attached to the slusher motor frame, the operator would not be exposed to a shock hazard if a bare wire made contact with the frame. He attributed this to the manner in which the slushers were installed, resulting in a low impedance in connection with the earth itself. According to Mr. Pupera, the earth becomes another grounding conductor back to the power source. He even described this earth connection as far more reliable than the ground wires (Tr. II at 94). To the best of his recollection, tests of the earth connection in the 615-14 slusher showed an impedance of 2.5 ohms (Tr. II at 94). He classified this figure as much lower than the human body's resistance (Tr. II at 98). He felt that the slusher operator's resistance would be well in the hundreds of thousands of ohms because he is required to wear rubber gloves and boots (Tr. II at 98).

However, he later admitted that an individual not wearing gloves or boots could receive a shock if he made contact with a bare wire on the starter circuit. The extent of the injury sustained would depend upon the amount of current flowing through the body. He acknowledged that under the proper conditions, a lethal injury could occur (Tr. II at 139-140). This would occur if the bare wire was not in contact with the slusher because there would be no fault current flowing (Tr. II at 140).

A review of the testimony reveals that the amount of current, in terms of amperes, that can reasonably be expected to pass through the human body can be calculated with reference to Ohm's Law. According to Mr. William's, Ohm's Law states that amperage equals voltage divided by resistance (Tr. II at 235; Climax's Posthearing Brief at p. 14). Inspector Freilino testified as to the relationship between milliamps and physical injury. Muscular contraction starts at approximately 10 milliamps. Ventricular fibrillation could occur at 50 to 75 milliamps. The heart stops beating at approximately 100 milliamps (Tr. II at 410). According to the inspector, one would not reasonably anticipate serious injury below the 10 milliamp range (Tr. II at 414-415). He testified that prolonged exposure to 10 milliamps can produce permanent damage to internal organs (Tr. II at 411). The average resistance of the human body, according to the published standard for the average resistance hand-to-hand across the chest cavity, is 1,000 ohms (Tr. II at 412). Accordingly, application of the Ohm's Law formula reveals that 120 volts divided by 1,000 ohms yields .12 amps or 120 milliamps. This figure is well within the lethal range. As stated above the Applicant's expert, Mr. Pupera, stated that with the proper conditions a person touching a bare 120 volt wire could sustain a lethal shock (Tr. 139-140).

In summary, an individual touching a bare 120-volt wire that was not in contact with the metal portion of the slusher could, under the proper conditions, receive a fatal shock. A fault condition can occur when the dielectric strength of the cable is lower than the voltage passing through the circuit, and this can be induced by a reduction of the insulation. This results in an insulation breakdown that is virtually instantaneous, with the insulated cable assuming the properties of a bare wire, and with the same attendant shock hazards. The condition of the wire, viewed in

conjunction with the possibility of .12 amps passing through the body, reveals that a danger was present. The fact that a person wearing dry boots in good condition would not receive a shock (Tr. II at 425-428) is not controlling. The record clearly establishes that the presence of water sprays rendered the area damp (Tr. I at 185-186).

Climax has not established that the danger was not imminent. The testimony adduced with respect to the tripping time of circuit breakers is insufficient to sustain this burden. Also MSHA, by a preponderance of the evidence has established that an imminent danger existed. This is especially true in light of Mr. Pupera's above-mentioned testimony (Tr. II at 139-140). The tripping of this breaker would be dependent upon the creation of a ground fault condition which would not occur until the wire was touched by human hands if the damaged spot was facing upward. Thus, a fatal injury could be sustained. Additionally, I find it highly improbable that this cable would have remained in continuous contact with the metal portions of the slusher. This is based upon two sets of observations. First, the cable (Exh. 0-4) contains a second, similar groove, although it has not penetrated beneath the outer jacket. The mere presence of the second groove indicates that the cable was moved at some point in time and further indicates that the cable would probably be moved again in the ordinary course of mining. Second, the slusher operator would have to move the cable in order to properly examine it in the fashion dictated by the company (Tr. II at 117).

Most of the evidence adduced by Climax addresses the probability of occurrence. As indicated by the legislative history of the 1977 Mine Act, the probability of occurrence is not a controlling factor in determining the validity of an imminent danger order.

The condition of the wire was such that not only was the outer jacket of the cable worn through but some of the inner insulation was also worn. Exactly how much could not be determined by the visual examination which an inspector could make under the circumstances here. Therefore, a high potential of risk of serious physical harm existed. Accordingly, a reasonable man, given a qualified inspector's education and experience would objectively estimate that if normal mining operations in the disputed area continued, a serious shock or electrocution could occur before elimination of the danger.

Accordingly, it is found that the electrocution hazard presented an imminent danger within the meaning of the 1977 Mine Act.

In this regard it must be remembered that the legislative history of the 1977 Mine Act, as well as recent decisions of the Federal courts, have evolved to the point where the benefit of any doubt must be cast in favor of withdrawal.

As referred to previously in this decision, the legislative history of the 1977 Mine Act indicates that imminent danger is not to 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 anytime."

The legislative history further indicates that "the authority under this section is essential to the protection of the miners and should be construed expansively by inspectors and the Commission." The legislative history goes on to point out that an: "imminent danger withdrawal order is designed to afford miners immediate protection in those situations where a condition or practice in a mine could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977) supra.

Finally one Federal court recently stated that: "[t]he safety of the miner is the single most crucial motivation behind the [1969 Coal Act]." The court went on to state that the congressional hearings, the first section of the statute and judicial review "support the clear intent of Congress that coal mines, or areas of coal mines, in which imminent danger was found to exist must be evacuated at once, with the benefit of any doubt cut in favor of withdrawal." District 6, United Mine Workers of America v. United States Department of the Interior Board of Mine Operations Appeals, supra.

As relates to the purported fire hazard, Inspector Enderby testified that exposed inner insulation creates a fire hazard if it is not fire-retardant (Tr. I at 211). According to the inspector, electrical energy or heat from the conductors inside the insulation would be the source of the fire (Tr. I at 212).

At one point in his testimony on November 29, 1978, Inspector Freilino set forth his opinions with respect to the potential fire hazard, in which he assumed that the starter leg wire was ungrounded (Tr. I at 293-294). His testimony on January 31, 1979, reflected that he had observed approximately 12 slusher installations on the Storke level. He testified that there are points on the machines requiring lubrication, and that he had seen some areas on shafts containing a small amount of grease. Foreign matter, such as grease, oil or moisture, entering the cable through a hole in the jacket will increase deterioration and eventually cause an internal short between the conductors. In response to a question designed to determine how such conditions could create a fire, he stated that an arcing condition would occur before the cable actually failed and tripped the breaker (Tr. II at 352-353). However, it is unclear whether this circumstance relates solely to an ungrounded starter leg wire or whether it relates to a cable grounded by a bare No. 4 copper wire. Considering all surrounding factors it cannot be found that MSHA has established a prima facie case of an imminent danger as relates to the fire hazard.

V. Conclusions of Law

1. The Applicant, Climax Molybdenum Company and its Climax Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

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

3. MSHA inspector James Enderby was an authorized representative of the Secretary at all times relevant to this proceeding.

4. MSHA has not established a prima facie case of imminent danger as relates to the alleged fire hazard.

5. The condition of the starter leg wire on the 615-14 slusher which resulted in the issuance of Order of Withdrawal No. 333638 on August 31, 1978, did constitute an imminent danger to the workers in the mine in that it posed an electrocution hazard.

6. Order of Withdrawal No. 333638 was validly issued.

7. All of the rulings with respect to exhibits made in Part III(D) of this decision are reaffirmed and incorporated herein.

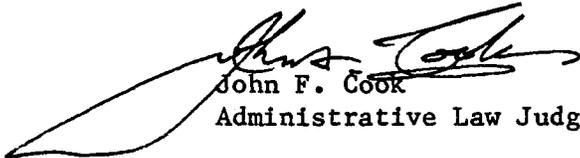
8. All of the conclusions of law made in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

MSHA and Climax submitted posthearing briefs. Climax submitted a reply brief. 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.

ORDER

Accordingly, Order of Withdrawal No. 333638 is AFFIRMED, and the application to vacate said order of withdrawal is DENIED.


John F. Cook
Administrative Law Judge

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

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-89-PM
Petitioner : A.C. No. 17-00310-05001
v. :
CIANBRO CORPORATION, : North Waterfield Pit & Mill
Respondent :

DECISION

Appearances: Ronald Glover Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
William Lee, Safety Director, Cianbro Corporation, Pittsfield, Maine, for Respondent.

Before: Administrative Law Judge Michels

This proceeding was brought pursuant to section 110(a) of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 820(a). The petition for assessment of civil penalty was filed by MSHA on January 30, 1979. A timely answer was filed by the Respondent. A hearing was held in Bangor, Maine, on October 16, 1979, at which both parties were represented.

This proceeding concerns one citation. Evidence was received and a decision thereon was rendered from the bench. The decision as it appears in the record, is set forth below.

Citation No. 201013, issued July 6, 1978

The following is the bench decision on this citation found at pages 38-42 of the transcript.

My decision in this matter is basically in two parts. First, whether or not there is a violation; and second, if there is a violation then I would make findings on the applicable criteria to determine the size of the penalty. Often-times, and perhaps here, some of the elements that are mentioned are taken into account in connection with the gravity or negligence findings, if in fact it is found there is a violation.

This matter concerns citation number 201013, which was issued on July the 6th, 1978. The inspector charged a violation of 30 C.F.R. 56.11-1. He alleged that the condition of practice was as follows, "The ladder to the rock return conveyor had been removed; a safe access was not provided." The applicable regulation charged reads as follows, "Safe means of access shall be provided and maintained to all working places."

In this instance, it was stipulated that the Mine Health and Safety Act and the applicable regulations do apply to this plant. So, I'll not further consider that particular element.

I do state, however, on this record, that it is not a precedent for any future act that this particular presiding Judge might take, but it's based solely upon the agreement of the parties. So accordingly, I do find then based on the agreement, that the Act and the regulations are applicable to this plant.

There is no dispute on certain basic facts. There is a walkway along the conveyor belt which is approximately four feet above the ground, at least at the lower end. This walkway, it is clear from the testimony, was a working place, since miners did have occasion to use it for maintenance. There is also no dispute that normally access to that walkway would be by means of ladder which was propped up at the end of the walkway. This ladder was not located at the end of the walkway on the day the inspector made his inspection. There is * * * a little dispute as to where it may have been, but it is clear that it was not located against the walkway on that occasion.

It is further clear and admitted that this ladder might be used on some occasions in other parts of the plant and could be a considerable distance from the walkway.

It is further clear and admitted that access is required to this walkway at about several times a week for the purposes of maintenance.

The only real question perhaps is whether this regulation requires, in this particular instance at least, a permanent means of access or a continuous means of access or whether access need only be provided at such times as the walkway is used.

It would be my view and decision is based on it, that a continuous means of access is necessary for access by miners to a working place, including this walkway. It would

be my further view that this is somewhat more than technical. I'll take into account that no miners were seen using this walkway by the inspector; and furthermore, the testimony shows that no one has ever observed a miner using that walkway unless the ladder was there; that element would come into the gravity of the violation. The fact remains, however, that somehow, sometime, there will be an emergency occasion and that ladder might not be there and a miner would find the occasion to use that walkway and attempt to gain access without the ladder and thus subject himself to possible injury. Accordingly, I do find that there is a violation of 30 C.F.R. 56.11-1 as charged. My findings on the criteria are as follows:

A history of prior violations: there is little or no indication of prior violations in the record and I find that there is no such history. The operator's size: it was stipulated that this company is small to medium in size. There is no evidence that the penalty to be assessed here today would have any effect on the operator's ability to continue business. Abatement: the inspector testified, and I would accept his testimony as a finding that the violation was abated in very good faith immediately. Furthermore, the operator has demonstrated even further good faith by bolting a permanent ladder to this location.

That leaves two remaining points. Now because of the circumstances that were demonstrated here, I'll find slight negligence. In my view, it is the type of situation in which the operator should have known they needed a continuous means of access. Nevertheless, the testimony does indicate that the operator in honesty and in good faith believed that that would not be used except if the ladder was in place. The operator had no reason to believe otherwise and had never been warned of an unsafe situation. And so, I would take all that into account and under the circumstances [find that the operator] demonstrated slight negligence.

Gravity: The lack of a means of access, it seems to me, shows a serious violation. This is mitigated to some extent in this case by the fact that there is no evidence at all that anybody used that means of access unless that ladder was in place. Nevertheless, it could have been so used. And if a miner had attempted to gain access without a ladder the miner might have seriously injured himself in a fall or in getting caught in the moving machinery. Taking into account all these circumstances, the very good faith of the operator and its slight negligence because of the circumstances, I would reduce the penalty originally assessed by the assessment officer from \$34.00 to \$10.00, which I believe would be a nominal penalty under the circumstances.

The above bench decision is AFFIRMED.

It is ORDERED that Respondent pay the penalty of \$10 within thirty (30) days of the date of this decision.


Franklin P. Michels
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	:	Civil Penalty Proceedings
v.		:	
PARAMOUNT MINING CORPORATION,	Respondent	:	Deep Mine No. 5

Docket Nos. NORT 79-81-P
NORT 79-92-P
VA 79-51

Docket Nos. VA 79-1
NORT 79-80-P

Deep Mine No. 2

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Galen C. Thomas, Esq., Barber Oil Corporation, New York, New York, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASES

These cases were initiated by petitions seeking civil penalties for alleged violations of mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* By order issued August 31, 1979, the above dockets were consolidated for the purposes of hearing and decision. Pursuant to notice, the cases were called for hearing on the merits on November 15, 1979, in Big Stone Gap, Virginia. Allan Garrett Howell, a Federal coal mine inspector, testified on behalf of Petitioner. Melvyn Eads testified on behalf of Respondent. Both parties waived the filing of written proposed findings of fact and conclusions of law.

MOTION TO PRECLUDE

With respect to Docket No. VA 79-51, Respondent filed prior to the hearing a motion to preclude Petitioner from offering evidence on any

matter concerning which interrogatories, admissions, or production of documents were requested. The grounds for the motion were that the responses were inadequate and not timely filed. I denied the motion on the record and hereby confirm that ruling.

DOCKET NO. NORT 79-92-P

Citation No. 35619, issued November 15, 1978, charged a violation of 30 CFR 75.200. Following the testimony regarding this citation, I issued a decision from the bench as follows:

JUDGE BRODERICK: Very well.

With respect to the violations charged in Citation Number 035625 -- I've got the number wrong. This is 035619. I find and this finding will apply to all alleged violations in these docket numbers -- that the respondent, on the basis of the stipulation that between six hundred twenty-one thousand and seven hundred twenty-one thousand tons of coal were produced in the year 1978, is a large operator. There is no evidence in the record that penalties would affect the operator's ability to continue in business, and, therefore, I find any penalties assessed herein would not affect its ability to continue in business.

The petitioner does not contend that the respondent has such a history of prior violations that penalties otherwise appropriate should be increased because of the history and, therefore, I will not increase any penalty I might assess in this case because of respondent's history.

The violation charged in the citation at issue is a violation of 30 CFR 75.200, and the citation charges the respondent violated certain provisions of its approved roof control plan, in that there were areas of unsupported roof, five separate areas of unsupported roof in the section of the mine involved, namely the main section.

I find on the basis of the evidence presented that there were areas of unsupported roof and there were violations of the approved roof control plan as follows: In the crosscut between the belt entry and the Number Three heading -- the belt heading in the Number Three heading, there was an area approximately twenty by fifteen feet of unsupported roof; I find that in the Number Two heading, there was an area in excess of twenty feet from the face to the last roof supports, and that the heading was approximately twenty feet wide; I find, also, that the continuous miner used in this heading was approximately twenty feet from the extreme bit to the pull [control]

area in the miner, therefore, if the miner was cutting in that area, the operator of the continuous miner was under unsupported roof; I find that in the Number One heading, there was an area of unsupported roof approximately eleven feet back of the face in the heading, and that heading was approximately twenty feet wide; I find that there was an area in by the Number One heading where the miner apparently had slabbed to the left while cutting the Number One heading, and this area was approximately four feet in depth; there were permanent supports between the crosscuts, which were approximately eight feet from the face area of the slabbing; I find there was an area -- another area in the Number One heading to the left approximately fifteen feet by eleven feet where there was unsupported roof; I find, also, there were danger boards on each rib in the crosscut between the belt heading and the Number three heading; I find there had been a prior rock fall in the area between the belt heading and the Number three heading, and that the rock had been cleaned up; there also had been rock falls in the area of the Number Two heading, and that the rock fall in this area was in an irregular pattern and varied from one to three and a half feet; I find that the bottom in the crosscut between the belt heading in Number Three heading was relatively dry and was on an angle; there were areas of water in both the Number One and Number Two heading, and the bottom was very soft; the Number One heading was extremely high because of a rock fall, and it was from twelve to thirteen feet in height; in the Number Two heading, rock had been taken down by the miner with the coal; there was no danger sign in the Number Two heading; the continuous miner was present in the Number Two heading outby the crosscut; there was a danger sign in the Number One entry.

Respondent had taken over this mine from another mining company and inspected the mine in September of 1978. Mining was not begun until mid-October, 1978. Problems were encountered because of an area of old works which was partly crossed in this section.

Based on these findings of fact, I conclude that the violation charged in Citation Number 035619 of 30 CFR 75.200 occurred.

Because of the number of areas involved and because of the extreme seriousness in the mining industry of roof falls, and because of the general poor condition of the roof in this area, I find that the violation was serious.

The conditions found by the inspector had apparently not existed for a long time. There were danger signs in

certain of the areas involved. For these reasons, I find that although respondent was aware of these conditions, there were difficulties in immediately taking care of the conditions because of the extreme height of some of the areas of rock fall and because of the difficult mining conditions. These tend to mitigate the negligence of the operator.

For that reason, the penalty will not be as large as it might have been in the event of a finding of negligence.

On the basis of all the testimony submitted, I will assess a penalty for this violation which I have found to have occurred of seven hundred fifty dollars (\$750).

I hereby affirm that decision.

DOCKET NO. VA 79-51

Order No. 36857, issued December 21, 1978, charged a violation of 30 CFR 75.313. Following the testimony concerning this violation, I issued a decision from the bench as follows:

JUDGE BRODERICK: All right. I will find, on basis of all evidence which was introduced this afternoon, that the Government has failed to sustain its burden of proving the occurrence of the violation charged in the order.

I hold that for a violation of 30 CFR 75.313, the Government must establish that the methane monitor is inoperative and that coal was mined, cut or loaded while it was inoperative.

The evidence in this case does not establish that coal was being produced, that it was mined, cut or loaded during the time the methane monitor was inoperative. The monitor became inoperative, according to the evidence, on December 15, 1978. The order was placed for a replacement after the existing substitute monitor was also found to be inoperative. The order was placed on December 15.

The inference which could be drawn from the testimony of the inspector that coal was being cut on December 15 is contradicted by direct testimony of the operator's and the company records.

And I conclude, on the basis of all the testimony and the records, that coal was not being produced on December 21, 1978, and there was no evidence it was produced after the monitor became inoperative on December 15.

For these reasons, I conclude that the violation charged in Order Number 36857 did not occur, and, therefore, no penalty is assessed.

I assume, because of my findings, that the legal issues raised by counsel for respondent are moot at this time. I should say, however, that I would rule that the challenge to the order which was raised prior to the evidence in this case is not properly before me in a civil penalty proceeding, and my ruling would be that this matter has to be decided on the merits and not on the motion to dismiss which was submitted at the beginning of the hearing.

I hereby affirm that decision.

Order No. 36858, issued December 21, 1978, charged a violation of 30 CFR 75.316 because of the failure of the operator to maintain line curtains as required by its ventilation plan. On the record, the parties moved for the approval of a settlement of this violation for a payment of \$475. The violation was originally assessed at \$750. The parties stated that at certain locations the operator had removed line curtains because of water problems, intending to replace them with a different kind of curtain. The fan was shut down shortly thereafter and the miners were removed from the section. This reduced the gravity of the violation. I approved the settlement agreement.

DOCKET NO. NORT 79-92-P

Order No. 35625, issued November 20, 1978, charged a violation of 30 CFR 75.200 because of a violation of the approved roof control plan. The parties moved for the approval of a settlement of this violation for a payment of \$350. The original assessment was \$500. The parties stated that the operator had encountered unexpected roof conditions and that he had set more temporary supports than the plan required. The operator was experiencing problems with the mine floor which made the setting of permanent supports more difficult. I approved the settlement agreement.

DOCKET NO. NORT 79-81-P

Citation No. 34338, issued October 31, 1978, charged a violation of 30 CFR 75.200 because a heading was advanced 25 feet from the last row of permanent supports. The parties moved for the approval of a settlement of this violation for a payment of \$55. The original assessment was \$78. The parties stated that the roof conditions were good and that there was a factual dispute concerning the measurements. I approved the settlement agreement.

Citation No. 34339, issued October 31, 1978, charged a violation of 30 CFR 75.200 because of an inadequate reflectorized warning device at the

last permanent support. The parties moved for the approval of a settlement of this violation for the payment of \$26, which was the amount of the original assessment. I approved the settlement agreement.

Citation No. 35620, issued November 15, 1978, charged a violation of 30 CFR 75.503 because of a permissibility violation on a scoop. The parties moved for the approval of a settlement of this violation for the payment of \$38, which was the amount of the original assessment. No methane had been found in the mine. I approved the settlement agreement.

Citation No. 35621, issued November 15, 1978, charged a violation of 30 CFR 75.605 because of an inadequate strain clamp on a shuttle car cable. The parties moved for the approval of a settlement of this violation for the payment of \$15. The violation was originally assessed at \$30. The clamp had apparently given way just prior to the inspection, and the operator's negligence was minimal. I approved the settlement agreement.

DOCKET NO. VA 79-1

Citation No. 36161, issued November 8, 1978, charged a violation of 30 CFR 75.200 because two rows of permanent supports had been dislodged and not replaced. The parties moved for the approval of a settlement of this violation for the payment of \$1,250. The violation was originally assessed at \$1,500. The parties stated that there was a factual dispute as to the length of time the supports had been dislodged. The roof conditions were good. I approved this settlement agreement.

Order No. 35705, issued November 8, 1978, charged a violation of 30 CFR 75.200 because of the operator's failure to roof bolt a 20-foot area. The parties moved for the approval of a settlement of this violation for the payment of \$650. The original assessment was \$1,500. The parties stated that the roof bolter was not operating at this time, that there was a factual dispute as to whether the area involved was a traveled area and that the roof conditions were exceptionally good. I approved the settlement agreement.

DOCKET NO. NORT 79-80-P

Citation No. 356706, issued November 8, 1978, charged a violation of 30 CFR 75.200 because of the failure to make a torque check on the first roof bolt installed. The parties moved for the approval of a settlement of this violation for the payment of \$32, the amount of the original assessment. I approved the settlement agreement.

Citation No. 35707, issued November 8, 1978, charged a violation of 30 CFR 75.200 because of the operator's failure to have an approved torque wrench on the roof bolting machine. The parties moved for the approval of a settlement of this violation for the payment of \$32, the amount of the original assessment. I approved the settlement agreement.

Citation No. 35708, issued November 8, 1978, charged a violation of 30 CFR 75.200 because of the operator's failure to have a slate bar on the roof bolting machine. The parties moved for the approval of a settlement of this violation for the payment of \$30, the amount of the original assessment. Both the torque wrench and slate bar were present on the section. I approved the settlement agreement.

Citation No. 35709, issued November 8, 1978, charged a violation of 30 CFR 75.200 because of an inadequate number of test holes being drilled on the roof. The parties moved to settle this violation for the payment of \$40, the amount of the original assessment. There was a factual dispute as to the number of holes present. I approved the settlement agreement.

Citation No. 35710, issued November 8, 1978, charged a violation of 30 CFR 75.1704 because of the accumulation of water in the designated escapeway. The parties moved to settle this violation for the payment of \$12. The original assessment was \$24. The water was not of such height as to prevent miners from using the escapeway. I approved the settlement agreement.

Citation No. 35711, issued November 8, 1978, charged a violation of 30 CFR 75.1720 because two miners were observed not wearing eye protection when driving metal spikes. The parties moved for the settlement of the violation on the payment of \$20. The original assessment was \$34. All miners were provided with eye protection and no supervisory personnel were in the area. I approved the settlement agreement.

ORDER

Within 30 days of the date of this decision, Respondent is ORDERED to pay the following penalties:

<u>Citation or Order No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Penalty Amount</u>
35619	11/15/78	75.200	\$ 750
36857	12/21/78	75.313	0
36858	12/21/78	75.316	475
35625	11/20/78	75.200	350
34338	10/31/78	75.200	55
34339	10/31/78	75.200	26
35620	11/15/78	75.503	38
35621	11/15/78	75.605	15
36161	11/08/78	75.200	1,250
35705	11/08/78	75.200	650
35706	11/08/78	75.200	32
35707	11/08/78	75.200	32
35708	11/08/78	75.200	30
35709	11/08/78	75.200	40

35710	11/08/78	75.1704	12
35711	11/08/78	75.1720	20
		TOTAL	<u>\$3,775</u>

James A Broderick
James A. Broderick
Chief Administrative Law Judge

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