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DECEMBER

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Secretary of Labor, MSHA v. Sigler Mining, Inc., WEVA 80-519; (Judge Kennedy, November 5, 1980)

Secretary of Labor, MSHA v. Phillips Uranium Corporation, CENT 80-208-M; (Judge Boltz, October 27, 1980)

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

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Bobby Gooslin v. Kentucky Carbon Corporation, KENT 80-145-D; Petition for Interlocutory Review.

Secretary of Labor, MSHA v. Lone Star Steel Company, DENV 79-291-PM, etc. (Judge Stewart, November 14, 1980)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 2, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. DENV 76-46
v.	:	IBMA No. 77-10
CF&I STEEL CORPORATION	:	

DECISION

This proceeding was initiated when CF&I Steel Corporation filed an application for review of an order of withdrawal issued on December 5, 1975, pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. 1/ The administrative law judge

1/ Section 104(c) of the 1969 Coal Act provided:

> (1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, 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 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 notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also cuased by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspector of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine. [Emphasis added.]

granted CF&I's application for review and vacated the order, on the ground that the Mining Enforcement and Safety Administration (MESA) failed to prove that there had been no intervening "clean" inspection of the entire mine, within the meaning of section 104(c)(2). MESA appealed. 2/ We affirm the judge.

The withdrawal order alleged, inter alia, that a section 104(c)(1) withdrawal order had been issued on August 6, 1975, and that no inspection of the entire mine had been made since August 6, 1975 which disclosed no similar violation. The judge found that MESA had conducted two complete regular quarterly inspections of this mine between (1) July 25, 1975 and September 25, 1975 (this inspection took 23 days--19 of which were after the section 104(c)(1) order of August 6, 1975); and (2) October 2, 1975 to December 16, 1975 (this inspection took 15 days--11 of which were prior to the section 104(c)(2) order of December 5, 1975). Of the 38 inspection days required to complete both inspections, 30 were in the period between August 6 and December 5, 1975. The MESA inspector testified that he did not know whether a complete mine inspection had occurred during those 30 inspection days, but that it was possible. MESA argued, however, that a "clean" inspection of the entire mine within the meaning of section 104(c)(2) occurs only when MESA conducts a regular quarterly inspection from beginning to end after the underlying section 104(c)(1) order has been issued. The judge disagreed stating:

> The evidence presented is not sufficient to support a finding that there has not been a complete inspection of the entire mine following the issuance of the 104(c)(1) order which disclosed no similar violations. I cannot conclude, simply because MESA had not completed an entirely new 3 month cycle of inspections following the issuance of the (c)(1) order, that there had not, in fact, been an intervening "clean" inspection of the entire mine. [Decision at 4.]

He concluded that MESA had not presented a prima facie case to show that a "clean" inspection of the entire mine had not occurred in the period between the two orders.

2/ On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals under the 1969 Coal Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. §961 (1978).

We agree with the judge that a prerequisite to the issuance of an order of withdrawal under section 104(c)(2) of the 1969 Coal Act was the absence of an intervening "clean" inspection of the entire mine, and that it was MESA's obligation to present a prima facie case of that fact to sustain the order.

We also agree that MESA failed to prove this prerequisite in this case. The requirement of a clean inspection before an operator could avoid being subjected to section 104(c)(2) withdrawal orders was intended to further public interest in promoting earnest and continuous compliance with mandatory safety and health standards. Nothing in the record, however, suggests that the Secretary's position--that only a complete regular quarterly inspection can constitute a "clean" inspection of the entire mine--is necessary to achieve this interest.

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1980

GLENN MUNSEY	:	
	:	
v.	:	
	:	
SMITTY BAKER COAL COMPANY, INC., P&P COAL COMPANY, AND RALPH BAKER	:	Docket No. NORT 71-96 IBMA 72-21

DECISION

The United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission to consider the following issues:

1) Whether Ralph Baker can be ordered to rehire Glenn Munsey at Mason Coal Company; 2) whether P&P Coal Company is a successor to the Smitty Baker Coal Company which may be ordered to reinstate Munsey; and 3) whether P&P Coal Company, even if not a successor, may be liable under section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977)("the 1969 Coal Act") for refusing to hire Munsey. Munsey v. FMSHRC, 595 F.2d 735, 745 (D.C. Cir. 1978).

On appeal, the D.C. Circuit affirmed the administrative law judge's finding that Smitty Baker Coal Company and Ralph Baker violated section 110(b) of the 1969 Coal Act. The incidents leading to the finding of a violation of the Act's anti-discrimination provision occurred in 1971. Since that time this case has twice reached the Court of Appeals and has now come to the Commission to determine what remedy is due to Glenn Munsey and who must provide it. In the intervening time Smitty Baker Coal Company ceased mining operations; P&P Coal Company purchased a lease and equipment from Smitty Baker Coal Company and opened the former Smitty Baker No. 2 Mine; and Ralph Baker incorporated a new mining company, Mason Coal Company, in a different location from that of the former Smitty Baker Coal Company operation.

For the reasons that follow, we hold that Ralph Baker can be ordered to reinstate Munsey at Mason Coal Company; that P&P Coal is a successor to Smitty Baker Coal Company; and that Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company are jointly and severally liable for the illegal discrimination against Glenn Munsey. We further hold that P&P Coal cannot be held liable for an alleged independent act of discrimination arising out of its asserted failure to hire Munsey. Finally, we remand for additional findings on whether appropriate offers of reinstatement have already been made by Ralph Baker or P&P Coal, the amount of lost wages due to Munsey, and the costs and expenses to be awarded.

I.

Ralph Baker was general manager of Smitty Baker Coal Company and was responsible for the day-to-day operations of that company. The Court of Appeals affirmed the administrative law judge's conclusion that Baker violated section 110(b) of the 1969 Coal Act by refusing to rehire Glenn Munsey on April 29, 1971.

The Smitty Baker Coal Company stopped mining operations in October, 1971, due to a strike and did not resume operations after the strike was settled in late 1971. As of 1975, the Smitty Baker Coal Company still had active accounts. Ralph Baker now owns all the stock of Mason Coal Company, which began operations in May or June, 1972, in a different location from that of the Smitty Baker Coal Company. His testimony indicates that his authority at Mason Coal Company encompasses the hiring of employees.

Section 110(b)(2) of the 1969 Coal Act requires a violator of section 110(b)(1) to "take such affirmative action to abate the violation as the [Commission] deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner ... to his former position with back pay." 30 U.S.C. §820(b)(2) (1976). Remedies in discrimination cases should be suited to the individual facts of each case and designed to eliminate the effects of illegal discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 364 (1977); Southern Tours, Inc. v. NLRB, 401 F.2d 629 (5th Cir. 1968). As the Court of Appeals found, Ralph Baker illegally discriminated against Munsey. Therefore, we must afford such affirmative relief as will best restore Munsey to the position in which he would have been but for the illegal discrimination. We hold that on the facts of the case reinstatement by Ralph Baker at Mason Coal Company, with such seniority and benefits as Munsey would have had if the illegal discrimination had not occurred, is an appropriate remedy in order to fully compensate Munsey for the effects of the illegal discrimination he suffered.

The record, however, raises a question as to whether Baker may have already made a suitable offer of reinstatement. Baker testified in December, 1975, that he offered Munsey employment at Mason Coal Company "maybe a year ago, maybe not that long." In his testimony, Munsey mentioned neither an offer of employment from Baker nor a request for a job at Mason Coal. No findings have been made on this issue. If a suitable offer was made and refused, then the need to offer reinstatement now is moot. Also, the making of a suitable offer would toll the accumulation of lost wages due to Munsey as the result of the violation. Thus, we remand for further proceedings the question of whether Baker has made a suitable offer to Munsey of employment at Mason Coal Company.

II.

In March, 1972, approximately five months after it had ceased operations, Smitty Baker Coal Company transferred some of its interests in coal leases to Clyde and Charlie James Poe. The transferred coal leases included Smitty Baker Coal Company's No. 2 mine, but did not include the No. 1 mine in which Munsey had worked. Rights to certain machines, some of which had been used in the No. 1 mine, were transferred. The Poes subsequently renegotiated the lease with Peabody Coal Company, the owner of the leases both before and after these transfers. The Poes incorporated under the name P&P Coal Company and began mining in March 1972. Glenn Munsey, alleging P&P Coal to be a successor company to Smitty Baker Coal Company, moved to add P&P Coal as a respondent in 1975. That motion was granted by the administrative law judge. The administrative law judge found, however, that P&P was not liable to Munsey as a successor. The Court of Appeals remanded this question to the Commission for consideration.

The legislative history on section 110(b) of the 1969 Coal Act supports the conclusion that the protection afforded miners is similar to that in existing provisions in other labor statutes. As Senator Kennedy stated:

> My proposed amendment, then, simply puts into the Coal Mine Health and Safety Act the same protection which we find in other legislation.

115 Cong. Rec. 27948 (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 667 (1975). In certain circumstances, the protections of those other statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' acts of discrimination. E.g., Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973); U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968); International Technical Products, 249 NLRB No. 183, 104 LRRM 1294 (1980). We believe that in appropriate cases the successorship doctrine should also be applied under the 1969 Coal Act.

The United States Court of Appeals for the Sixth Circuit has enumerated several factors to be considered in determining whether under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. (1976), a new business entity is a successor employer:

> 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or

substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

EEOC v. MacMillan Bloedel Containers, Inc. 503 F.2d 1086, 1094 (6th Cir. 1974). We find that these factors provide a useful framework for resolving the question of successorship in the present case.

The first factor to be weighed is whether the asserted successor, P&P Coal Company, had notice of the charge of discrimination and possible liability at the time of its acquisition of the predecessor's business operations. The administrative law judge found that the owners of P&P and representatives of Smitty Baker Coal Company did not discuss Munsey's discrimination complaint during the negotiations on the transfer of the lease. The administrative law judge also found that one of the owners, Charlie James Poe, knew generally that there was a dispute, but did not know that it involved an alleged discriminatory discharge. The judge concluded, "P&P Coal acquired its interest in this company with no knowledge that applicant [sic] was liable to applicant for a discriminatory discharge."

The administrative law judge erroneously relied on knowledge of liability, rather than notice of proceedings which could lead to liability, in reaching his conclusion that P&P Coal is not a successor to Smitty Baker Coal Company. See Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); U.S. Pipe and Foundry Co. v. NLRB, supra. P&P admitted in its answer to Munsey's motion to add it as a respondent "that it was aware of the litigation between the applicants and Smitty Baker Coal Company." Further, an administrative law judge had issued a decision on February 29, 1972, in which he found Smitty Baker Coal Company liable to Munsey for reinstatement, back pay, and costs including attorney's fees. P&P had sufficient notice to enable it to protect itself by either an indemnification clause or a lower purchase price in the takeover agreement. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 185 (1973). P&P also presented evidence on the question of its successorship. P&P clearly had sufficient notice of the litigation between Munsey and Smitty Baker Coal Company to be held liable for back pay and reinstatement if other facts of this case show P&P to be a successor.

The ability of the predecessor to provide relief is the second factor to be considered. In his decision, issued in 1976, the administrative law judge found that Smitty Baker Coal Company's accounts "remain active and there is still money in them." He did not make a finding regarding the amount of money in the accounts. Assuming that funds sufficient to cover the monetary award due to Munsey are in the accounts, the question of reinstatement for Munsey remains. Munsey will not be made whole unless he also is offered "reinstatement ... to his former position." 30 U.S.C. §820(b)(2). Smitty Baker Coal Company, the predecessor, no longer is active in mining operations and can not reinstate Munsey. Thus, in the present case the predecessor can not provide complete relief.

The third factor, whether there has been a substantial continuity of business operations, has been termed the "successorship keystone". Saks and Co., 247 NLRB No. 128, 103 LRRM 1241 (1980). The Supreme Court relied heavily on this factor in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964), in which it held that the disappearance of a corporation by merger did not necessarily terminate the rights of employees under a collective bargaining agreement, and that a successor could be compelled to arbitrate. 1/ The Court stated:

> Although Wiley [the alleged successor] was substantially larger than Interscience [the predecessor], relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty.

376 U.S. at 551. This emphasis on the continuity of the workforce was reaffirmed in Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974). The Court, distinguishing its decision in John Wiley & Sons, supra, noted that Howard Johnson Co., whom the Court found not to be a successor, selected and hired its own work force and employed very few of its predecessor's workers. 417 U.S. at 259-260.

The administrative law judge found that "many" of the miners hired by P&P were not former Smitty Baker Coal Company employees; however, Charlie James Poe, president of P&P, testified that, needing experienced miners, he asked Ralph Baker if P&P could hire Baker's former employees. With Baker's agreement, P&P hired the Smitty Baker Coal Company employees according to the Baker senority list without any screening. While the percentage of former Baker employees in the P&P workforce is unclear from Poe's testimony, it was at least 50 percent and possibly as high as 70 percent. 2/ P&P's testimony indicates that it would have hired Smitty Baker employees exclusively if they had been available. Thus, we find that the composition of the work force remained substantially the same.

1/ Analysis of cases determining the bargaining obligations of successor employers does not differ significantly from that of cases concerning the obligation to remedy the effects of the predecessor's illegal discrimination.

2/ Poe testified:

> Approximately how many employees did you have there during the first month of operation?
>
> A. I believe we finally wound up with twenty-four I believe the first month and ten.
>
> Q. How about the second month?
>
> A. That was probably it for a while. I'm afraid to say unless I went back to the records. I believe fifteen of those men were taken directly from Mr. Baker's seniority list and two of them were his bookkeeper and Fred Coburn were company men which I retained. That made seventeen in all you see. I believe that's right.

Transcript at 407-408. From this testimony, it is unclear whether Poe had 24 or 34 employees during the first month of operation.

In determining whether there has been substantial continuity of the employing industry, the NLRB has considered additional factors including the existence of a hiatus between the closing of the business and the reopening by an alleged successor. Mondavi Foods Corp., 235 NLRB 1080, 98 LRRM 1102 (1978); Radiant Fashions, Inc., 202 NLRB 938, 82 LRRM 1742 (1973). In Radiant Fashions, the Board characterized a three month hiatus as "lengthy", and viewed it to be a "significant" though not "controlling" factor in determining whether there had been a substantial continuity of business operations. In the present case, there was about a five month hiatus between the cessation of the active Smitty Baker operation and the opening of P&P Coal. At least the first month of this gap is attributable to a mine strike, and should not necessarily be counted as an interruption of business operations.

The remaining factors discussed in MacMillan Bloedel concern the degree of identity between the former employer and the alleged successor. The first inquiry is whether the same plant is used. The specific mine in which Munsey worked was not operated by P&P. P&P reopened another mine operated by the Smitty Baker Coal Company, the No. 2 mine. P&P emphasizes that it did not work the mine where the controversy arose and that it leased approximately 3,500 acres from Peabody Coal Company whereas Smitty Baker Coal had only leased 300 acres. However, P&P first contracted to take over Smitty Baker Coal's leases and later renegotiated the lease with Peabody Coal. The proper inquiry is not whether P&P took over the actual locus of the dispute, but whether it substantially replaced the Smitty Baker Coal Company's operations. P&P took over Smitty Baker Coal Company's Peabody lease and reopened one of its mines. P&P used equipment that it had purchased from Smitty Baker and that Smitty Baker had used in its operation. We find that P&P Coal Company operated the substantial equivalent of the Smitty Baker Coal Company "plant." See Mondavi Foods Corp., supra.

Regarding the continuity of supervisory personnel, the record indicates that P&P hired a section foreman of Baker Coal who became P&P's mine superintendent. P&P also hired Smitty Baker's bookkeeper as its bookkeeper. Additional information as to the supervisory personnel of P&P is lacking in this record.

Use of the Smitty Baker Coal Company senority list and retention of collective bargaining representatives indicate that the same jobs and working conditions probably continued. There is no evidence comparing production methods of the two companies. The same product, coal, was produced.

We recognize that the resolution of any question concerning successorship involves "striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee." Golden State Bottling Co. v. NLRB, 414 U.S. at 181. After careful consideration of all the circumstances of this case, we conclude that the purposes of section 110(b) of the 1969 Coal Act are

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 9, 1980

LOCAL UNION 1957, UNITED MINE WORKERS OF AMERICA, David Biggs, et al.	:	
	:	Docket No. VINC 77-112
v.	:	
SOUTHERN OHIO COAL COMPANY	:	

DECISION

This discrimination case arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). The issue is whether six miners 1/ were discriminated against by their employer, Southern Ohio Coal Company, in violation of section 110(b)(1) of that Act. 2/

The administrative law judge found that a large body of water existed in the miners' route to their workplace in the entry at the end of a mantrip; that the miners believed the route was unsafe, complained to mine management about it, and refused to cross it 3/; and that their shift foreman denied them alternate work, which was available, because he believed they were not entitled to refuse to cross the water to work on their regular jobs. The judge ruled that there was no violation of the Act, since the evidence did not establish that these miners were denied alternate work by their employer because of the miners' safety complaints. 4/

1/ The miners' names are David Biggs, Thurmond Adkins, Ruler M. Champe, Curtis Chaney Jr., Donald A. Hunter, and Chester Young.

2/ Section 110(b)(1) provides in part:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger ***.

3/ "The record is clear that Applicants' request for their safety committeeman arose out of genuine concern over a safety condition, and was not the outgrowth of some general labor dispute with management." J.D. 13.

4/ The judge stated that "whether such actions were discriminatory depends on whether Respondent was motivated by a desire to retaliate against applicants for their reporting of safety complaints...." J.D. 14 (emphasis added).

We have difficulty at arriving at the conclusion reached by the judge in light of the evidence and the judge's own findings. The foreman's testimony is clear that the reason he denied the miners alternate work was because they had refused to cross the water to perform their regular jobs. 5/ The judge found that this refusal by the miners was reasonable and in good faith. J.D. 7, 8, 11. 6/ The Union argues that the miners' actions in these circumstances were protected under section 110. We agree. Alternate work was available, was requested, and was denied because the miners refused to work in conditions they believed were unsafe. The miners' actions were protected by section 110 and the foreman's refusal to afford them alternative work violated that section.

Accordingly, the decision of the administrative law judge is reversed and remanded to determine the amounts of back pay and any other relief owed to the miners.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

5/ J.D. 14-15, citing Tr. 819-820.

6/ So too was the miners' refusal to take other routes, which they also believed were unsafe. Id.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 10, 1980

SECRETARY OR LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. DENV 79-1-P
CO-OP MINING COMPANY	:	

DECISION

On October 16, 1979, the administrative law judge issued a decision and order approving the proposed penalty settlement of the parties with respect to an alleged violation of 30 C.F.R. §70.250(b). 1/ The approval was based upon a stipulation of settlement prepared by the parties. The Secretary alleged that Co-op had failed to submit a respirable dust sample for one miner whom the Secretary identified by his social security number, 528-96-5108.

The parties stipulated that Co-op's records indicated the company never employed a miner with that social security number. They also stipulated that Co-op did employ a miner with the social security number 528-96-5109, and that the required dust sample had been submitted for that miner. These stipulated facts were quoted by the judge in his decision and order, which we directed for review sua sponte.

We hold that under the circumstances in this case, the settlement should not have been approved. The parties' stipulation shows that the alleged violation did not occur. The legislative history of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979), states, "The purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." 2/ To assure this purpose is served section 110(k)

1/ 30 CFR §70.250(b) provides:

> One sample of respirable dust shall be taken from the mine atmosphere to which each individual miner assigned to a working section is exposed at least once every 120 days, except those miners already sampled during such 120-day period in sampling cycles conducted under the provisions of §§70.210, 70.220, and 70.230 of this part.

2/ S. Rep. No. 95-181, 95th Cong., 1st Sess. 41 (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 629 (1978).

of the Mine Act places an affirmative duty upon us to oversee settlements. Compliance with the Act and its standards is not fostered by payment of a civil penalty where the stipulated facts establish that no violation occurred. Accordingly, the notice of violation is vacated, the order approving the settlement and ordering payment is reversed, and the proceeding is dismissed.

Richard V. Backley, Chairman

Frank F. Nye, Commissioner

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Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 19, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 78-722-P
ALLIED CHEMICAL CORPORATION	:	

DECISION

This civil penalty proceeding arises under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) ("the Mine Act"). 1/ In his decision, the administrative law judge concluded that Allied Chemical Corporation (Allied) had not violated 30 CFR §75.1404 as alleged by the Secretary of Labor, and dismissed the Secretary's petition for assessment of civil penalty. For the reasons below, we remand to the judge for further proceedings.

Certain facts are undisputed. On September 8, 1977, while hauling loaded mine cars in Allied's Shannon underground mine, the trolley harp assembly supplying electrical power to the locomotive became disengaged. The motorman was unable to control or stop the locomotive, which subsequently derailed. Both the brakeman and the motorman jumped from the moving locomotive before the derailment. The brakeman was killed and the motorman was injured.

A withdrawal order was issued to Allied on September 9, 1977, alleging a violation of the mandatory standard at 30 CFR §75.1404. The order stated:

1/ The inspector issued the withdrawal order at issue on September 9, 1977, pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) ("the Coal Act"). The Secretary filed his petition for assessment of civil penalty on August 29, 1978, after the effective date of the Mine Act. Thus, while the violation occurred under the Coal Act, these proceedings arise under the Mine Act.

The pneumatic braking system on the ... locomotive ... was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks [locomotive wheels] and could not apply uniform frictional pressure on the braking surface....

Allied contested the order and a hearing was held before the administrative law judge. In his decision the judge concluded that the locomotive in question had a dual braking system "installed." 2/ He further concluded that the Secretary had not proven that the locomotive was being operated outside its design capabilities, or had been operated at excessive speed. The Secretary filed a petition for discretionary review, which we granted in part. 3/ The issue before us on review is whether the judge correctly interpreted and applied 30 CFR §75.1404.

The standard at issue provides:

§75.1404 Automatic brakes; speed reduction gear.
[Statutory Provisions]

Each locomotive and haulage car used in an underground coal mine shall be equipped with automatic brakes, where space permits. Where space does not permit automatic brakes, locomotives and haulage cars shall be subject to speed reduction gear, or other similar devices approved by the Secretary, which are designed to stop the locomotives and haulage cars with the proper margin of safety.

§75.1404-1 Braking system.

A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of §75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design capabilities and at speeds consistent with the conditions of the haulage road....

2/ The parties agree that a dual braking system consists of a dynamic or electric brake system and a pneumatic or service brake system.

3/ In his petition for discretionary review, the Secretary also assigned as error the judge's conclusion that he had not established by a preponderance of the evidence an adverse effect on the locomotive's braking capacity caused by misaligned brake shoes. However, under the authority of section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. §823 (d)(2)(A)(i), we declined to direct that issue for review.

Allied argued before the judge, and argues before us, that to comply with the cited standard a locomotive merely has to have a dual braking system installed, and that the standard is not directed at the operability of the system. In Allied's words, the standard establishes "design" criteria and does not impose "maintenance" requirements. In our view the judge's resolution of this issue is ambiguous. At the conclusion of his decision, the judge appears to accept Allied's interpretation, but in other portions of his decision he apparently considered the operability of the braking system. To resolve any doubts, we hold that 30 CFR §75.1404-1 requires that a dual braking system be both present and operable. Thus, a violation of the standard can be established by proving that a locomotive is not equipped with an operable dual braking system. The standard can also be violated if the locomotive is operated beyond its design capabilities or at speeds inconsistent with haulage road conditions.

We believe that any other result would be contrary to the remedial intent of the Coal Act, the Mine Act, and this standard, as well as common sense. 30 CFR §75.1404 restates section 314(e) of the Coal Act. 30 CFR §75.1404-1 merely establishes a permissible alternative to the automatic brakes required by the statutory provision. Section 314(e) in turn reiterates section 214(e) of S. 2917, the Senate version of the Coal Act, and is quite similar to the House version. The Senate Report stated: "This provision will reduce, substantially, the number of haulage collisions that are responsible for many accidents." 4/ The House Report stated that section 314(e) "requires automatic brakes, speed reduction devices, or other safeguards ... to be certain that the equipment can be stopped promptly." 5/ Where Congress indicated in such unequivocal terms that its objective was to stop equipment promptly in order to prevent accidents, it could not have intended merely that locomotives be equipped with dual braking systems, and have been indifferent to whether the brakes were operable. If brakes are to stop a locomotive promptly, it is axiomatic that, once installed, they must be operable.

We turn now to the question of whether the judge properly applied the standard in this case. The judge found that "the failure of the locomotive brakes to function was due to the unexpected loss of power caused by the loss of the trolley harp assembly, which in fact resulted in the unanticipated loss of braking air pressure due to the loss of electrical power." The judge found "no indication that the ... operator

4/ S. Rep. 91-411, 91st Cong., 1st Sess. at 82 (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 208 (1975) ["Legis. Hist."].
5/ H. Rep. 91-563 at 55; Legis. Hist. at 1085.

experienced any difficulties in negotiating the grades traveled on the very day of the accident ... or that he experienced any difficulty in braking and controlling the locomotive...," but that his difficulties began when the loss of power "incapacitat[ed] all of the locomotive brake systems."

The Secretary submits that the judge's finding, that the brakes failed because of a loss of electrical power, is contrary to the evidence. He submits that of the three possible causes of the locomotive's brake failure, the judge considered only two: operator error and loss of power. In attributing the brake failure to the latter, he did not consider the third possible cause, systemic failure. The Secretary bases his assertion on the apparent failure of both portions of the pneumatic brake after the loss of the harp assembly. He contends that notwithstanding the loss of electricity, a single application of the primary pneumatic component should not have exhausted the air supply; the pneumatic brake should have stopped the locomotive. Even if the primary pneumatic component failed, "the loss of electrical power cannot rationally explain the failure of the truck emergency component to stop the locomotive...." He emphasizes that the truck emergency brake does not rely on electricity and is immune to air demands of other equipment. Therefore, the only logical explanation for its failure to stop the locomotive after the primary pneumatic brake failed to do so, is that it was defective. The Secretary contends that "[s]ubsequent testing confirmed that the truck emergency [brake] was defective," because the brakes failed in three surface tests conducted on level ground. Citing the testimony of Allied's expert witness, the Secretary submits further that because the truck emergency brake is an integral part of the pneumatic system, any defect in it meant that the pneumatic system was defective. Therefore, in the Secretary's view, the locomotive was not equipped with an operable dual braking system as 30 CFR §75.1404-1 requires.

In sum, the Secretary contends that the judge's analysis is flawed because the loss of electricity does not adequately explain the failure of the dual braking system. In the Secretary's view the primary pneumatic brake should have had sufficient air, even without electricity, to stop the locomotive on nearly level ground. Once the primary pneumatic brake failed, he believes that an operable truck emergency brake, as part of the dual braking system, with its independent air supply, should have stopped the locomotive.

Allied contends that it was in compliance with 30 CFR §75.1404: "A dual braking system was present and the locomotive was operated within design capabilities and at speeds consistent with the haulage road conditions." Allied rejects the Secretary's argument that the truck emergency brake is a part of the pneumatic system, was inoperative and therefore that the pneumatic braking system was deficient. Allied cites the testimony of its expert witness that the truck emergency brake is independent of the dual braking system. It compares the technical expertise of that expert witness to the "speculative opinion testimony" of the allegedly untrained MSHA inspector, urging the correctness of the judge's reliance on the former.

Allied asserts further that the Secretary introduced no evidence to demonstrate that the truck emergency brake was inoperable. It argues that the surface tests to which the Secretary refers involved bleeding off pressure in the main reservoirs, not in the truck emergency brake. Allied submits that this demonstrated nothing about the truck emergency brake, which would have required 24 hours to replenish its air supply. In conclusion, Allied asserts that the Secretary failed to demonstrate that the truck emergency brake was part of the pneumatic system or that it was inoperable. Allied submits that the judge considered the truck emergency brake and all other possible causes of brake failure, and that the judge properly determined that the loss of electrical power was the sole cause of the failure.

30 CFR §75.1404-1 permits a locomotive to be equipped with a dual braking system as an acceptable alternative to the automatic brakes mandated by 30 CFR §75.1404. Neither the regulation nor the legislative history of section 314(e) of the 1969 Act (which §75.1404 restates) defines a dual braking system. The parties appear to agree that a dual braking system consists of a dynamic braking system and a pneumatic braking system. They also agree generally as to the operation of at least the primary pneumatic brake. They disagree, however, on what constitutes the pneumatic braking system, and whether the truck emergency brake is part of the pneumatic braking system. They disagree further as to whether the truck emergency brake was operable. The ensuing controversy colors the entire case.

Although the judge found that "the locomotive had a dual braking system installed ...," he did not explicitly determine what constituted the pneumatic portion of the dual braking system. We believe that the judge should have made explicit findings as to whether the truck emergency brake and its air supply were part of the pneumatic braking system. The failure to determine whether the truck emergency brake was part of or independent of the pneumatic braking system leaves unanswered the major factual issue in this case, whether the dual braking system was operable. If the truck emergency brake were found to be part of the pneumatic system, questions remain as to whether it was operable in these circumstances and could have supplied air to the brake cylinders after the main air supply was depleted. We also believe that the loss of the harp assembly does not explain the total breakdown of the dual braking system. The loss of the harp assembly should have caused the complete failure of only the electrically-powered dynamic brake. The other component of that dual braking system, the pneumatic braking system, is not fully dependent upon electricity. Electricity powers the compressor to maintain adequate air supply. If operable, it should have continued to function at least until the air supply in its tanks was exhausted; the loss of electricity would merely have prevented the replenishing of that air supply.

Therefore, we remand to the judge for further proceedings. Specifically, we remand for a finding as to whether the dual braking system was operable. In order to make this ultimate finding, findings are also necessary on why the primary pneumatic brake failed to stop the train after the electricity was interrupted; whether the truck emergency brake is part of the pneumatic portion of the dual braking system; and, if so, why it failed to stop the train.

Richard V. Backley, Chairman

Frank E. Jestrab, Commissioner

A. E. Lawson, Commissioner

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 1 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-2-M
	:	Assessment Control No. 44-02965-05005F
v.	:	
A. H. SMITH STONE COMPANY, Respondent	:	Louisa Quarry and Mill

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner;
A. H. Smith, Jr., and Wheeler B. Green III, Branchville, Maryland, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 28, 1980, a hearing in the above-entitled proceeding was held on October 21, 1980, in Falls Church, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision 1/ which is reproduced below (Tr. 101-114):

> This proceeding involves a Petition for Assessment of Civil Penalty filed in Docket No. VA 80-2-M on November 8, 1979, by the Secretary of Labor, seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 56.11-1.
>
> The issues in a civil penalty case are whether a violation occurred and, if so, what civil penalty should be

1/ A petition seeking review of my bench decision was filed with the Commission by respondent on November 21, 1980. Since I had not yet issued my decision in final form, the official file was still in my office. Therefore, the petition was routed to me so that it could be placed in the official file.

assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

I shall make some findings of fact on which my decision will be based. I shall set them forth in enumerated paragraphs.

1. A. H. Smith Stone Company, according to a stipulation of the parties, had 163,693 man-hours in 1979. The company operates the facility which is involved in this proceeding, namely, the Louisa Quarry and Mill which is located in Louisa County, Virginia. The man-hours worked at that particular facility in 1979 were 47,586.

The parties have stipulated that the company is subject to the provisions of the Act.

2. On January 25, 1979, Mr. James H. Whalen, the operator of the crusher at the Louisa Quarry and Mill was found head first in the primary crusher, resulting in his death before he could be extricated from the crusher.

On January 26, 1979, the day after the fatality occurred, several people made an investigation of the accident. The only person representing MSHA during that inspection who testified here today was Inspector Charles W. Quinn. He stated after he had examined the feeder at the site where Mr. Whalen was killed, that he had concluded that there was not a safe means of access to and from the feeder.

For that reason, he wrote Citation No. 301536, dated January 26, 1979, alleging a violation of section 56.11-1, which provides that a "[s]afe means of access shall be provided and maintained to all working places."

3. There were a number of photographs introduced into evidence in this proceeding. They are essential for an understanding of the area where the victim was killed and also of the physical layout of the facility where Inspector Quinn felt a violation of section 56.11-1 had occurred.

Some of these exhibits were introduced by Inspector Quinn and some by the company. All the photographs have been very helpful in showing the situation which existed. Exhibit No. 4-A shows how a person who is 5'8" tall would have to proceed and how he would have to move his body in order to get out of the feeder in the vicinity of the control booth from which the crusher is operated.

4. Exhibit No. 4-D is a very close-up picture of the exact area where a person would have to stand if he wanted to get out of the feeder. That picture indicates that an individual leaving the feeder would have to stand on what is known as a "grizzley," which consists of 4-inch wide metal strips with an opening between them of about 6 inches.

Although the witnesses, or at least Mr. Christopher, who was a witness for the respondent, indicated that the grizzley is 5 feet long, a person coming out of the control booth, or going into it from the feeder, is considerably closer to the terminal end of the grizzley on the side of the crusher than 5 feet, according to Exhibit No. 4-D.

5. Exhibit No. A-6 shows a good view of the grizzley at the site where a person would be if he wanted to go out at the control booth and it is especially obvious that a person stepping up from the feeder would be stepping up, from an insecure footing, a distance of 2 feet.

6. Exhibit No. A-10 is a close-up view of the feeder and control booth after a handrail was installed near the control booth and after a step was made toward the top of the feeder. Those improvements were made in order for the company to abate the violation alleged in Citation No. 301536.

7. Ms. Kaufmann correctly stated in her remarks that no one knows for sure what caused Mr. Whalen to fall into the crusher, but we do have the testimony of Mr. Christopher who was the person who last talked to Mr. Whalen before his death. Exhibit No. A-4 shows the end of the feeder farthest from the control booth and, according to Mr. Christopher's testimony, Mr. Whalen, the victim, was standing in the feeder about 3:50 p.m. when Mr. Christopher last talked to him. That was on January 25, 1979. At that time, Mr. Christopher told Mr. Whalen an explosive charge would be set off in the quarry and that Mr. Whalen should shut off the crusher and could leave for the day after he had finished cleaning the feeder which was almost entirely free of residue at that time.

8. When Mr. Christopher had returned to the area of the feeder after obtaining the detonating equipment for setting off the blast, he realized that Mr. Whalen was not in sight at any of the places where he normally saw him at that time of day. Consequently, he made a search for Mr. Whalen and eventually found his body in the crusher with his head foremost into the crusher and his legs sticking out the top. At that time, Mr. Whalen was already dead.

9. When Mr. Christopher talked to Mr. Whalen at 3:50 p.m., the feeder was not operating but the crusher was. At 3:50 p.m., the feeder still had rock in it which needed to be transported by the feeder into the crusher. When Mr. Christopher returned around 4:00 or 4:05 p.m. to the vicinity of the feeder, the material in the feeder had been discharged into the crusher, but the crusher was still running.

10. The inspection report written by MSHA's investigators was received into evidence as Exhibit F. That report indicates on page three that Mr. Whalen was an epileptic and that he was normally taking phenobarbitol to counteract his illness and an analysis of his blood showed a rather high concentration of aprobarbital.

Despite the fact that Mr. Whalen had been under a doctor's treatment for his problem, Mr. Christopher worked with him for approximately 8 years without noticing that Mr. Whalen had any problems in the form of dizziness or slurred speech or any indication he had an abnormal condition of any kind. Mr. Christopher did not observe any unusual physical attributes about Mr. Whalen at 3:50 p.m. on January 25, 1979, when Mr. Christopher last talked to Mr. Whalen before his death.

I believe that generally summarizes the facts in this case.

As I have indicated in the findings, the feeder was not equipped with any type of step or handrailing to assist a person who had been working in the feeder to get out of the feeder once he had finished that work.

The testimony indicates that it was the practice, especially in the wintertime, to clean out the feeder during every shift because the materials in the wintertime had a tendency to cling around the top of the feeder.

While there is no doubt in my mind that a person with secure footing could step up a distance of 2 feet, or 2-1/2 feet if you include the angle into the control booth that was discussed by Inspector Quinn, the fact remains that anyone getting out of the feeder has to do so by standing on top of the grizzley and, as I have indicated in my findings, his footing would not be very stable.

It is undoubtedly true that Mr. Whalen had been down in that feeder and had cleaned in it for many years because he worked for the company from February 4, 1970, until his death

on January 25, 1979. Nevertheless, the evidence shows that without any handhold or anything to assist a person who was stepping up out of the feeder, there was certainly a hazard involved in not having any facilities whatever to assist a person coming out of the feeder. Therefore, I find that a violation of section 56.11-1 occurred because a safe means of access into and out of the feeder had not been provided.

Having found that a violation occurred, it is necessary for me to assess a penalty based on the six criteria.

The first criterion is the size of respondent's business. As to that matter, I have indicated in paragraph one of my findings that the company had total man-hours of operation of 163,693. That places the company in a moderate range of size. Therefore, any civil penalty to be assessed in this case will be or should be in a moderate range of magnitude, insofar as the size of respondent's business is considered as one of the criteria.

There was introduced with respect to the criterion of history of previous violations Exhibit No. 5. That exhibit shows that there have been two previous violations of section 56.11-1 by the company. It has always been my practice to increase a penalty otherwise assessable under the other five criteria by a specific amount if I find existence of an unfavorable history of previous violations. Exhibit No. 5 shows that two previous violations occurred sometime between January 27, 1977, and January 26, 1979. I find that two violations in that length of time should be considered as somewhat unfavorable and therefore whatever penalty is assessed in this case will be increased by $50 under the criterion of history of previous violations.

As to the criterion of the operator's ability to continue in business, there was no testimony given on that subject. The former Board of Mine Operations Appeals held in Buffalo Mining Company, 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that if a company puts on no evidence showing its financial condition, that a judge may presume payment of penalties would not cause it to discontinue in business. Therefore, I find that payment of penalties will not cause A. H. Smith Stone Company to discontinue in business.

The next criterion to be considered is the question of whether the operator demonstrated a good faith effort to achieve rapid compliance after the citation was written. The inspector terminated the citation on January 30, 1979.

The citation was written on January 26, 1979. He has indicated that he felt the company showed a normal good faith effort to achieve rapid compliance. I find that the evidence supports that conclusion. When I find that a company has made a normal good faith effort to achieve compliance, I neither increase nor decrease a penalty otherwise assessable under the other criteria.

The remaining two criteria, that is, gravity and negligence, are the ones that affect the penalty the most severely. The first consideration is the degree of negligence involved in this particular violation. I think in connection with that criterion, it is worthwhile to note that the inspector had made a previous examination of the crusher at the Louisa Mill and had not noticed this particular hazard. I can understand why an inspector would not see everything that might be hazardous around the crusher on his first inspection. The inspector did indicate that he had been in this part of the facility and it did not occur to him at that time that this was a particularly hazardous area and he did not write a citation for a violation of section 56.11-1 at that time.

Nevertheless, when one does examine the area of the feeder from the standpoint of the photographs which I have discussed in my findings, one reaches the inescapable conclusion that the operator was at least guilty of a normal amount of negligence in not having put any kind of provisions here for a person to grab when he is trying to get in or out of the feeder, particularly since Mr. Christopher has indicated the feeder has to be cleaned out rather constantly during cold weather. Therefore, I find that there is a moderate amount of negligence involved in this case.

The final criterion I have to consider is the question of gravity. Gravity gets back to the question of whether the failure to provide a safe means of egress, specifically a step and a handhold for getting up out of the feeder, was the direct cause of the person's death in this instance. In a general situation, the question would be how serious a fall from the side of this feeder would normally be. The difficulty with making that finding in this case is associated with the fact that there was no eyewitness who saw Mr. Whalen fall, if he did fall, and there is no one who can say for certain that the medication he was taking had no bearing upon the fact that he was found in the crusher.

The inspector and Mr. Christopher have been unable to explain satisfactorily why a person, assuming he did slip in trying to get out of the feeder, would not only have fallen

backwards but also would have further slid into the opening to the crusher. There was a distance of at least a couple of feet from the place where he would have fallen to the point where he would have started down into the crusher.

Another part of the problem in assessing gravity in this instance gets to the fact that when Mr. Christopher was talking to Mr. Whalen at 3:50 p.m., the feeder was not running. When Mr. Christopher next came back to the feeder, it still was not running but all the material that had been thrown down by Mr. Whalen onto the feeder had been transported by the feeder into the crusher and the feeder was empty of any material.

The foregoing facts support a conclusion to the effect that Mr. Whalen at least successfully got out of the feeder and turned it on in order to eliminate the materials that were in it. Inspector Quinn's belief that Mr. Whalen slipped while trying to get out of the feeder and fell backwards and rolled into the crusher, is really not supported by the facts because, once Mr. Whalen got out of the feeder and turned it on, there is no reason that we know of, based on the facts in this case, that he would have gotten back down into the feeder. We simply do not have any evidence to show for certain that failure to have a step and a handhold for a person to come out of the feeder was the direct cause of Mr. Whalen's death in this case.

Since we do not have any way to show the exact cause of death, and the inspector's accident report, Exhibit F, so indicates on page three, I can only find on the evidence in this case that the violation was moderately serious and would not normally be expected to result in a person's death.

There is one aspect of the evidence which does make this feeder and its lack of facilities to help a person get out of it serious, and that is, up until this accident occurred, Mr. Whalen was cleaning out the edges of the feeder while keeping the crusher in operation. That practice meant if anyone should fall into the crusher while cleaning out the feeder, his death was more likely than if the crusher had not been operating.

According to Mr. Christopher, after the accident, the company has discontinued that practice and now turns off both the feeder and the crusher at the time that a person is down in the feeder cleaning it out.

At the time this particular accident occurred, the company was engaging in a kind of operation which was less safety-oriented than it is now.

The lack of a means of egress, a safe means of egress on January 25, 1979, was more serious than it would be today when neither the crusher nor the feeder is operating, but on January 25, 1979, the crusher was operating even though the feeder was not.

For that reason, I find that the evidence supports a conclusion that the violation was moderately serious.

In summary, since we have a company which operates a medium-sized business, and since we have a good faith effort to achieve compliance and a moderate amount of negligence and a moderate amount of gravity, I believe a penalty of $400 should be assessed, to which there should be added $50 under the criterion of history of previous violations, so that the total penalty in this case should be $450.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, A. H. Smith Stone Company shall pay a penalty of $450.00 for the violation of section 56.11-1 charged in Citation No. 301536 dated January 26, 1979.

Richard C. Steffey

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

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A. H. Smith Stone Company, Attention: A. H. Smith, Jr., and Wheeler B. Green III, Branchville, MD 20740 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 2 1980

GEX COLORADO, INCORPORATED, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	NOTICE OF CONTEST DOCKET NO. WEST 80-327-R Citation No. 0786929 Roadside Mine

DECISION

Appearances:

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Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor,
United States Department of Labor,
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for Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

Contestant, GEX Colorado, Incorporated, (GEX), seeks damages, expenses, and costs against the Secretary of Labor. It alleges that it suffered such damage as a result of the improper issuance of Citation No. 786929 by a mine safety inspector of the Federal Mine Safety and Health Administration (MSHA). The citation was originally issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

PROCEDURAL BACKGROUND

At a hearing on May 20, 1980 in Grand Junction, Colorado in a case [1] involving the above parties, the representative of GEX presented a copy of its notice of contest of MSHA citation No. 786929.

1/ GEX Colorado Incorporated, Contestant, vs. Secretary of Labor, Mine Safety and Health Administration (MSHA), Respondent, Docket No. WEST 80-306-R, decision issued June 9, 1980.

The parties indicated the citation had been withdrawn before the hearing. (Tr. 7-8). The Commission file was subsequently assigned to the trial judge.

In reply to a Commission order on May 29, 1980, GEX indicated its intention to seek the additional relief as prayed in its notice of contest although the citation had been vacated.

> GEX's additional relief seeks: general damages according to proof; punitive and exemplary compensation; costs of maintaining the action; incidental expenses according to proof; other and further relief as the Commission deems proper.

GEX expressly states that any and all compensation awarded to it will be used to offset any future valid assessed penalties.

Subsequent to the events of May 20, 1980, the Commission Judge stated he would rule on the issue of whether the GEX notice of contest, in its present posture, states a claim upon which relief can be granted. If affirmative, the case would be set for an evidentiary hearing. If negative the notice of contest would be dismissed. (Order, July 11, 1980).

The parties filed briefs in support of their respective positions.

The Secretary contends that the Federal Mine Safety and Health Review Commission does not have jurisdiction to consider the merits of GEX's claim because the citation was withdrawn by MSHA prior to the time that GEX filed its notice of contest. Additionally, MSHA asserts that the doctrine of sovereign immunity bars recovery on GEX's claim. The Secretary also has moved to dismiss the case on the ground that GEX has failed to state a claim upon which relief can be granted.

ISSUE

In a notice of contest under Section 105(d) of the Federal Mine Safety and Health Act, contestant seeks damages against the Secretary of Labor. Prior to the filing of the notice of contest the Secretary withdrew his citation against contestant. The issue is whether the Review Commission has jurisdiction to consider the contest.

FINDINGS OF FACT

The facts as shown by the file and admissions are as follows:

1. A federal mine inspector issued Citation 786929 to GEX on April 29, 1980.

2. The citation charged GEX with violating 30 CFR 75. 1704 [2] by failing to provide substantial fire doors in the main intake portal. The inspector gave GEX an extension until May 19, 1980 to abate the condition.

3. On May 15, 1980, after incurring some abatement expense, GEX was advised by the inspector that MSHA had withdrawn the citation as "being written in error" (Tr. 6, notice of contest.)

4. The notice of contest was lodged with the Review Commission on May 23, 1980.

DISCUSSION

For the reasons hereafter stated the notice of contest is dismissed with prejudice.

The legal matters over which the Commission has jurisdiction are limited to those set forth in the Federal Mine Safety and Health Review Act, 30 U.S.C. 801 et seq. A mine operator is afforded an opportunity for a hearing on its contest of a citation, a withdrawal order, the length of an abatement period, or the penalty assessed by the Secretary, 30 U.S.C. 815(d). There are additional opportunities for a hearing that are not relevant here but there is no provision in the Act for a suit against the Secretary of Labor for damages sustained as a result of the improper issuance of a citation. A contest of a citation involves a dispute as to the validity of the citation. It cannot be construed so as to provide for a hearing on a claim for consequential damages suffered by the operator.

GEX contends that the grant of authority in 30 U.S.C. 815(d) giving the Commission the power to order "other appropriate relief", is to be interpreted to allow consideration of GEX's claims for a set off. I disagree. This provision refers to the authority of the Commission to provide relief to the parties who have brought before the Commission matters within its jurisdiction. Since the citation which gave rise to the claimed damages had been withdrawn prior to the time GEX filed its notice of contest there is no substantive matter in the notice that is cognizable by the Commission.

2/ § 75.1704 Escapeways. [Statutory Provisions]. Except as provided in § 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

GEX also cites North American Coal Corp., 3 IBMA 93 (1974) as support for its theory that it is entitled to an award of damages and to set off such claim against any future penalties. North American is distinguishable from the present case. There the Interior Board of Mine Operations Appeals ruled that the loss in production incurred as a result of a vacated withdrawal order could be considered as a mitigating factor in the assessment of the penalty for the violation which was the subject of the withdrawal order. The loss was to be considered in the same manner as the other statutory criteria required to be evaluated in the calculation of a penalty. It was within the discretion of the judge to determine how much, if any, the penalty should be reduced because of the economic loss.

The Board did not rule that damages could be assessed against the United States and set off against any future civil penalties. The reduction in the fine was allowed because the economic loss plus the reduced penalty was believed by the Board to be a sufficient deterrent against future infractions. The ruling was limited to instances where the condition which gave rise to the improper withdrawal order and subsequent loss in production is the same condition for which the civil penalty is assessed. Cf. Climax Molybdenum Company v. Secretary of Labor et al DENV 79-102-M, October 1980.

In the present case, there is no penalty assessment at issue. The ultimate remedy requested by GEX, if granted, would allow them to violate the Act with impunity until any money damages were satisfied. This would contravene the intention of Congress in providing for the assessment of a penalty.

The intent of Congress on this point appears in the legislative history.

> To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance. Senate Report No. 95-181, 95th Cong., 1st Sess. 41 (1977).

For the reasons stated, I have determined that the Review Commission does not have jurisdiction to consider contestant's claim for damages. Accordingly, it is not necessary to consider the Secretary of Labor's arguments based on sovereign immunity.[3]

CONCLUSIONS OF LAW

The Commission lacks jurisdiction to consider this case because the citation was withdrawn before the notice of contest was filed. A procedure awarding damages in such a situation would be inconsistent with the Act. For these reasons I find that Contestant has failed to state a claim upon which relief can be granted.

3/ For a companion case discussing the doctrine of soverign immunity see GEX Colorado vs. Secretary of Labor, WEST 80-328-R.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

The notice of contest is dismissed with prejudice.

John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of Tedrick A. Housh, Jr.
Regional Solicitor, United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106

Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor
U. S. Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown, Attorneys at Law
1100 United Bank Center, Denver, Colorado 80290

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 2 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GEX COLORADO, INC., Respondent.	CIVIL PENALTY ACTION DOCKET NO. WEST 79-28-M ASSESSMENT CONTROL NO. 05-00281-03012 ROADSIDE MINE

APPEARANCES:

Ann M. Noble, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado
for the Petitioner,

Curt Neumann, Assistant Safety Director, appearing pro se, Grand Junction, Colorado
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceedings Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, GEX Colorado, Inc. (GEX), violated regulations promulgated under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Grand Junction, Colorado on May 20, 1980.

The parties waived their right to file post trial briefs.

ISSUES

The issues are whether GEX violated the standards.

CITATION 242465

This citation alleges a violation of 30 C.F.R. 75.302-4(a) [1]

The facts are uncontroverted.

1. MSHA Inspector Walter Blanc used a smoke tube test to determine the flow of the air current in the GEX mine (Tr. 5, 6, 10).

2. Air from the working face in the mine was being recirculated into the air intake entry and thus the air was again travelling to the working face (Tr. 4-5).

3. The recirculating air from the auxilliary fan was blowing under a line curtain instead of following the return air course (Tr. 5, 8, P5).

DISCUSSION

GEX contends the situation cited by the inspector was merely turbulent air which did not create a hazard. In addition, GEX asserts that MSHA failed in its burden of proof because the inspector did not follow the air to the working face (Tr. 90).

GEX's arguments lack merit. The inspector's testimony clearly establishes that a recirculation of air occurred. The regulation prohibits such a recirculation "at any time". The regulation in its present form presumes the existence of a hazard.

Concerning the second argument, it is not necessary for the MSHA inspector to follow the air to the working face. The movement of the recirculated air into the intake air entry is sufficient to establish the violation of 30 C.F.R. 75.302-4(a). Once it has entered the intake air corridor, the air can only be drawn to the working face (Exhibit P5). The citation should be affirmed.

In view of the statutory criteria [2], I consider the proposed civil penalty of $114.00 to be appropriate.

1/ § 75.302-4 Auxiliary fans and tubing.

(a) The fan shall be of a permissible type, maintained in permissible condition, so located and operated to avoid any recirculation of air at any time, and inspected frequently by a certified person when in use.

2/ 30 USC 820(i)

CITATION 242467

This citation alleges a violation of 30 C.F.R. 75.403.

The parties by stipulation propose an amendment of the civil penalty and respondent agrees to withdraw its notice of contest.

An analysis of the supporting documentation indicates that the proposed settlement is warranted in view of the statutory criteria, 30 USC 820(i). Accordingly this citation and the proposed civil penalty, as amended, in the amount of $75.00 should be affirmed.

CITATION 242662

This citation alleges a violation of 30 C.F.R. 75.316 [3].

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

1. MSHA Inspector Matthew Biondich, using his anemometer, was unable to measure the air velocity in the mine (Tr. 33-38).

2. The stoppings in the mine were leaking "pretty bad" (Tr. 35).

3. Three smoke readings indicated an air velocity of 7025 cfm (cubic feet per minute). (Tr. 39-40).

4. After the stoppings were repaired, the velocity increased to 20,475 cfm (Tr. 44).

5. According to GEX's ventilation plan, 16,000 cfm should be maintained (Exhibit P-3).

Respondent's two fold argument is that the decrease in air velocity was due to necessary ventilation changes when moving from one side of the belt line to the other. Further, respondent asserts it cannot be expected to maintain air velocity in the last open cross cut.

3/ § 75.316 Ventilation system and methane and dust control plan.
[STATUTORY PROVISIONS]

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

I reject respondent's arguments. While a conflict exists as to the amount of the air velocity in this section of the mine, I find this to be basically a matter of expert testimony. Respondent conceded the expertise of the MSHA inspectors (Tr. 32-33).

Respondent's defenses cannot prevail since its ventilation plan requires air velocity at all places in excess of the 7025 cfm measured by the inspector.

This citation should be affirmed and in view of the statutory criteria [4], I consider the proposed civil penalty of $180.00 to be appropriate.

ORDER

Based on the foregoing findings of fact, conclusions of law, and stipulation I hereby enter the following order:

1. Citation 242465 and the proposed civil penalty of $114.00 are affirmed.

2. Citation 242467 and the proposed civil penalty, as amended, in the amount of $75.00 are affirmed.

3. Citation 242662 and the proposed civil penalty of $180.00 are affirmed.

John J. Morris
John J. Morris
Administrative Law Judge

Distribution:

Ann M. Noble, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294

Mr. Curt Neumann, Acting Safety Director, GEX Colorado, Inc., P. O. Box W, Palisade, CO 81526

4/ 30 USC 820(i)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 2 1980

GEX COLORADO, INCORPORATED, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	NOTICE OF CONTEST DOCKET NO. WEST 80-328-R Citation No. 0786890 Roadside Mine

DECISION

Appearances:

Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown
1100 United Bank Center, Denver, Colorado 80290
for Contestant,

Robert J. Lesnick, Esq., Office of Tedrick A. Housh, Jr.,
Regional Solicitor, United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106
for Respondent

Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor,
United States Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294
for Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

Contestant, GEX Colorado, Incorporated, (GEX), seeks damages, expenses, and costs against the Secretary of Labor. It alleges that it suffered such damage as a result of the improper issuance of Citation No. 786890 by a mine safety inspector of the Federal Mine Safety and Health Administration (MSHA). The citation was originally issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

PROCEDURAL BACKGROUND

At a hearing on May 20, 1980 in Grand Junction, Colorado in a case [1] involving the above parties, the representative of GEX presented a copy of its notice of contest of MSHA citation No. 786890.

1/ GEX Colorado Incorporated, Contestant, vs. Secretary of Labor, Mine Safety and Health Administration (MSHA), Respondent, Docket No. WEST 80-306-R, decision issued June 9, 1980.

Counsel for the Secretary of Labor moved to withdraw the citation, (Tr. 7). The trial judge indicated he did not have the Commission file but he would grant the motion to vacate (Tr. 10). The file was subsequently assigned to the trial judge.

In reply to a Commission order on May 29, 1980, GEX indicated its intention to seek the additional relief as prayed in its notice of contest although the citation had been vacated.

> GEX's additional relief seeks: general damages according to proof; punitive and exemplary compensation; costs of maintaining the action; incidental expenses according to proof; other and further relief as the Commission deems proper.

GEX expressly states that any and all compensation awarded to it will be used to offset any future valid assessed penalties.

Subsequent to the events of May 20, 1980, the Commission Judge stated he would rule on the issue of whether the GEX notice of contest, in its present posture, states a claim upon which relief can be granted. If affirmative, the case would be set for an evidentiary hearing. If negative the notice of contest would be dismissed. (Order, July 11, 1980).

The parties filed briefs in support of their respective positions.

The Secretary contends that the doctrine of sovereign immunity bars recovery on GEX's claim. He also has moved for the dismissal of the case on the ground that GEX has failed to state a claim upon which relief can be granted.

ISSUE

The issue raised is whether contestant, GEX, can seek damages against the Secretary of Labor for an allegedly improper issuance of a citation.

FINDINGS OF FACT

The facts as shown by the file and admissions are as follows:

1. A federal mine inspector issued Citation 786890 to GEX on May 15, 1980.

2. The citation charged GEX with violating 30 CFR 75.503 [2] by failing to properly maintain its roof bolting machine. Specifically, flat washers were used between the face of the lock washers and the cover lid bolts on the main controller compartment. (Citation, Notice of Contest, ¶ 4).

3. The GEX notice of contest was presented [3] to the Review Commission Judge during a hearing on an unrelated case involving the same parties.

4. At the above hearing the Secretary moved to vacate Citation 786890. The motion to vacate was granted (Tr. 7, 10).

DISCUSSION

For the reasons hereafter stated the notice of contest is dismissed with prejudice.

The Secretary is correct in his view that the doctrine of sovereign immunity bars GEX's claim. There are a myriad of cases holding that the United States "is immune from suit save as it consents to be sued . . and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit." United States v. Testan 424 U.S. 392 (1976). Contestant is not entitled to money damages without a waiver of sovereign immunity, and the Federal Mine Safety and Health Act of 1977 contains no such waiver.

A mine operator is provided relief from improper actions of the Secretary through the vacation or modification of a citation, penalty, order of withdrawal, or abatement period. Administrative and judicial review of any action of the Secretary is allowed but the remedies available do not include monetary or exemplary damages.

2/ § 75.503 Permissible electric face equipment; maintenance. [Statutory Provisions] The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

3/ No party questions the propriety of the service of the notice of contest under these circumstances, and that issue is not addressed in this decision.

GEX contends that the grant of authority in 30 U.S.C. 815(d), giving the Commission the power to order "other appropriate relief", is to be broadly interpreted to allow consideration of GEX's claims for a set off. I disagree. The consent to be sued must be "unequivocally" expressed in the statute. Testan, supra. "Other appropriate relief" cannot be interpreted as an express waiver of sovereign immunity.

GEX also cites North American Coal Corp., 3 IBMA 93 (1974) as support for its theory that it is entitled to an award of damages which would be set off against any future penalties. North American is distinguishable from the present case. There the Interior Board of Mine Operations Appeals ruled that the loss in production incurred as a result of a vacated withdrawal order could be considered as a mitigating factor in the assessment of the penalty for the violation which was the subject of the withdrawal order. The loss was to be considered in the same manner as the other statutory criteria required to be evaluated in the calculation of a penalty. It was within the discretion of the judge to determine how much, if any, the penalty should be reduced because of the economic loss.

The Board did not rule that damages could be assessed against the United States and set off against any future civil penalties. The reduction in the fine was allowed because the economic loss plus the reduced penalty was believed by the Board to be a sufficient deterrent against future infractions. The ruling was limited to instances where the condition which gave rise to the improper withdrawal order and subsequent loss in production is the same condition for which the civil penalty is assessed. Cf. Climax Molybdenum Company v. Secretary of Labor et al DENV 79-102-M, October 1980.

In the present case, there is no penalty assessment at issue. The ultimate set off remedy requested by GEX, if granted, would allow them to violate the Act with impunity until any money damages were satisfied. This would contravene the intention of Congress in providing for the assessment of a penalty.

The intent of Congress on this point appears in the legislative history.

> To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance. Senate Report No. 95-181, 95th Cong., 1st Sess. 41 (1977).

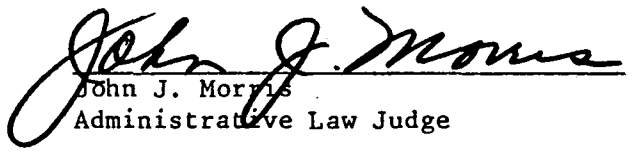
CONCLUSIONS OF LAW

The Commission lacks jurisdiction to consider a claim for damages against the Secretary of Labor since the Federal Mine Safety and Health Act of 1977 does not waive the sovereign immunity of the United States. A procedure awarding damages for a future set off in such a situation would be inconsistent with the Act. For these reasons I find that contestant has failed to state a claim upon which relief can be granted.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

The notice of contest is dismissed with prejudice.



John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

(703) 756-6210/11/12

DEC 2 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. BARB 79-319-P A.O. No. 31-00136-05006R
v.	:	Docket No. SE 79-56-M A.O. No. 31-00136-05007
CAROLINA STALITE COMPANY, Respondent	:	Docket No. SE 79-91-M A.O. No. 31-00136-05001 Docket No. SE 79-92-M A.O. No. 31-00136-05003 Docket No. SE 79-93-M A.O. No. 31-00136-05004 Docket No. SE 79-94-M A.O. No. 31-00136-05002 Docket No. SE 79-95-M A.O. No. 31-00136-05005 Docket No. SE 79-85-M A.O. No. 31-00136-05008 Docket No. SE 79-87-M A.O. No. 31-00136-05009 Docket No. SE 79-114-M A.O. No. 31-00136-05010 H Docket No. SE 80-35-M A.O. No. 31-00136-05012 Docket No. SE 80-37-M A.O. No. 31-00136-05013 Docket No. SE 80-44-M A.O. No. 31-00136-05014 Stalite Mill

DECISION AND ORDER

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
William C. Kluttz, Jr., Esq., Salisbury, North Carolina, for the respondent.

Before: Judge Kennedy

These 13 penalty cases involve 133 charges of violations of the Mine Act and the mandatory safety standards for sand, gravel and crushed stone operations set forth in 30 C.F.R. Part 56. In all these cases, the operator filed an answer in which it (1) generally denied liability, (2) specifically denied subject matter jurisdiction, (3) moved to suppress evidence, (4) challenged the standards for vagueness, and (5) claimed the charges were the result of arbitrary and capricious action.

On November 28, 1979, respondent filed a motion for summary decision and to dismiss based on its jurisdictional and constitutional challenges. After briefing and oral argument, the motion was denied by Decision and Order of April 14, 1980, a copy of which is attached hereto and incorporated herein.

Thereafter, in the interest of a just, speedy and inexpensive disposition, the parties stipulated to waive an evidentiary hearing and agreed to submit all of the violations for decision on the record of their written submissions, leaving to the judgment, expertise and discretion of the trial judge the resolution of factual conflicts and the determination of the amount of the penalties warranted. 5 U.S.C. § 556(d); 30 U.S.C. §§ 110(i), (k), 113(d). The stipulation originally proposed that in addition to deciding the merits the trial judge would rule on the void for vagueness claim without briefing or argument. When the trial judge declined to accept this provision, respondent withdrew this challenge. The stipulation as filed on August 11, 1980 and amended on October 30, 1980, the trial judge finds is acceptable.

The claim that the charges are arbitrary and capricious is without merit. The evidence shows that most of the violations did, in fact, occur. Furthermore, the undisputed evidence as to the conditions observed by the inspector established probable cause to believe that at the time of issuance of the citations and orders the violations charged existed. There is no evidence that the enforcement action taken was so selective as to establish an abuse of discretion or so grossly erroneous as to imply bad faith. Accordingly, the defense of arbitrary and capricious action is denied.

The record for decision in these cases consists of the citations and orders, the inspector's statements and contemporaneous notes, the operator's statements in defense or in mitigation of the gravity and negligence (Exhibit "B" to the stipulation as amended), photographs submitted by respondent, sketches submitted by petitioner, and the parties' prehearing submissions.

After a careful review of the record and based on an independent evaluation and de novo review of the circumstances of each violation, I find, that except as noted below, the conditions and practices observed and set forth in the citations and orders were violations of the mandatory safety standards cited. Appendix "A" attached hereto and made a part hereof, supplemented where appropriate with the additional discussion contained in Appendix "B" hereto, contains my determinations with respect to gravity, negligence, and, based on my consideration of the other criteria applicable to the assessment of penalties, findings as to the amount of the penalties warranted for each violation found. For the reasons advanced by the operator, and after careful consideration of the record considered as a whole, including the physical circumstances shown in the photographs and sketches, I find the violations indicated in Appendix "A" as "vacated" are deficient as a matter of fact and law, and that these violations did not, in fact, occur.

The total amount of the penalties found warranted for the 103 violations found is $14,542.00. Accordingly, it is ORDERED that on or before Monday, December 29, 1980, the operator pay the amount of the penalties assessed, $14,542.00, and that subject to payment the captioned matters be, and hereby are, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Attachments

Distribution:

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

William C. Kluttz, Jr., Esq., Kluttz and Hamlin, 507 West Innes Street, P.O. Drawer 1617, Salisbury, North Carolina 28144 (Certified Mail)

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
BARB 79-319	104393	§103(a)	*Serious	Intentional	$ 500
SE 79-56	105187	56.14-6	Low Risk	No Negligence	50
	105190	56.14-1	Vacated - protected by location		
	105191	56.9-2	High Risk	High degree of ordinary	500
	105192	56.9-2	High Risk	High degree of ordinary	500
	105193	56.14-6	Vacated - protected by location		
	105195	56.11-12	Moderate Risk	Ordinary	125
	105196	56.14-1	Moderate Risk	Ordinary	125
	105567	56.4-33	High Risk	Ordinary	175
	105568	56.4-4	High Risk	Ordinary	175
	105569	56.12-20	Vacated - area dry, no shock hazard existed		
	105570	56.12-30	Low Risk	Ordinary	75
	105572	56.14-6	Vacated - protected by location		
	105573	56.14-6	Vacated - protected by location, machinery not in operation		
	105574	56.14-6	Vacated - protected by location, machinery not in operation		
	105575	56.11-2	Low Risk	Ordinary	75
	105576	56.14-6	Low Risk	Ordinary	75
	105577	56.11-2	Low Risk	Ordinary	75
79-91	104395	56.16-5	High Risk	Ordinary	150
	104397	56.14-8(b)	Moderate Risk	Ordinary	100
	104398	56.12-8	Low Risk	Ordinary	75
	104399	56.12-32	Low Risk	Ordinary	75
	104650	56.15-5	High Risk	High degree of ordinary	300

*See Appendix B

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
79-91 (cont.)	104651	56.9-3	Extremely Serious (imminent danger)	Gross	$ 1000
	104687	56.9-3	Extremely Serious (imminent danger)	Gross	1000
79-92	104618	56.14-1	Vacated - protected by barrier and location		
	104619	56.14-1	Vacated - protected by barrier and location		
	104620	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104628	56.14-1	Low Risk	No negligence	50
	104629	56.14-1	Low Risk	No negligence	50
	104630	56.9-7	Low Risk	Ordinary	75
	104631	56.14-1	Vacated - protected by location		
	104632	56.11-13	Low Risk	No negligence	50
	104633	56.14-2	Low Risk	No negligence	50
	104634	56.14-1	Vacated - protected by location		
	104635	56.14-1	Non-serious	No negligence	50
	104637	56.14-1	Vacated - protected by location		
	104638	56.14-1	Low Risk	Ordinary	75
	104639	56.14-1	Low Risk	Ordinary	75
	104640	56.14-1	Vacated - protected by location		
	104641	56.14-1	Vacated - protected by location		
	104642	56.14-1	High Risk	Ordinary	150
	104643	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104644	56.14-1	Low Risk	Ordinary	75
	104645	56.11-2	Low Risk	Ordinary	75

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
79-93	104646	56.14-1	Vacated - protected by barricade and location		
	104647	56.14-1	Low Risk	No negligence	50
	104648	56.14-1	Low Risk	No negligence	50
	104649	56.11-12	High Risk	Ordinary	150
	104661	56.14-1	Vacated - protected by location		
	104662	56.11-2	Low Risk	Ordinary	75
	104663	56.14-1	Low Risk	Ordinary	75
	104664	56.14-1	Low Risk	Ordinary	75
	104665	56.14-1	Low Risk	Ordinary	75
	104666	56.14-1	Vacated - protected by location		
	104667	56.14-1	Low Risk	No negligence	50
	104668	56.14-2	Low Risk	Ordinary	75
	104669	56.14-1	Low Risk	No negligence	50
	104670	56.14-1	Low Risk	Ordinary	75
	104671	50.20-1	No Risk	No fault	1
	104672	50.30(a)	No Risk	No fault	1
	104652	56.14-1	Low Risk	Ordinary	75
	104653	56.14-1	Low Risk	Ordinary	75
	104654	56.14-1	Low Risk	Ordinary	75
	104655	56.9-7	Low Risk	Ordinary	75
79-94	104394	56.4-2	Low Risk	Ordinary	30
	104396	56.4-24(c)	Vacated - extinguisher not discharged		
	104400	56.11-13	Low Risk	Ordinary	75
	104601	56.14-1	Low Risk	Ordinary	75
	104602	56.9-7	Low Risk	Ordinary	75
	104603	56.9-7	Low Risk	Ordinary	75
	104604	56.12-8	Low Risk	No negligence	30
	104605	56.11-1	Low Risk	Ordinary	75
	104606	56.14-1	Vacated - protected by barricade and location		

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
	104607	56.14-1	Vacated - protected by barricade and location		
	104608	56.14-1	Low Risk	Ordinary	75
	104609	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104610	56.14-1	Vacated - protected by location		
	104611	56.9-22	High Risk	No negligence	75
	104612	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104613	56.11-2	Serious	Ordinary	150
	104614	56.14-1	Vacated - protected by location		
	104615	56.11-2	Low Risk	Ordinary	75
	104616	56.14-1	Vacated - protected by location		
	104617	56.9-7	Low Risk	Ordinary	75
79-95	104656	56.14-1	Low Risk	Ordinary	75
	104657	56.14-1	Low Risk	Ordinary	75
	104658	56.14-1	Low Risk	Ordinary	75
	104659	56.14-1	Low Risk	No negligence	50
	104660	56.14-1	Low Risk	Ordinary	75
	104673	56.9-7	Low Risk	Ordinary	75
	104674	56.9-7	Low Risk	Ordinary	75
	104675	56.14-6	Moderate Risk	Ordinary	125
	104676	56.14-1	Low Risk	Ordinary	75
	104677	56.11-12	High Risk	Ordinary	150
	104678	56.14-1	Low Risk	No Negligence	50
	104679	56.12-32	Moderate Risk	Ordinary	75

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
	104680	56.14-1	Low Risk	No negligence	50
	104681	56.11-1	Low Risk	Ordinary	75
	104682	56.14-1	Vacated - protected by location		
	104683	56.14-1	Vacated - protected by location		
	104684	56.14-2	Low Risk	Ordinary	75
	104685	56.9-11	Low Risk	Ordinary	75
79-85	105188	56.11-2	Moderate Risk	Ordinary	100
	105189	56.11-2	Moderate Risk	Ordinary	100
	105194	56.11-2	Moderate Risk	Ordinary	100
	105198(a)	56.15-5	Extremely Serious (imminent danger)	Gross	1000
	105198(b)	56.12-16	Extremely Serious (imminent danger)	Ordinary	500
	105565	56.15-4	Vacated - condition did not occur, men wearing safety glasses		
	105571	56.14-1	Vacated - protected by location		
	105197	56.11-1	High Risk	Ordinary	125
79-87	105566	56.14-45	Very High Risk	High degree of ordinary	300
79-114	104453	56.15-5	*Extremely serious (imminent danger)	Gross	1500
80-35	104510	56.9-73	Low Risk	No negligence	30
	105556	56.14-1	High Risk	Ordinary	125
	105557	56.11-2	Low Risk	Ordinary	75
	105558	56.14-1	Low Risk	Ordinary	75

*See Appendix B

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
80-35 (cont.)	1055559	56.14-1	Low Risk	Ordinary	75
	105560	56.14-1	Low Risk	Ordinary	25
80-37	104511	56.14-1	Low Risk	Ordinary	75
	104512	56.11-12	High Risk	Ordinary	125
	105552	56.9-88	Low Risk	Ordinary	50
	105553	56.14-1	High Risk	Ordinary	125
	105554	56.14-1	High Risk	Ordinary	125
	105555	56.14-1	Low Risk	Ordinary	75
	104514	56.11-1	Low Risk	Ordinary	75
	104515	56.11-12	Low Risk	No negligence	50
	104516	56.11-2	Low Risk	Ordinary	75
80-44	104513	56.9-6	Low Risk	Ordinary	75
	104517	56.14-1	Low Risk	Ordinary	75
	104520	56.18-10	Low Risk	Ordinary	75
	106621	56.9-6	High Risk	Ordinary	125
	105522	56.17-1	High Risk	Ordinary	125
				TOTAL PENALTIES	$14,542

APPENDIX B

BARB 79-319-P

Citation No. 104393: The undisputed facts with regard to this violation are set forth in the attached decision and order of April 14, 1980. As discussed therein, section 103(a) of the Act provides a right of entry upon mine property for the purpose of conducting inspections for health and safety hazards. The operator contends, however, that a denial of entry is not a violation of the Act for which a civil penalty may be assessed. I disagree. Section 110(a) of the Act states that any operator who violates "a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty ..." Since section 103(a) provides the Secretary with a right of entry upon mine property, it also of necessity creates a duty on the part of the operator not to interfere with the exercise of that right. Interference with the right of entry by the operator is, therefore, a violation of section 103(a), and a civil penalty for that violation must be assessed. Accord, Waukesha Lime & Stone Co., 1 FMSHRC 512, 518 (June 5, 1979); Baker Coal Co., 2 FMSHRC 2626 (September 16, 1980).

With regard to the amount of the penalty warranted for the violation found, I note that the operator denied the inspector access to the mine knowing full well that the inspector was authorized to enter by the Act. I further note that the mine property had been inspected on numerous occasions pursuant to the warrantless inspection provisions of the Metal and Nonmetallic Mine Safety Act of 1966, and the operator was therefore familiar with the federal inspection authority. This was a serious violation in that it significantly lengthened the employees' exposure to dangerous conditions. Accordingly, and after considering the other statutory criteria, I conclude that a civil penalty in the amount of $500 is warranted for this violation.

SE 79-114-M

Imminent Danger Closure Order No. 104453: Thirty minutes after the operator's foreman had been warned against allowing workmen to work in high places without safety belts and lines, he was observed watching an employee standing twenty feet above the ground on a four-inch angle iron brace working on a chute from the silo to the Nordberg crusher. Because of the imminent hazard to life and limb, the inspector issued a section 107(a) imminent danger closure order.

No excuse for the foreman's disregard for safety was offered. Furthermore, there is no evidence that any disciplinary or other corrective action was taken by the operator with respect to either the foreman or the perpetrator of the violation. This indifference to the foreman's reckless participation in the violation reflects a lack of commitment to voluntary compliance by the operator and its supervisory management.

I find, therefore, that (1) the violation of 30 C.F.R. 56.15-5 charged did, in fact, occur, (2) the violation was extremely serious in that it exposed the miner involved to a potentially fatal fall onto structures below, and (3) the violation was the result of reckless indifference to safe operating practices. Accordingly, and after considering the other statutory criteria, I conclude that a civil penalty in the amount of $1500 is warranted for this violation.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
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APR 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. BARB 79-319-P
	:	A.O. No. 31-00136-05006R
v.	:	
	:	Docket No. SE 79-56-M
CAROLINA STALITE COMPANY, Respondent	:	A.O. No. 31-00136-05007
	:	Docket No. SE 79-91-M
	:	A.O. No. 31-00136-05001
	:	Docket No. SE 79-92-M
	:	A.O. No. 31-00136-05003
	:	Docket No. SE 79-93-M
	:	A.O. No. 31-00136-05004
	:	Docket No. SE 79-94-M
	:	A.O. No. 31-00136-05002
	:	Docket No. SE 79-95-M
	:	A.O. No. 31-00136-05005
	:	Docket No. SE 79-85-M
	:	A.O. No. 31-00136-05008
	:	Docket No. SE 79-87-M
	:	A.O. No. 31-00136-05009
	:	Docket No. SE 79-114-M
	:	A.O. No. 31-00136-05010
	:	Docket No. SE 80-35-M
	:	A.O. No. 31-00136-05012
	:	Docket No. SE 80-37-M
	:	A.O. No. 31-00136-05013
	:	Docket No. SE 80-44-M
	:	A.O. No. 31-00136-05014
	:	Stalite Mill

DECISION AND ORDER

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Lewis P. Hamlin, Jr., Esq., William C. Kluttz, Jr., Esq., Kluttz & Hamlin, Salisbury, North Carolina, for Respondent.

Before: Judge Kennedy

The operator has moved for summary decision and to dismiss the captioned petitions on the grounds that (1) its business is not subject to Mine Act jurisdiction, and (2) the evidence obtained during the warrantless inspections which resulted in the issuance of the 132 violations charged must be suppressed. I find the operator's business consists of mineral milling or mineral preparation within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), and that the Act's provision for warrantless searches is constitutional.

I. Jurisdictional Claim

The contention that Stalite's operation is not a "coal or other mine" within the meaning of section 3(h)(1) of the Mine Act 1/ rests on the following:

1/ Section 3(h)(1), 30 U.S.C. § 802(h)(1), provides:

"For the purpose of this Act, the term 'coal or other mine' means (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, machine, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, 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

The Carolina Stalite Company operates a plant in Gold Hill, North Carolina, producing a light-weight construction material called Stalite. 2/ The raw material from which the product is made is slate purchased from a neighboring quarry. The quarry is owned and operated by an unrelated employer, Young Stone Company. Young Stone Company mines and crushes the slate and delivers it by conveyor to the premises of Carolina Stalite. The conveyors by which the slate is delivered are owned, operated, maintained, and controlled by Young Stone Company. Young Stone Company is subject to Mine Act jurisdiction, and is regularly inspected by MSHA. There is no corporate affiliation between Carolina Stalite and Young Stone, and no business relationship other than that of vendor and purchaser. Carolina Stalite heats the crushed slate in rotary kilns to approximately 2,000 degrees Fahrenheit which causes it to "bloat" and increase in volume transforming it into a light-weight material. The Stalite is later crushed and sized to fill customer requirements, and is shipped in interstate commerce by truck and rail for use primarily in the manufacture of light-weight concrete masonry blocks.

Section 3(h)(1) of the Mine Act defines "coal or other mine" as including, inter alia, "structures, facilities, equipment, machines, tools, or

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fn. 1 (continued)
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."

2/ Stalite is an unregistered trade name used by respondent.

other property * * * used in, or to be used in, the milling of * * * minerals, or the work of preparing * * * minerals." Section 3(h)(1) further states that: "[i]n 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 at one physical establishment." Thus, the dispositive question of jurisdictional fact is whether the Stalite operation is properly classified as mineral milling or preparation.

Since mineral milling or preparation is not specifically defined in the Act, the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) have entered into an agreement by which they define their respective jurisdictions. 39 Fed. Reg. 27382, superceded by 44 Fed. Reg. 22827. Appendix A of the Interagency Agreement includes the following definition: "Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable constituents of the crude from the undesired contaminants with which it is associated."

Respondent's argument is that it separates no constituents of the crude from any contaminants with which it is associated and separates nothing from the material it purchases for manufacture. It merely purchases crushed stone from an unaffiliated quarry, heats that stone to cause it to "bloat," and thereafter crushes and sizes it to order. The operator concludes that since

a separating or refining process is an essential element of milling it cannot be deemed to be engaged in milling.

Although this contention may have merit with respect to this definition of milling, 3/ it fails to address the question of whether the operator is engaged in mineral preparation within the meaning of the Act.

In this regard, the Interagency Agreement gives 18 specific examples of mineral milling or preparation processes considered to be included in Mine Act jurisdiction. One of these processes is "heat expansion" which is defined as follows: "Heat expansion is a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit volume." Additionally, the Interagency Agreement defines "crushing" as "the process used to reduce the size of mined materials into smaller, relatively course particles," and "sizing" as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes."

These definitions taken together exactly describe the Stalite process. It can be concluded, therefore, that the Carolina Stalite Company is engaged

3/ A Dictionary of Mining, Mineral and Related Terms (U.S. Bureau of Mines, 1968), page 707, defines milling as including "the grinding and crushing of ore * * * and preparation for market," and defines ore as including "a mineral of sufficient value as to quality and quantity which may be mined with profit." Id. at 772. These definitions taken together classify the Stalite process as milling. It should also be noted that the Stalite process is similar to that of cement plants utilizing rotary kilns and crushing and sizing equipment. Although cement plants also do not separate constituents of a crude from undesired contaminants, they are classified as mills and are subject to Mine Act jurisdiction.

in mineral processing within the jurisdiction of the Mine Safety Act if the definitions contained in the Interagency Agreement are in accord with the legislative intent.

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible 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.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

The operator contends, however, that the Secretary's designation of certain operations such as brick, clay pipe, refractory, and concrete product plants as being within OSHA jurisdiction while including the Stalite operation within MSHA jurisdiction is arbitrary and capricious, and constitutes an abuse of discretion. The operations listed in the Agreement as being within OSHA jurisdiction are, however, primarily manufacturing in nature and generally do not exclusively rely on such milling-related processes as heat expansion, crushing or sizing. Section B.4 of the Interagency Agreement states that "under section 3(h)(1), the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these

processes are related, technologically or geographically, to milling." In making this determination, the Agreement states that the following considerations will be taken into account:

> [T]he processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. Id.

The Secretary asserts that the conversion of slate to a light-weight aggregate is recognized as mineral processing, and the exposure of employees to the safety and health hazards associated with these processes is the same regardless of whether the operation is free-standing or is directly associated with a mineral extraction process. MSHA and its predecessors have had years of experience inspecting mining and milling operations, and have had the opportunity to develop an expertise in the inspection of Carolina Stalite's operations during the 18 inspections of its plant carried out since 1971. Given these considerations, along with the fact that the Carolina Stalite operation is located directly adjacent to its stone quarry supplier which is also subject to MSHA jurisdiction, I cannot find that inclusion of respondent's operation within the coverage of the Mine Act is an abuse of discretion. 4/

4/ As a result of this determination, it is clear that Carolina Stalite's argument that 30 C.F.R. § 56.2 provides a restrictive definition of milling which is inapplicable to its operation is likewise without merit. That section provides that the word 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 operator contends that the words "used at or in connection with, an excavation or mine" is limiting

This conclusion is in accord with Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980), which dealt with a closely analogous situation. There, the State of Pennsylvania dredged a river and deposited the material into a nearby basin. The operator purchased this material and through the use of a front-end loader and conveyor belts transported the material to its plant where, through a sink-and-float process, a low-grade fuel was separated from the sand and gravel. The court held that the operator was engaged in the preparation of minerals within the jurisdiction of the Mine Act, and 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." 602 F.2d at 592.

Thus, I find that the Carolina Stalite Company's operation is properly subject to Mine Act jurisdiction, and the fact that it does not itself extract the minerals which it processes does not remove its employees from the Act's protection.

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fn. 4 (continued)
language which excludes the Stalite operation since it is independent of the neighboring quarrying operation. This construction cannot be accepted since to do so would limit the jurisdictional language of section 3(h)(1) which does not include the "in connection with" phrase. Thus, the 30 C.F.R. § 56.2 definition must be construed as being illustrative rather than exclusive. Accord, Readymix Sand & Gravel Company, WEST 79-66-M (December 5, 1979). It must also be noted that this provision was originally promulgated at 34 Fed. Reg. 12511 (July 31, 1969), pursuant to the Federal Metallic and Nonmetallic Mine Safety Act, P.L. 89-577, 80 Stat. 772, and is not reflective of the jurisdictional reach of the 1977 Mine Act.

II. Fourth Amendment Claim 5/

With respect to the assertion that the warrantless inspection of the Stalite plant was violative of the Fourth Amendment and the fruits of that inspection must be suppressed, the operator asserts and the Secretary does not dispute, the following material facts:

5/ Neither party has questioned the propriety of addressing the constitutional challenge. For years, it has been the conventional wisdom that an administrative agency is not competent to rule on constitutional challenges to the organic statute of the agency. See Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robinson, 415 U.S. 361 (1974). This has led to the anomalous result that constitutional challenges raised for the first time on appeal have been dismissed for failure to exhaust the "available" administrative remedy, despite the fact that the agency refuses to rule on such challenges. See Marshall v. Able Contractors, 573 F.2d 1055, 1057 (10th Cir.), cert. denied, 439 U.S. 826 (1978). Increasingly, however, courts are beginning to recognize that important and difficult constitutional questions cannot be decided devoid of factual context, and that agency adjudicative procedures are uniquely suited to the factfinding necessary to the determination of constitutional issues. Marshall v. Babcock & Wilcox Company, No. 79-1641 (3rd Cir., November 16, 1979). Indeed, four circuits have held that constitutional challenges must be brought in the first instance before the agency in order to preserve the issue for appeal. In Re Worksite Inspection of Quality Products, 592 F.2d 611 (1st Cir. 1979); Bethlehem Steel Corporation v. OSHRC, No. 79-1040 (3rd Cir., October 15, 1979); Blocksom & Company v. Marshall, 582 F.3d 1122, 1124 (7th Cir. 1978); Marshall v. Able Contractors, supra. See also, Bituminous Coal Operators' Association v. Marshall, 82 F.R.D. 350, 353 (D.D.C. 1979), holding that the Mine Safety and Health Review Commission is authorized to decide "all matters in dispute" in cases before it. This comports with the requirement of 5 U.S.C. § 557(c)(A) that the agency decide "all the material issues of fact, law or discretion presented on the record * * *", as well as of section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), which states that "No objection that has not been urged before the Commission shall be considered by the court . . ." Indeed, Congress specifically found that the provisions that "objections not raised before the Commission cannot be raised before a reviewing court are consistent with sound procedure and do not deny essential due process." Leg. Hist. at 637. See generally, Note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 Harvard Law Review 1682 (1977); Southern Pacific Transportation Co. v. Public Utilities Commission, 18 Cal. 3d 308, 556 P.2d 289 (1976).

On the morning of Tuesday, October 17, 1978, at approximately 9:00 a.m., Charles L. Blume, a Federal mine inspector, entered the Carolina Stalite Company office and requested entry to inspect the operation under the Mine Safety and Health Act of 1977. The company's assistant superintendent, Fred Drew, declined admittance to Mr. Blume because management had instructed him to refuse entry to MSHA inspectors. Mr. Blume returned again that afternoon, at which time the plant superintendent, Ben Ketchie, was present. Mr. Ketchie, citing the same instructions, also refused admittance to Inspector Blume, whereupon Mr. Blume, following the instructions contained in the MSHA Inspection Manual issued a section 104(a) citation alleging a violation of section 103(a) of the Mine Act for failure to admit him for the purpose of inspecting the plant. The time fixed for abatement was 4:00 p.m. that afternoon, but was extended overnight when the inspector did not return that day.

The following day, Wednesday, October 18, at approximately 9:00 a.m., Mr. Blume returned to the Carolina Stalite Company and informed Mr. Ketchie that unless entry was granted he would issue a section 104(b) closure order which would have the effect of immediately shutting the operation down. Inspector Blume delayed action to allow Mr. Ketchie time to call Allen Johnson, managing partner, and agreed to await his arrival before proceeding further.

With attorney Clarence Kluttz, Mr. Johnson arrived at the plant later that morning. At that time, Mr. Blume informed them that unless entry was allowed for the purpose of conducting an inspection, he would have to issue a closure order.

Mr. Kluttz asked if he could have 2 work days to familiarize himself with the provisions of the Mine Act. Mr. Blume refused this request. Mr. Kluttz called Mr. Blume's supervisor, Marvin Nichols, who also refused a further delay. At that time, the operator elected to cooperate and permit entry because of the threat of closure.

Arguing from these facts, the operator seeks a finding (1) that entry to the plant was nonconsensual and only granted as a result of the inspector's threat to issue a section 104(b) closure order, and (2) that the Fourth Amendment does not permit warrantless searches of this particular operation, and that the fruits of such nonconsensual searches must be suppressed.

I conclude that the existence of the operator's standing instructions regarding entry shows it had ample time to reflect on its policy before the inspector arrived, that the 24 plus hours allowed by the inspector for compliance after he arrived was reasonable and that the inspector's refusal and that of his supervisor to further extend the time for compliance was not under the circumstances an abuse of discretion.

Respondent urges that the inspector was not authorized to issue a section 104(a) citation or to threaten to issue a section 104(b) closure order citing violation of section 103(a) since the Act provides that where entry is denied the Secretary's only recourse is to seek an injunction in Federal district court pursuant to the provisions of section 108(a). The operator claims that the issuance of a section 104(b) order amounts to the imposition of a summary sanction not contemplated by the Act, which "provides for immediate judicial review by requiring the Secretary to secure an injunction

in the district court if he is refused entry." Citing Marshall v. Stoudt's Ferry Preparation Company, supra at 594. 6/

Disposition of this claim depends on an analysis of the respective functions of sections 104 and 108 of the Act, and of the remedies available in the face of a closure order. Section 104(a) provides that whenever an inspector "believes that an operator * * * has violated this Act * * * he shall with reasonable promptness issue a citation to the operator." (Emphasis added.) Section 104(b) provides that "if a violation described in a citation * * * has not been totally abated * * * [and] the period of time for the abatement should not be further extended, he * * * shall promptly issue" a closure order. (Emphasis added.) Thus, the scheme of section 104 is to require inspectors to issue citations whenever they find a violation of the Act or the mandatory standards, and to issue closure orders whenever an operator fails or refuses to abate the violation. The inspector, after issuing the citation, informed the operator that a section 104(b) closure order would issue if the operator continued to refuse entry. The operator then permitted entry and the section 104(b) order never issued.

The operator maintains that the inspector had no authority to threaten the issuance of a closure order since section 108 requires the Secretary to

6/ Regarding the "immediacy" of judicial review under section 108(a), it should be noted that some district courts have been notoriously slow in considering requests for injunctions following denials of entry. For example, the Eastern District of Wisconsin in Marshall v. Waukesha Lime & Stone, C.A. No. 79-C-114, denied a request for preliminary injunction on March 9, 1979, and has yet to hear the request for permanent injunction, and in Marshall v. Halquist Stone, C.A. No. 78-C-463, the preliminary injunction was denied on September 15, 1978, and the permanent injunction proceedings are still pending.

seek an injunction whenever entry is denied. Section 108(a)(1) merely provides, however, that "[t]he Secretary may institute a civil action for relief, including a permanent or temporary injunction * * * whenever such operator or his agent - (A) violates or fails to comply with any order or decision issued under this Act * * * [or] (C) refuses to admit such representatives to the * * * mine, [or] (D) refuses to permit the inspection of the * * * mine." (Emphasis added.) Thus, it is clear that the language of section 108 is permissive rather than mandatory in nature, and that the 1977 Mine Act contemplates a complementary scheme of administrative remedies followed by, where necessary, judicial intervention.

There is, however, language in some cases which seemingly supports the operator's position that the exclusive enforcement provision in denial of entry situations is a section 108(a) injunction. In addition to the statement in Stoudt's Ferry, supra; Marshall v. Nolichuckey Sand, 606 F.2d 693, 696; (6th Cir. 1979), petition or cert. filed No. 79-1204 (February 4, 1980); and Marshall v. Charles T. Sink, No. 77-2514 (4th Cir., January 24, 1980), suggest that "the Secretary must seek an injunction when an operator refuses to allow an inspection." Id. Slip opinion at 6.

In support of this conclusion, the cases cite Justice White's opinion in Marshall v. Barlows' Inc., 436 U.S. 307 (1978). There it was held that finding warrantless searches unconstitutional under OSHA would not necessarily doom similar provisions in other statutes, and that since other regulatory acts had differing "enforcement needs and privacy guarantees," they must be evaluated on a case-by-case basis. Id. at 321. In dicta, however, Justice

White cited the Metal Act of 1966 and the Coal Act of 1969 as examples of statutes which while authorizing warrantless searches provided for judicial intervention to enforce the right of entry. Id. at note 18. What Justice White failed to note was that both the Metal Act and the Coal Act were repealed by the 1977 Mine Act 6 months before the decision in Barlow's; and that the 1977 Act contains an administrative sanction for a refusal of entry not contained in either of the predecessor statutes.

Both section 8(b) of the Metal Act and section 104(b) of the Coal Act limited the sanction of closure orders to violations of mandatory standards. Therefore, the only possible remedy for a refusal of entry under both predecessor statutes was injunctive. Under section 104(b) of the 1977 Mine Safety Act, however, the closure order sanction was expanded to include violations of the provisions of the Act itself. It is the scope of this provision which is being challenged here, and it is the existence of this provision which was ignored by the Supreme Court in Barlow's.

This error on the part of Justice White was subsequently compounded by the courts of appeals in the cases cited above. For example, in Nolichuckey Sand, supra at 696, it was stated that the "enforcement provisions of the Metal Act [were] carried over to and included in the 1977 Amendments Act." What the Sixth Circuit failed to recognize was that the enforcement provisions of the Metal Act were not only carried over but supplemented by the expanded closure and penalty sanctions of the 1977 Act. It is important to note that at least one case recognized the proper interrelationship between the complementary closure and injunctive sanctions of the 1977 Act. In

Marshall v. Donofrio, 605 F.2d 1196 (3rd Cir. 1979), affirming 465 F. Supp. 838 (E.D. Pa. 1978), cert. denied No. 79-848 (February 19, 1980), the inspector issued a section 104(a) citation under the 1977 Mine Act upon a denial of entry, and a section 104(b) closure order upon a subsequent denial of entry. When the operator persisted in refusing entry even in the face of the closure order, the Secretary brought a suit for an injunction under section 108. It is significant to note that in Donofrio the propriety of first pursuing administrative remedies before resorting to the courts was never questioned.

Correctly stated, the operator's argument is that the issuance of a section 104(b) closure order in a denial of entry situation amounts to the imposition of a summary sanction and a deprivation of the operator's right to the labor of its workforce without due process. The claim is that the inspector's threat to issue such an order had, therefore, a chilling effect on the operator's exercise of his constitutionally-protected rights. This contention is incorrect in light of the remedies available to an operator faced with what he believes to be an illegal closure order.

Had the closure order issued, the operator could have immediately applied for expedited proceedings before the Commission pursuant to 29 C.F.R. § 2700.52 as well as for temporary relief pursuant to 29 C.F.R. § 2700.45 and section 105(b)(2) of the Act. If immediate relief was not granted by the Commission, the operator could then take the matter to the court of appeals. See Sink v. Morton, 529 F.2d 601 (4th Cir. 1975).

Since "such procedure accords the plaintiff due process," Sink, supra at 604, and since section 104(b) requires an inspector to issue a closure order whenever an operator refuses to abate a violation within a reasonable amount of time, it must be concluded that the threatened issuance of such an order was not unlawful or the subsequent search unconstitutional. 7/

We then come to respondent's primary contention that the Fourth Amendment precludes warrantless inspections of operations such as that of Carolina Stalite. Having found that the operation is under the jurisdiction of the Mine Act, the question becomes whether the reasoning of Marshall v. Barlow's, supra, arising under the Occupational Safety and Health Act, or that of the cases decided under the Mine Act is dispositive. Marshall v. Stoudt's Ferry, supra; Marshall v. Nolichuckey Sand, supra; Marshall v. Charles T. Sink, supra; Marshall v. Texoline, 612 F.2d 935 (5th Cir. 1980); Marshall v. Donofrio, supra. The operator argues that the Mine Act cases are not controlling since the Stalite operation is not part of a closely-regulated industry long subject to Government supervision and inspection,

7/ Although the Constitution generally requires notices and a hearing prior to a deprivation of private property, there are well recognized exceptions to this requirement where significant governmental interests or the public health and safety are involved. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of yacht carrying contraband); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); Bowles v. Willingham, 321 U.S. 503 (1944) (rent control orders); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931) (collection of Federal revenue); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (seizure of enemy property); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of contaminated food). See also, In Re Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1319 (D.D.C. 1978) (upholding cessation orders for failure to abate violations under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(2)).

no license is required to engage in this business, and it has never been pervasively regulated. 8/

In Barlow's, the Court held that warrantless inspections under the Occupational Safety and Health Act (OSHA) were violative of the Fourth Amendment. Based on its earlier decisions in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the general rule that warrantless searches are presumptively unreasonable. It did not find applicable, in the OSHA context, the recognized exception to the warrant requirement which exists for "pervasively-regulated businesses" and for "closely-regulated" industries "long subject to close supervision and inspection." Barlow's, supra at 313.

The Court found that several protections are given the operator of a business when an OSHA inspector presents a search warrant. The warrant assures the owner that the inspection is reasonable, authorized by statute, and pursuant to an administrative plan containing specific neutral criteria. In addition, it advises the owner of the scope and object of the search. Id. at 323.

These protections could be provided without undue burden, in the Court's view, because of the comparative ease with which "probable cause" could be shown. The requirement of probable cause for the issuance of a search warrant for an administrative inspection is more easily met than the probable

8/ The record discloses, however, that the plant had been inspected some 18 times by MESA and the Bureau of Mines since 1971, and was required to comply with the mandatory standards promulgated under the Metal Act of 1966.

cause requirement in the criminal law sense. A showing that a business was chosen for inspection on "the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" would serve as sufficient probable cause. Id. at 321.

It is important to note, however, that the warrant requirement of the Fourth Amendment is not absolute. Search warrants are not required in certain classes of cases involving pervasively-regulated businesses or closely-regulated industries subject to strict supervision and inspection. The leading cases which illustrate this exception are Colonnade Catering Corporation v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972).

Colonnade involved a warrantless inspection of a Federally-licensed liquor dealer. The court held that "Congress has broad authority to fashion standards of reasonableness for searches and seizures" in industries which have been "long subject to close supervision and inspection." 397 U.S. at 77. Noting that the liquor industry had been regulated since pre-Fourth Amendment days both in England and the American colonies, the court upheld the warrantless inspection provisions in question. Id. at 75-77.

The Supreme Court also applied this rationale in Biswell, which dealt with searches conducted under the Gun Control Act of 1968. Because of the ease with which firearms could be concealed or transported, a warrant requirement was seen as seriously reducing the effectiveness of the inspection program. Unlike the regulation of the liquor industry, however, the historic regulation of the firearms industry was relatively recent,

apparently having only originated with the Federal Firearms Act of 1938. Noting that "Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is Governmental control of the liquor industry," the Court relied on Congressional findings prefacing the Gun Control Act to find that:

> [C]lose scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. Large interests are at stake, and inspection is a crucial part of the regulatory scheme * * *. 406 U.S. at 315.

Thus, the strong public interest in the regulation of firearms reduced the amount of time necessary to establish a "tradition" of close Government supervision.

In Barlow's, the Government argued that the "pervasive regulation" exception applied because businesses subject to OSHA had been covered by the minimum wage and maximum hours provisions of the Walsh-Healey Act since 1936. The Court rejected this argument, however, because Walsh-Healey and other statutes which regulate businesses solely on the basis of their being engaged in interstate commerce are not of the same specificity and pervasiveness as OSHA. 436 U.S. at 314.

These cases read together indicate that an exception to the warrant requirement of the Fourth Amendment exists where an industry has been regulated closely over a period of time, but that the length of the historic regulation required to qualify for the exception cannot be precisely fixed,

and will be greatly influenced by the nature of the public interest behind that regulation.

It must be emphasized that the Court in Barlow's explicitly limited its decision to OSHA inspections and stated that other warrantless search provisions must be examined on an individual basis in light of the "specific enforcement needs and privacy guarantees of each statute," noting that other statutes may "apply only to a single industry, where regulation might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply." Id. at 321. As of this date, four courts of appeals, the Third Circuit in Stoudt's Ferry, and Donofrio, supra; The Fourth Circuit in Charles T. Sink, supra; the Fifth Circuit in Texoline, supra; and the Sixth Circuit in Nolichuckey Sand, supra, have ruled that the Mine Act is such a statute and have upheld the validity of the warrantless search provision of section 103(a) of the Mine Act.

In Stoudt's Ferry, the Third Circuit held that the warrantless inspection provisions of the Mine Act are "sufficiently distinguishable from those of the Occupational Safety and Health Act so as to withstand constitutional challenge." 602 F.2d at 590. Noting that the inspection provisions of the Mine Act are more limited and closely defined than those of OSHA, the court called attention to the unequivocally stated Congressional intent that the Mine Act's inspection provisions would not require warrants and its finding that such inspections were reasonable. 9/ The Third Circuit concluded:

9/ "This is intended to be an absolute right of entry without need to obtain a warrant. The Committee notes with approval the decision of the three-judge Federal Court in Youghiogheny & Ohio Coal Company v. Morton, 364 F. Supp. 45

> Mindful of the Supreme Court's reluctance to foreclose the incremental protection afforded a proprietor's privacy by a warrant, we are persuaded that the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard reasserted in Barlow's. Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding. * * * [W]e believe that there are enough major differences between Barlow's and the case at bar to lead to a contrary result. In our view, warrantless inspections and the procedure provided for enforcement in the Mine Safety Act meet the standards of reasonableness in this pervasively regulated industry.

Id. at 593-594, accord Marshall v. Charles T. Sink, supra.; Marshall v. Texoline, supra.

Similarly, in Nolichuckey Sand, the Sixth Circuit held that a warrantless inspection of a sand and gravel pit subject to Mine Act jurisdiction was not violative of the Fourth Amendment. In so holding, the court rejected the same contentions advanced by Carolina Stalite in this proceeding that "its

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fn. 9 (continued)
(S.D. Ohio 1973) which holds the parallel provision of the Coal Act permitting unannounced warrantless inspections of coal mines constitutional. Safety conditions in the mining industry have been pervasively regulated by Federal and State law. The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant * * *. The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." Leg. Hist. at 615.

business does not fall within an exception to the warrant requirement because the sand and gravel industry has no long history of government regulation, no license is required and it has never been 'pervasively' regulated." 606 F.2d at 695.

Agreeing that the sand and gravel industry does not have the long history of regulation and licensing referred to in Colonnade and Biswell, supra, the court noted that all employees in such operations are exposed to health and safety hazards and that it was "reasonable to bring all mineral extraction businesses and operations under a single regulatory act." Id. at 695. The court concluded that "the enforcement needs in the mining industry make a provision for warrantless inspections reasonable." Id. at 696.

The record shows and the operator does not deny that since 1971 its business has been regularly inspected and regulated under the Metal Act. Even a casual review of the Metal Act and the mandatory safety standards issued thereunder demonstrates the pervasive nature of that regulation. For these reasons, I conclude that as a matter of fact and law, respondent is engaged in a business subject to pervasive and longstanding Federal-state regulation.

Thus, it is proper to conclude that the operator is within the jurisdiction of the Mine Act and subject to the warrantless search provisions of section 103(a) until such time as the Supreme Court rules otherwise. 10/

10/ While it is unnecessary to consider the authority of the Commission to order suppression of the evidence, I note that two circuits have ruled that in a civil regulatory context the exclusionary sanction does not necessarily apply to the fruits of all unconstitutional inspections. In Todd Shipyards v. Secretary, 586 F.3d 683, 690 (9th Cir. 1978), the court held that the

Accordingly, it is ORDERED that respondent's motion for summary decision and to dismiss and to suppress evidence be, and hereby is, DENIED.

It is FURTHER ORDERED:

1. That full compliance with the Pretrial Order issued September 24, 1979, be accomplished on or before Friday, May 16, 1980.

2. That the operator's motion for a protective order be, and hereby is, GRANTED.

Joseph B. Kennedy
Administrative Law Judge

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fn. 10 (continued)
exclusionary rule is not retroactively applicable to a pre-Barlow's warrantless search under OSHA since "the deterrent effect of the exclusionary rule would not be enhanced by its application to an OSHA search that may have exceeded the Barlow's limits but which took place before the Barlow's decision." The court noted that the inspectors were acting "pursuant to an apparent Congressional authorization which had not yet been declared unconstitutional by a court of competent jurisdiction." Id. Likewise, in the present situation, even if the inspection were to be held violative of the Fourth Amendment it would have taken place long before a court of competent jurisdiction so held. Thus, since the "introduction of evidence which had been seized by law enforcement officials in good faith compliance with then-prevailing constitutional norms did not make the courts 'accomplices in the willful disobedience of a Constitution they are sworn to uphold,'" a retroactive application of the exclusionary rule would not be justified. United States v. Peltier, 422 U.S. 531, 536 (1975). Likewise, in Savina Home Industries v. Secretary, 594 F.2d 1358, 1364 (10th Cir. 1979), it was held that the exclusionary rule is not applicable to a pre-Barlow's inspection, and that evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional. In the present situation, it could not be said that the inspector should have known that his actions were unconstitutional given the state of the case law under the Mine Act. Thus, even if I were to hold the search in question violative of the Fourth Amendment, the exclusionary sanction would not be retroactively available.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 4 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. LAKE 80-130-M : A.O. No. 21-00596-05001
v.		: Mine: Rockite Gravel Company
ROCKITE GRAVEL COMPANY,	Respondent	:

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Roger L. Gilmer, Esq., Hutchinson, Minnesota, for Respondent.

Before: Judge Edwin S. Bernstein

On September 16, 1980, a hearing was held in Minneapolis, Minnesota, to determine if Respondent violated the mandatory health standard at 30 C.F.R. § 56.5-50 1/ as alleged in Citation No. 289904 and, if so, what penalty should be assessed in accordance with the criteria in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act).

1/ The standard in question provides in part:
"56.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc. 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

Findings of Fact

The citation in question was issued to Respondent on June 12, 1979, and read:

> The noise level around the Caterpillar #908B front end loader operator was 220% of the permissible limit for noise on June 12, 1979, day shift, from 7:05 a.m. to 3:10 p.m.

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fn. 1 (continued)

PERMISSIBLE NOISE EXPOSURES

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

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

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

If the sum

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

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

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

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

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

Feasible engineering or administrative controls were not being used to reduce the loader operator's noise exposure to within the levels of the table in part and section 56.5-50(a) in order to eliminate the need for hearing protection.

The parties stipulated, and I find:

1. Respondent, Rockite Gravel Company, is a partnership located in South Haven, Minnesota.

2. Respondent is a small operator.

3. There is no history of previous violations by Respondent.

4. If a penalty is imposed, it will not affect Respondent's ability to continue in business.

5. The violation was abated within a reasonable time.

6. Arnie Mattson, the MSHA inspector who issued the citation, is a duly authorized representative of the Secretary of Labor.

7. The citation in question was issued by Mr. Mattson on June 12, 1979, and was duly delivered to a representative of Respondent on or about that date.

8. Hutchinson, Minnesota, is approximately 90 miles north of the Minnesota-Iowa border, and approximately 90 miles east of the Minnesota-South Dakota border. These distances represent the closest distances between Hutchinson and the next adjacent states.

At the hearing, Arnie Mattson testified for Petitioner and Robert Peterson testified for Respondent.

Inspector Mattson testified that he is a mining inspector stationed at MSHA's field office in Mankato, Minnesota. On June 12, 1979, he conducted a health inspection at Respondent's facility. During a previous visit, Mr. Mattson noticed that the front end loader was fairly loud and he felt there might be a noise problem with it. In order to verify this, he decided to take a dosimeter 2/ reading during the June 12 inspection. He asked the

2/ The dosimeter which was introduced into evidence as Petitioner's Exhibit 6 contains a memory cell which is sensitive to all sound with a loudness between 90 and 115 decibels. The cell stores information relating to cumulative noise exposure during an entire eight-hour shift. At the end of the shift, the memory cell is placed into a read-out machine (Petitioner's

operator of the loader to place the dosimeter in his shirt pocket with the microphone under his collar near his ear. The operator refused to wear the device and told the inspector to "hang it someplace else." Mr. Mattson then hung the device in the cab of the loader "close to [the operator's] hearing, trying to get the microphone so it [didn't] bang against glass or metal, [or] anything * * * that would pick up extra noise."

During the first half of the eight-hour shift, after he had hung the dosimeter, Mr. Mattson took four readings in the cab with a sound level meter. 3/ He testified that when the loader was operating normally, he got readings of 90 to 95 decibels, but when the loader was "revved up," the readings were 98 to 100 decibels. The readings dropped below 90 decibels when the loader was idling.

After taking the sound level meter readings, Mr. Mattson checked the loader for any engineering controls 4/ which may have limited the operator's exposure to noise. There was no rubber matting on the floor of the cab, but Mr. Mattson noted some insulation on the cab ceiling. He testified that rubber matting on the floor would have helped to cushion the sound from the engine, which was located in back of the cab. He also stated that the loader did not have a muffler, but only "a straight pipe for an exhaust."

Asked if he was aware of any administrative controls 5/ which may have been used to control the operator's exposure to excessive noise, Mr. Mattson

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fn. 2 (continued)
Exhibit 8) which allows the inspector to determine the percentage of allowable noise to which the worker was exposed during the shift.

It should be noted that if there is any exposure to noise louder than 115 decibels, a special indicator inside of the dosimeter is triggered. Since the standard states that "[no] exposure shall exceed 115 [decibels]," there would presumably be an automatic violation in any such situation, regardless of what readout was obtained from the memory cell.

3/ A sound level meter (Petitioner's Exhibit 7) is a small, hand-held device which gives an instant reading as to the number of decibels of noise in a given area. Mr. Mattson testified that he used the sound level meter to give him "a little idea what the dosimeter should produce at quitting time."

He also stated that he checked his equipment before and after the inspection to make sure it was operating properly. Two devices which are used to calibrate the equipment were admitted as Petitioner's Exhibits 9 and 10.

4/ Mr. Mattson explained that an engineering control was a device or mechanism which reduced the level of noise in the working area. He stated that a muffler, additional insulation, or some other barricade between the source of the noise and the working area would be examples of engineering controls.

5/ Administrative controls involve methods of organizing work assignments at the site so that a worker who is exposed to high noise levels for part of his shift is later moved to another job involving much less noise exposure. The net effect of such a system is to reduce the worker's overall noise exposure during the course of the full shift.

replied in the negative. He also determined that no personal protection equipment, such as ear plugs or ear muffs, was being used by the men, but he did not check with the owner to see if such equipment was provided.

During his testimony, Mr. Mattson repeated the statement made in the citation that the noise level in the relevant area was 220 percent of the permissible limit. Neither Mr. Mattson nor Petitioner's counsel, Mr. Carmona, was able to enunciate at the hearing exactly what this figure represented. 6/ Mr. Mattson stated that he obtained this number from the readout machine when he placed the dosimeter memory cell into it at the end of the shift. At one point in his testimony, he stated that this number represented a percentage of the "threshold limit value," which is the maximum noise that an employee can be exposed to over an eight-hour period. This explanation is consistent with the following statement printed on the back of the readout machine: "Readout value is displayed in percent of allowable OSHA exposure. 100% equals one allowable dose." 7/

6/ On September 22, 1980, after the record in this case was closed, Petitioner moved to admit into evidence the operating manual for the dosimeter which was used to take the noise readings. Respondent opposed the motion on the grounds that the operating manual "was not introduced, nor received, at the hearing" and that its introduction would deprive Respondent of "the opportunity of cross-examination."

I agree with Respondent. The May 9, 1980, Prehearing Order directed the parties, inter alia, to list proposed exhibits. Petitioner's Prehearing Report, filed May 28, 1980, did not refer either to the dosimeter or the operating manual. Nevertheless, at hearing, Petitioner utilized the dosimeter in connection with the presentation of its case. At my request, to make the record more complete, the dosimeter was introduced into evidence as an exhibit. At that time, no reference was made by Petitioner to any operating manual. In failing to offer the manual during the hearing, Petitioner deprived Respondent of the opportunity to challenge statements made in the manual, and in failing to refer to the manual and the dosimeter before the hearing, Petitioner deprived Respondent of the opportunity to prepare cross-examination and present witnesses to challenge the device as well as statements made in the manual. It is further noted that no argument was based on the manual at the hearing, in Petitioner's Motion to Supplement the Record, or in the briefs submitted by the parties. Therefore, Petitioner's motion is DENIED.

7/ The "Permissible Noise Exposure" table in 30 C.F.R. § 56.5-50, reproduced in footnote 1, supra, is identical to the table which appears in the Occupational Safety and Health Administration's noise standard. See 29 C.F.R. § 1910.95(b)(1), Table G-16. Therefore, the manufacturer's statement that the readout machine measures sound in terms of percent of allowable OSHA exposure also applies to the allowable MSHA exposure.

In its brief, Petitioner explained that the "Note" to 30 C.F.R. § 56.5-50 contains a formula for determining whether a violation of the standard has occurred when "daily noise exposure is composed of two or more periods of noise exposure at different levels * * *." The following example and explanation is helpful to understanding what the dosimeter is designed to measure (Petitioner's Brief at 11-12):

Mr. Mattson testified that the violation was abated by installing a muffler on the loader. After this was done, the inspector took several sound level meter readings which convinced him that the condition had been abated and that another dosimeter test was not necessary.

Respondent's witness was Robert Peterson. Mr. Peterson and his wife are the sole owners of Rockite Gravel Company. Mr. Peterson is also the sole proprietor of Rockite Silo Company, which is located in Hutchinson, Minnesota, approximately 30 miles south of Rockite Gravel. Rockite Gravel has five employees, one of whom serves as manager, or foreman. Mr. Peterson testified that between 10 and 20 percent of the company's production is sold locally to private consumers in the area, or to the local county government. The remaining production is trucked by an independent contractor to Rockite Silo. Rockite Silo produces several products from this material, including concrete blocks (about 15 percent of its production), silo materials (about 25 percent), farm drain tiles (10 to 15 percent), and ready-mix concrete (about 50 percent). Due to the prevailing freight charges, most of Rockite Silo's production is sold within a 50-mile radius of the company's facility in Hutchinson. On very rare occasions, products may be shipped as much as 100 miles away. Mr. Peterson testified that Rockite Silo buys from suppliers other than

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fn. 7 (continued)

"This formula can be better understood by substituting numbers for the letters in an equation in which D is the individual daily noise recorded.

Example:

D= $(C_1/T_1) + (C_2/T_2) = (C_n/T_n)$

D= 6/8 + 1/2 + 1/1 = 2.25 of allowable exposure

C_1 = exposure for 6 hours at 90 decibels

T_1 = 8 hours noise exposure permitted by Table in 30 C.F.R. § 56.5-50(a) at 90 decibels

C_2 = exposure for 1 hour at 100 decibels

T_2 = 2 hours noise exposure permitted by Table at 100 decibels

C_n = exposure for 1 hour at 105 decibels

T_n = 1 hour noise exposure permitted by Table at 105 decibels.

"The result in this example is 2.25 or 225% which exceeds a unity and that would be considered a violation of 30 C.F.R. § 56.5-50(a) because it exceeded the permissible exposure according to the provision in the note part of this standard. Even though in this example the individual noise levels are permissible (6 hours at 90 decibels, 1 hour at 100 decibels, and 1 hour at 105 decibels) their combined effect would result in a violation of the standard. Since the sound level meter records individual periods of noise level, a dosimeter is always used for practical purposes in situations where the daily noise exposure is composed of two or more periods of noise exposure at different levels as is shown in this example, and as is the situation in the instant case." [Emphasis in original.]

Rockite Gravel, but that he was unaware of any sales by Rockite Silo to out-of-state customers.

The Interstate Commerce Issue

Respondent contended that its operation "does not meet the definition of [interstate] 'commerce' as provided by law." It asserted in its brief that it is not subject to the Act since "its activities are conducted solely within the State of Minnesota, and because its activities do not in any way affect commerce." [Emphasis in original.] In order to decide on this question, it is necessary to examine the constitutional underpinnings of federal jurisdiction over the mining industry.

Article I, Section 8, Clause 3 of the Constitution gave Congress the power to "regulate Commerce * * * among the several States * * *". The U.S. Supreme Court has a long history of upholding federal regulation of ostensibly local activity on the theory that such activity may have some effect on interstate commerce.

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court upheld a federal law regulating the production of wheat which was "not intended in any part for commerce but wholly for consumption on the farm." Id. at 118. The Court stated that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Id. at 125.

In 1975, the Court elaborated on this idea, stating that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542, 547 (1975). More recently, the Seventh Circuit Court of Appeals relied upon Wickard when it said that the commmerce clause "has come to mean that Congress may regulate activities which affect interstate commerce." United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) [Emphasis in original.]

These principles have often been relied on by the lower courts in ruling on the coverage of the present Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. 8/ One leading case is Marshall

8/ Section 4 of the 1969 Act, which was substantially unchanged by the 1977 Amendments Act, provided: "Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this Act." Section 3(b) of the 1969 Act, which was not amended by the 1977 Amendments Act, defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or

v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). There, the Court upheld the applicability of the 1969 Act to a small mine which was owned and operated entirely by four brothers. No other personnel had worked there for at least seven years, and the brothers had no intention of hiring other employees in the future. The brothers contended that all of the coal which they mined was sold and consumed within the State of Pennsylvania and did not involve interstate commerce. Id. at 908. The defendants admitted, however, that more than 80 percent of their production was sold to a paper processing corporation which was "actively engaged in interstate commerce." Id. at 909. The Court held 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 * * * the Act." Id. at 911.

A similar case was Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976), involving a mine which was operated entirely by two brothers, Edward and Frederick Shingara. In the words of the Court, "Edward [went] underground, while Frederick [did] the hoisting." Id. at 694. The Court found that the fruits of their labor were sold as follows:

> The Shingara coal is sold primarily to Calvin V. Lenig of Shamokin, Pennsylvania who resells it, along with other coal which he has gathered, to Keystone Filler and Manufacturing Co., Inc. of Muncy, Pennsylvania and Mike E. Wallace of Sunbury, Pennsylvania. Keystone Filler combines the Shingara-Lenig coal with others in order to achieve a particular ash content, dries the mixture, and grinds it into a powder which is shipped to customers outside of Pennsylvania.

Id. The Court stated that "[a]lthough the activity in question here may seem on first examination to be local, it is within the reach of Congress because of its economic effect on interstate commerce." Id. The Court compared the facts of the case to the facts in Wickard and concluded that "the Shingara coal mining activity, which has an even more direct impact on the coal market, also 'affects commerce' sufficiently to subject the mine from which it emanates to federal control." Id. at 695.

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fn. 8 (continued)
between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof." It is clear that in enacting mine safety legislation, Congress intended "to exercise its authority to regulate interstate commerce to 'the maximum extent feasible through legislation'." Secretary of the Interior v. Shingara, 418 F. Supp. 693, 694 (M.D. Pa. 1976), quoting S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966), reprinted in (1966) U.S. Code Cong. & Ad. News 2072.

In both Kraynak and Shingara, the coal in question was being sold to parties who were engaged in interstate commerce. In other mining cases, such facts were not shown, but the courts nevertheless utilized the seminal Wickard decision to find that the activities in question "affected commerce." Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), involved a specific agreement between the owner of a coal mine and his buyer that the latter would sell the coal only within the state and not place any of it into interstate commerce. In holding that interstate commerce was still affected, the Court went back to the following passage from Wickard:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.

478 F. Supp. at 7, citing 317 U.S. at 128. Using this rationale, the Kilgore Court found it "inescapable that the product of the defendant's mine would have an affect [sic] on commerce. The fact that the defendant's coal is sold only intrastate does not insulate it from affecting commerce, since its mere presence in the intrastate market would effect [sic] the supply and price of coal in the interstate market." 478 F. Supp. at 7. See also Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978) ("The Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage.")

I am aware of only one case where a Court held that a mine did not affect commerce within the meaning of the Act. Morton v. Bloom, 373 F. Supp. 797 (W.D. Pa. 1973), involved a one-man mine which had no employees. The coal which the defendant produced was sold "exclusively within Pennsylvania." Id. at 798. The Court held that this operation was not the type which the Congress intended to cover when it enacted the statute. Id. More significantly, the Court found itself unable to conclude "that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce." Id. at 799. Even under the Wickard standard, the Court stated that the mine was "one of local character in which the implementation of safety features required by the Act will not exert a substantial economic effect on interstate commerce." Id.

I have carefully reviewed the Court's reasoning in Bloom, and I conclude that it should not be followed in the instant matter. First, I do not believe the Court properly considered all of the possible means by which the Bloom operation could have affected interstate commerce. At one point in the opinion, the Court noted that the "defendant does use some equipment in his mine which was manufactured outside of Pennsylvania * * *" 373 F. Supp.

at 798. The Court found that this did not bring the defendant's mine within the ambit of the commerce clause since the purchase of this equipment was "so limited that its use would be de minimis." Id. This reasoning, in my view, runs directly contrary to the Supreme Court's statement in Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1946), that the de minimis maxim should not be applied to commerce clause cases in the absence of a Congressional intent to make a distinction on the basis of volume of business. And, as the Court noted in Bosack, the Mine Safety Act does not require that the effect on interstate commerce be substantial. See 463 F. Supp. at 801.

Secondly, and perhaps more importantly, the Court in Bloom did not consider the effects which many one-man coal mining operations, taken together, might have on interstate commerce. Going back once again to the Wickard case, the Supreme Court held that even if the wheat in question was never marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S at 128. Similarly, in the instant case, the gravel which Respondent supplies to Rockite Silo supplies the needs of that company, which would otherwise be reflected by purchases in the open market. While the parties indicated that Rockite Silo would have bought from local merchants even if Rockite Gravel went out of business, I believe that such practices in the open market would have enough of an effect, direct or indirect, on commerce to bring Respondent within the purview of the commerce clause, and thus the Act.

Concluding Findings and Conclusions of Law

I find that Respondent violated the mandatory standard at 30 C.F.R. § 56.5-50 as alleged. The dosimeter readout indicated that the operator of the loader was exposed to a noise level equal to 220 percent of the permissible level over the course of the shift. In my view, there was insufficient evidence that the dosimeter or other noise measuring equipment was operating improperly to negate this reading. 9/ Further, the inspector

9/ It should be noted that Mr. Mattson did testify that the efficiency of the noise-measuring equipment could be affected by prolonged exposure to high temperatures. He stated that it was his practice to leave the equipment in the back seat of his car, but that he kept the windows rolled down when the weather was hot, and he took the equipment into his motel room with him at night when he was on the road if it was hot outside. He produced some notes which he received during a noise training course concerning the possible effect of heat on the instruments. Part of this material stated: "If the instrument is used for an extended period of time or is stored in ambient temperature above 100 degrees Fahrenheit, the battery should be removed to avoid corrosion effects of battery leakage." However, there was no firm testimony that the instruments which were used to establish this violation were exposed to excessive heat which may have affected their operation. Additionally, the training notes indicated that the primary danger from such heat was that the batteries in the instruments might leak. Apparently,

testified that Respondent did not utilize any engineering or administrative controls sufficient to bring the operator's exposure within permissible limits. This testimony was uncontroverted by Respondent. The inspector also determined, and the Respondent was unable to refute, that no personal protection equipment was being used by the operator of the loader. Finally, as discussed in the preceding section, I find Respondent's argument that it does not affect commerce within the meaning of the Act to be without merit.

Turning to the criteria in Section 110(i) of the Act, I find Respondent's negligence in this matter was high, since the inspector testified that the loudness of the noise emanating from the loader was noticeable even without taking a noise level reading. The gravity was also high, since the noise which the loader operator was exposed to was more than twice the permissible exposure. However, Respondent is a small operator with no previous violations of the Act, and this violation was rapidly abated. I assess a penalty of $75 for this violation.

ORDER

Respondent is ORDERED to pay $75 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

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Roger L. Gilmer, Attorney, Gilmer Law Office, 45 Adams Street South, Hutchinson, MN 55350 (Certified Mail)

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fn. 9 (continued)
this did not occur in the instant situation, since Mr. Mattson testified that he checked the batteries both before and after making the measurements which resulted in the issuance of the instant citation. Therefore, I do not find that the instruments were rendered inoperative by excessive heat prior to their use at Respondent's facility on June 12, 1980.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 5 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. SE 80-47
v.	:	A/O No. 01-01897-03004I
	:	Gurnee Strip Operation No. 2
BURGESS MINING AND CONSTRUCTION CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Murray Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner, MSHA;
W. E. Prescott III, Burgess Mining and Construction Corporation, Birmingham, Alabama, for Respondent, Burgess Mining and Construction Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Burgess Mining and Construction Corporation. A hearing was held on November 10, 1980.

In a series of written stipulations filed on October 22, 1980, the parties agreed to the following stipulations (Tr. 4-5):

(1) Burgess Mining and Construction Company is the owner and operator of the Gurnee Strip Mine No. 2 located in Shelby County, Alabama.

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

(3) The Administrative Law Judge has jurisdiction over this proceeding.

(4) The inspector who issued the subject citation and termination was a duly authorized representative of the Secretary of Labor.

(5) The true and correct copy of the subject citation, termination and extension were properly served upon the operator in accordance with the Act.

(6) Copies of the subject citation and termination are authentic and may be entered into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.

(7) The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that in 1979 the Gurnee Strip Mine No. 2 produced an annual tonnage of 55,772, and the controlling company, Burgess Mining and Construction Corporation, had an annual tonnage of 540,361.

(8) The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 11, and the total number of inspection dates in the preceding months is 4.

(9) The alleged violation was abated in a timely manner, and the operator demonstrated good faith in attaining abatement.

(10) The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 8-139). 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. 139-140). A decision was rendered from the bench setting forth findings, conclusions and determinations with respect to the alleged violation (Tr. 156-160).

BENCH DECISION

This case is a petition for the assessment of a civil penalty. The mandatory standard involved is 30 C.F.R. § 77.1606(c) which provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

The alleged violation is set forth in the subject citation as follows:

> The parking brake was inoperative on the 180 International Payhauler Company S/H, 15-19, Serial No. 669. It was not properly secured or adjusted. Brake lining was worn 50%. The running brakes were not adequate as only the right rear brake was operative as reported by the operator who was involved in the accident on November 3, 1978 at 2:45 p.m.

According to the testimony of record, the piece of equipment in question, a payhauler, is used to transport coal from

the pit to the preparation plant or to the storage pile. The payhauler itself weighs about 40 tons and can carry up to 50 tons of coal. It is, therefore, a very big and a very heavy piece of equipment. The record further shows that on November 3, 1978, the payhauler loaded with coal failed to make it to the top of the ramp leading out of the pit and after stalling at a point 15 to 20 feet from the top rolled back down the ramp until it hit the highwall. The driver of the payhauler was seriously injured. I accept the testimony which indicates the foregoing occurred.

During the hearing today, the driver testified in detail with respect to the cited payhauler. He stated he had been driving this payhauler for about 2 weeks before the accident and that the brake bands were worn so badly that they would not touch the drums and that only the brake on the right rear wheel worked. I found the driver a credible witness and I accept his testimony.

I further accept the MSHA inspector's testimony that 3 days after the accident the parking brake lining was 50 percent worn upon a visual examination. The payhauler, of course, had not been used in the intervening 3 days since it had been so badly damaged in the accident.

I conclude that the conditions described by the driver and the inspector constituted defects in the equipment. Moreover, I find that these defects should have been corrected before the payhauler was used on the day in question. Accordingly, I find a violation existed.

There is no dispute as to the injury suffered by the driver. He had a fractured left elbow, a broken left wrist, a broken pelvis, first and second degree burns of the right arm and the right shoulder and lacerations over the left eye. This was a very serious violation.

I further conclude the operator was guilty of a high degree of negligence. I accept the driver's testimony that during the first week he drove the truck he told the pit mechanic about the defective brakes. It is no defense for the operator to state that the pit mechanic was a union man. The operator acts only through employees and is responsible to see to it that they do their job. The driver's testimony is uncontradicted that a week before the accident he told the mine superintendent that the brakes were not working and that the superintendent's response was only to say that they would try to fix the brakes as soon as they could. Such a response was clearly inadequate. There is no doubt that the operator is responsible for the acts of the superintendent

whom it placed in such a position of authority. Finally, on the day of the accident the driver discussed the defective brakes with the truck foreman who, according to the operator's evidence today, is the pit mechanic's supervisor. Far from seeing that the payhauler was immediately taken out of service, the truck foreman asked the driver to take one load of coal out of the pit and it was on this very trip that the unfortunate accident occurred. In light of the foregoing, it is clear that the driver contacted everyone along the ladder of authority with respect to the payhauler, but that the operator's response at each and every level was deficient. I recognize that the driver drove the payhauler for 2 weeks in its dangerous condition. The driver testified that he did this because it was Christmas time. However, whether or not the driver's actions were foolhardy or justifiable is irrelevant. It is the operator's responsibility to insure that the equipment is free from defects affecting safety before being used. Accordingly, I conclude there was a high degree of negligence.

I take into account the stipulations regarding history, good faith abatement, size and ability to continue. The first three justify mitigation of the penalty amount. However, gravity and negligence are so great that a very substantial penalty must be imposed in this instance.

Accordingly, a penalty of $5,000 is hereby imposed.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The operator is ORDERED to pay $5,000 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

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W. E. Prescott III, Authorized Representative, Burgess Mining and Construction Corporation, P.O. Box 26340, Birmingham, AL 35226 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 9 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. SE 80-5 A.O. No. 40-02385-03004
v.		
		Mine No. 1
MOUNTAIN ENERGY, INC.,	Respondent	

DECISION

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

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with three alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

Respondent answered and contested the proposed penalty assessments and the case was scheduled for hearing at Knoxville, Tennessee, October 29, 1980. Petitioner appeared at the hearing but the respondent did not. Under the circumstances, the hearing proceeded without him and petitioner presented testimony and evidence in support of the citations and its proposal for assessment of civil penalties. A tentative partial bench decision was rendered and my final decision is hereby reduced to writing as required by the Commission's Rules.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed

against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. One additional issue concerning respondent's failure to appear at the hearing pursuant to notice is discussed and disposed of in the course of my 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 Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

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

Discussion

Citation No. 145851, May 9, 1978, 30 C.F.R. § 75.1100-2, states as follows: "A water line or a 500 gallon water car was not provided for the 001 section."

The inspector fixed June 9, 1978, as the abatement date for the citation, but subsequently extended this date to August 18, 1978, by an extension notice issued on July 27, 1978, where he noted that "the mine is closed at the present time and the operator is trying to obtain a permit to build a pond to provide the water." On September 19, 1978, he extended the abatement time to November 20, 1978, and noted that "the mine has been idle for 9 weeks," and on November 21, 1978, extended it again to December 29, 1978, noting that "the mine hasn't operated in 4 months." Another extension was issued on May 9, 1978, by another MSHA inspector extending the abatement date to April 25, 1979, with a notation by the inspector that "the mine has been idle for 8 months," and finally on May 24, 1979, a third MSHA inspector terminated the citation with a notation that "the mine has been closed down by the operator."

Citation No. 145901, July 20, 1978, 30 C.F.R. § 75.902, states as follows: "A ground monitor system was not provided for the 3 phase 240 AC water pump that was located 2 crosscuts from the surface or the belt entry."

The inspector fixed August 18, 1978, as the abatement date for this citation, and on September 19, 1978, he extended the time to November 20, 1978, noting that "the mine has been idle for 9 weeks and the pump will be monitored when the mine resumes operation." The citation was terminated on March 21, 1979, and the inspector noted that "this citation is abated monitor provided."

Citation No. 145906, July 21, 1978, 30 C.F.R. § 75.1100-2(b) states: "A water line with valves and fire hose was not provided for the #1 belt conveyor."

The initial abatement date was fixed as August 18, 1978, was subsequently extended several times by MSHA inspectors, and was finally terminated on May 4, 1979, with a notation by the inspector that the operator had closed down.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector James P. Payne, Sr., confirmed that he inspected the mine in question on May 9, 1978, and that he issued Citation No. 145851 after discovering that the respondent failed to provide a waterline capable of reaching the working face and that no water tank was provided. Due to the lack of this equipment for the purposes of fighting a mine fire, he cited a violation of section 75.1100-2. Mine foreman Clyde Richardson accompanied him during the inspection, admitted that the required equipment was not provided, but he offered no explanation as to why it was not provided. However, two fire extinguishers and three or four bags of rock dust were present underground (Tr. 10-13).

Mr. Payne stated that the mine employed eight to 12 men on one production shift, and that there was a coal machine, a roof bolter, and two scoops present, as well as a small amount of explosives, and in the event of a mine fire, the two fire extinguishers would be inadequate to extinguish any fire. While a fire was possible, it was not probable (Tr. 14). Coal was being produced a week or so prior to May 9, but he believes the mine ceased production sometime during July 20 to July 27, 1978, and he confirmed that he extended the abatement several times because the respondent was having difficulties in obtaining a permit to build a pond to provide water for the mine. Inspector Payne did not return to the mine after November 21, 1978, but confirmed the fact that his fellow inspectors Norris W. Ferguson and Billy Griffin visited the mine in March and May 1979. Mr. Ferguson extended the abatement time further because the mine was idle, and Mr. Griffin terminated the citation on May 24, 1979, because the respondent closed the mine down. The cited conditions were never actually abated because the mine has been abandoned. However, it has not been sealed, and in November 1980, respondent will be required to seal it and submit a required map to MSHA confirming this fact. Mr. Payne stated that he recently met Mr. Connor and discussed the matter with him (Tr. 14-19).

Mr. Payne testified further that subsequent to the issuance of the citation, coal was being dumped and hauled to the surface area of the mine by means of the scoops, and that when he returned and extended the citation the first time a belt conveyor had been installed and a waterline was laid next to the belt but had not been connected due to the lack of a supply of water. In fact, respondent purchased a waterline before he had any source of water, and Mr. Payne believed that respondent was making an effort to comply. He also believed that respondent could have purchased or rented a water tank but did not do so (Tr. 20-21).

Inspector Payne confirmed that he issued Citation No. 145901 on July 20, 1978, citing section 75.902, after finding that respondent had no ground-monitoring system for the mine. Mr. Richardson confirmed that this was the case and indicated that the required system had been ordered, but he could not recall when it was ordered, nor could he recall requesting Mr. Richardson to produce a copy of any purchase order. From past contacts with Mr. Richardson, Mr. Payne believed he was a man of his word and he simply did not question that the system was on order (Tr. 21-22).

Mr. Payne stated that the ground-monitoring system is designed to protect against shock hazards in the event of a fault in the equipment. Power from outside the mine was used to operate a 230-volt AC three-phase pump being used underground and located "a couple of crosscuts" inside the mine, and the lack of the required ground protection system could have been fatal in the event of a shock hazard (Tr. 23). At least one miner would be exposed to the hazard, and while he recalled observing the monitor during a subsequent mine visit, the mine was not in operation during the periods when the citation was extended and that is probably why it was never installed (Tr. 25). Mr. Payne could not state with any certainty whether the respondent exercised good faith, but he believed that the monitor may have been on mine property but was simply not installed and he stated that the equipment required to install the system would be available from suppliers. The pump was used to pump water out of the mine and it was kept operating while the mine was out of production to protect the equipment from the water, and his records reflect that coal was being produced on July 20 when the citation issued (Tr. 28).

Mr. Payne stated that another MSHA inspector abated the citation on March 21, 1979, after the ground-monitoring system was installed, and during that period of time, the mine was in production sporadically during the evening because the respondent was still having difficulties with the state water quality agency and was unable to obtain a permit for construction of a water pond and the mine has produced no coal for the year 1980 (Tr. 28-29).

Inspector Payne confirmed that he issued Citation No. 145906 on July 21, 1978, after finding that a conveyor belt had been installed in the mine to transport the coal from the section but no valves were installed on the waterline as required by cited section 75.1100-2(b). The conveyor belt was approximately 500 feet long, and while two fire extinguishers were on the section, the protection afforded was not as great as that provided by a waterline equipped with operational valves which would facilitate the coupling of the hose to a water supply. The waterline itself was in place along the belt, but the valves were missing. Valves could be obtained from any mine equipment supplier and it is a common item (Tr. 31-32). The mine was in operation on the day the citation issued, but the citation was extended for a period of some 60 days because the mine was subsequently out of production and he did not return after November 21. However, Inspector Ferguson went to the mine on March 21, 1979, and extended the abatement further because the mine had been idle and out of production. Inspector Griffin went there on May 24, 1979, and extended the citation further after determining that the mine had been closed (Tr. 36).

Inspector Payne testified that the respondent was attempting to comply with the requirements of the standards which he cited and the fact that he purchased the equipment necessary for abatement attests to this fact. He also indicated that respondent could not come into compliance with the water quality requirements imposed on him by the state and was unable to secure the required state permit to construct a pond to retain water from the mine, and all during the periods of time in question, the mine was operating on an intermittent basis and was more or less "wildcatted" (Tr. 36-40).

Findings and Conclusions

Respondent's Failure to Appear at the Hearing

On the facts and circumstances presented in this case, I consider respondent's failure to enter an appearance at the hearing in this matter to be a waiver of any further rights on his part to be heard. For the reasons which follow below, I conclude that respondent has had more than ample opportunity to be heard with respect to his claims that due to the demise of his company he is unable to pay any civil penalty assessments.

In this case, MSHA's proposal for assessment of civil penalties was filed with the Commission on April 1, 1980, and the certificate of service reflects that a copy was served on the respondent at the following address:

Tom Connor, President
Mountain Energy Incorporated
Route 2, Box 85 C
LaFollette, Tennessee 37766

Section 105(a) of the Act provides that "refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this section." Thus, it seems clear to me that Congress recognized the fact that a potential respondent could avoid process by simply ignoring or failing to pick up his mail when he recognizes and knows full well that it is from MSHA and probably contains an assessment notice. However, in this case, the respondent apparently readily accepted the proposal for an assessment of civil penalty since he filed an answer. In that answer, respondent listed his then current address as "P.O. Box 12, LaFollette, Tennessee 37766." He also listed his telephone number and he indicated that he could be contacted by phone or by mail at that address.

In its answer filed April 25, 1980, respondent asserted that the No. 1 Mine has been closed since July 18, 1978, and an attempt to reopen it was made in October 1979. However, due to lack of finances, respondent stated he has been unable to resume mining operations. Respondent requested a hearing in Jacksboro, Tennessee, "to discuss the penalties and my inability to pay my assessments at this time." The case was docketed for hearing at Knoxville, Tennessee, along with several other cases docketed for hearing during the same time period. Since Jacksboro is approximately 30 miles from

Knoxville, I believe that the hearing site is convenient to the parties. My initial notice of hearing was mailed by registered mail to the address of record given by the respondent but it was returned by the post office marked "unclaimed" after two attempts to serve it on the respondent. The second notice of hearing advising the parties of the specific hearing location in Knoxville was also mailed by registered mail and was again returned by the post office as "unclaimed."

Petitioner's counsel asserted that he personally contacted respondent's president, Tom Connor, by telephone on October 29, 1980, several hours in advance of the scheduled 2 p.m. start of the hearing for the purpose of discussing the case with him and Mr. Connor advised him that he had not received the notice of the hearing and did not intend to appear. Mr. Connor is employed as a member of the State of Tennessee Highway Patrol and apparently operated the mine as an outside business venture. Counsel asserted further that Mr. Connor's address of record is a valid address and that he had experienced problems in the past in effecting service of documents on Mr. Connor and that he enlisted the aid of an MSHA inspector to personally deliver documents to him because of his failure to accept registered mail addressed to his posted address of record (Tr. 5-6).

Commission Rule 7, 29 C.F.R. § 2700.7(b) provides in pertinent part as follows:

> [A] proposal for a penalty * * * shall be served by personal delivery or by registered or certified mail, return receipt requested. All subsequent documents may be served by personal delivery or by first class mail. Service by mail is complete upon mailing. (Emphasis added)

On the facts presented in this case, it seems clear to me that two notices of hearing were mailed to the respondent by registered mail and in both instances, he obviously ignored them. Coupled with the fact that respondent has paid no civil penalties for past violations and allowed them to go to default, the fact that MSHA followed up with additional letters in its attempts to collect those prior assessments, the fact that MSHA counsel has had to arrange for personal service of documents on the respondent because of his failure to respond to the letters, and the fact that counsel personally advised the respondent by telephone about the hearing on the morning of October 29, 1980, several hours in advance of its commencement, I can only conclude that respondent is deliberately avoiding the inevitable and that he is entitled to no further consideration. I conclude that he has been treated fairly, has had ample opportunity to be heard, and that the notices of hearing were served in accordance with the rules.

Fact of Violation

I find that the testimony of Mr. Payne concerning the conditions and practices cited by him in the three citations issued in this proceeding establish the fact of violation as charged on the face of the citations by a preponderance of the evidence and the citations are AFFIRMED. Failure to provide

the required water to the working section of the mine, and failure to install the required outlet valves constituted violations of the cited sections, 75.1100-2 and 75.1100-2(b). In addition, failure to provide the required ground-monitoring system as required by section 75.902, constitutes a violation of that mandatory standard.

Negligence

I conclude and find that each of the citations in this case resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited by Inspector Payne. Although there is some testimony from the inspector that some of the equipment necessary for compliance was ordered by the respondent, there is no evidence that it had been ordered in advance of the inspection, and there is an inference through the many extensions granted by the inspectors that the equipment was ordered after the citations issued. I find that all of the citations resulted from ordinary negligence.

Gravity

I find that each of the citations were serious. On each occasion, the mine was in production and men were underground. The failure to provide adequate firefighting equipment, water, and protection against possible shock and electrocution constituted serious hazards.

Good Faith Compliance

The only citation which was actually abated was the one dealing with the ground-monitoring system. The inspector recalled observing the system at the mine, but could not recall whether it was actually installed and the termination notice simply stated that it "was provided." As for the remaining two citations, although the waterline was purchased and laid next to the conveyor line, it was never operational due to the lack of a water supply. As for the valves, the record reflects that the valves were never installed and both of the citations were apparently terminated because of the fact that the mine was idle and apparently abandoned by the respondent. The record suggests that respondent was making an effort to comply and he did in fact purchase a waterline and ground-monitoring device. Accordingly, I conclude that while total abatement has never been achieved due to the fact that the mine closed down, respondent should not be penalized further for this.

History of Prior Violations

Petitioner's Exhibit P-1 is a computer printout reflecting respondent's prior history of violations. The printout reflects that for the period July 22, 1976, through July 21, 1978, respondent was issued 18 citations for which he was assessed a total of $934 in civil penalties. Surprisingly, however, the printout reflects that respondent has paid none of the assessments, and with the exception of four citations which were contested before a Commission judge, the respondent was defaulted on the remaining 14 listed citations.

During the course of the hearing, petitioner's counsel was asked to explain the computer code DLT3 as shown on Exhibit P-1. Counsel was unable to explain the coding, but by letter filed with me on November 17, 1980, counsel indicated that respondent had defaulted on 14 of the citations listed on the computer printout and that MSHA had apparently sent him three letters on each violation demanding payment for the outstanding violations.

Petitioner's counsel stated at the hearing that respondent's 18 prior citations is not excessive (Tr. 7). While I am in agreement with that conclusion and find that for purposes of the instant case, respondent's prior history does not warrant any increase in the penalties assessed, the fact is that respondent has totally ignored prior assessments levied by MSHA for past violations and has paid nothing for these prior assessments. In the circumstances, I can find no mitigating circumstances which would warrant any further consideration for the respondent and I have given him none.

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

Petitioner agrees that respondent is a small operator (Tr. 7) and I accept that as my finding in this matter. Further, the record adduced in this case reflects that the mine has been closed and that respondent is no longer in business. However, absent any input from the respondent as to his ability to pay, I cannot conclude that the penalties assessed will adversely affect his ability to stay in business. His answer of April 21, 1980, implies that he may still be interested in resuming mining but has been unable to raise any capital. In any event, since it appears that he is no longer in business, the question of the impact of the penalties on his ability to remain in business appears to be moot. I believe that respondent has had more than a fair opportunity to come forward and be heard, but for reasons known only to the respondent it seems obvious to me that he is avoiding any confrontation with MSHA at a hearing and I do not intend to waste any more of the Commission's valuable resources dragging the respondent into court kicking and screaming.

Penalty Assessments

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the initial penalty assessments made and proposed by the petitioner for the three citations in issue are reasonable and should be affirmed. Accordingly, I adopt the proposed penalties as appropriate for the citations in question and they are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment
145851	5/09/78	75.1100-2	$ 66
145901	7/20/78	75.902	56
145906	7/21/78	75.1100-2(b)	114
			$236

ORDER

Respondent IS ORDERED to pay the civil penalties assessed in this proceeding, as indicated above, within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 9 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GROVE CRUSHING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-319-M MSHA CASE NO. 35-02844-05001 MINE: SAGER CREEK PIT

DECISION

APPEARANCES:

William W. Kates, Esq., Office of Robert A. Friel, Associate Regional Solicitor, United States Department of Labor, Seattle, Washington
for Petitioner,

Michael R. Hughes, President of Grove Crushing Company, appearing pro se, Eugene, Oregon
for Respondent.

Before: Judge John J. Morris

In this civil penalty proceedings, Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), alleges that respondent, Grove Crushing Company (GROVE), violated five safety regulations promulgated under the authority of the Federal Mine Safety and Health Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Eugene, Oregon, on July 9, 1980. Patrick Bodah testified for MSHA and Michael R. Hughes testified for GROVE. The parties did not file post trial briefs.

ISSUES

The issues are whether the violations occurred and what penalty, if any, is appropriate.

CITATION 349420

This citation alleges a violation of 30 C.F.R. 56.9-87. The cited standard provides:

> 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.

The evidence is uncontroverted.

1. GROVE's front end loader did not have a functioning automatic backing warning device (Tr. 11, 12).

2. The loader operator sits in the middle of the seven foot long machine. The loader itself obstructs the operator's view for a distance of 10 to 12 feet to the rear (Tr. 28).

DISCUSSION

The uncontroverted facts establish a violation of the standard. I accordingly conclude that this citation should be affirmed.

In view of the statutory criteria [1] and in view of the nature of the defective equipment and its potential hazard to workers, I deem a penalty of $25.00 to be appropriate.The penalty was reduced from $52.00 because MSHA failed to credit GROVE for its good faith abatement (Tr. 12).

CITATION 349421

This citation alleges a violation of 30 C.F.R. 56.9-22. The cited standard provides:

> 56.9-22 Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

The evidence is uncontroverted.

3. A twenty foot ramp leading to a feed hopper lacked a berm (Tr. 12 - 13).

4. A berm, hich must be hub high, prevents a vehicle such as a front end loader from going over the edge (Tr. 12 - 13).

1/ 30 U.S.C. 820(i)

5. GROVE's front end loader was continually going up and down the ramp (Tr. 14).

Since the evidence concerning the lack of berms is uncontroverted, the citation should be affirmed.

Considering the statutory criteria [2] the proposed penalty of $52.00 is excessive since the proposed assessment failed to credit Grove for its good faith abatement. A penalty of $25 is appropriate (Tr. 14).

CITATION 349422

This citation alleges a violation of 56.11-27. The cited standard reads:

> 56.11-27 Mandatory. Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

The evidence is uncontroverted.

6. The 10 foot high deck of the crusher machine had unguarded openings on two sides (Tr. 15).

7. One side of the work platform faced the jaw crusher (Tr. 15).

8. The crusher operator works on this platform (Tr. 15).

9. There is a chain on the crusher side, but it was unhooked at the time of the inspection (Tr. 36).

DISCUSSION

The chain situated on the jaw crusher side of the work platform, even if it had been hooked, would not constitute compliance with the regulation. The standard, 30 C.F.R. 56.11-27, by its terms requires more substantial protection for the platform operator. This citation should be affirmed.

In considering the statutory criteria,[3] the proposed penalty of $72.00 is excessive since it fails to credit GROVE for its good faith abatement (Tr. 17). A penalty of $25.00 is appropriate.

2/ 30 U.S.C. 820(i)

3/ 30 U.S.C. 820(i)

CITATIONS 349423 and 349424

These citations alleges a violation of 30 C.F.R. 56.14-1. The cited standard provides:

GUARDS

> 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

DISCUSSION

MSHA's case fails for two reasons. First, MSHA did not sustain its burden of proof. The inspector testified there were two unguarded tail pulleys. One was identified as being under the cone conveyor and one leading to the shaker screen. (Tr. 17 - 20, 30).

On the other hand GROVE's president testified the tail pulleys had foot guard boxes bolted on to the conveyor which provide adequate protection (Tr. 37, 40). In addition, I do not perceive any evidence establishing in what manner the GROVE workers would be exposed to the hazard if in fact it existed. The burden of proving all elements of an alleged violation rests with MSHA, 5 U.S.C. § 556(d). Brenner v. OSHRC, 511 F.2d 1139 (9th Cir., 1975); Olin Construction Company v. OSHRC 575 F.2d 464 (2d Cir., 1975).

For the foregoing reasons I conclude that Citations 349423 and 349424 and all proposed penalties therefor should be vacated.

ORDER

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

1. Citation 349420 is affirmed and a penalty of $25.00 is assessed.
2. Citation 349421 is affirmed and a penalty of $25.00 is assessed.
3. Citation 349422 is affirmed and a penalty of $25.00 is assessed.
4. Citation 349423 and all penalties therefor are vacated.
5. Citation 349424 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

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Michael R. Hughes, President, Grove Crushing Company, P. O. Box 5187, Eugene, Oregon 97405

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 9 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VINC 79-99-PM A.O. No. 33-00127-05002
v.	:	
NATIONAL LIME AND STONE COMPANY, Respondent	:	Carey Lime Plant-Quarry and Mill

DECISION

Appearances: Linda Leasure, Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Petitioner;
Ray E. Brandon, Findlay, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 56.12-37.

Respondent filed a timely answer contesting the civil penalty proposal and requested a hearing. A hearing was convened on July 31, 1980, in Findlay, Ohio, and the parties appeared and participated fully therein. The parties were afforded an opportunity to present oral and written arguments in support of their respective positions, and the arguments presented have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed in this proceeding; and, if so, (2) the appropriate civil penalty 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, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

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

Stipulations

The parties stipulated to jurisdiction, agreed that respondent's Carey Lime Plant-Quarry and Mill is a mine within the meaning of the Act, that it produces lime, limestone, and crushed stone, and they agreed to the admissibility of MSHA's computer printout reflecting respondent's prior history of violations (Exh. P-1, Tr. 6). The parties also agreed that respondent's mine size during the year 1978 consisted of 280,637 man-hours and that respondent's mining operation is a medium one (Tr. 6, 17), and they also agreed to the admissibility of all of the documents marked and received as part of the record in this case, including an agreement that the junction box which was the subject of the citation and produced in court as demonstrative evidence to acquaint the court with its physical characteristics, need not be made part of the official record in light of its rather cumbersome dimensions. Instead, the parties agreed that the exhibits describing and picturing this device is sufficient for any evidentiary purposes (Tr. 7). Respondent also stipulated that the proposed assessment will not adversely affect its ability to remain in business (Tr. 17).

Discussion

Citation No. 368657, June 21, 1978, citing an alleged violation of 30 C.F.R. § 56.4-29, was vacated and dismissed on motion by the petitioner by my order of July 9, 1980. The hearing in this case concerns Citation No. 368661, initially issued on June 21, 1978, by MSHA inspector Michael J. Pappas, alleging a violation of 30 C.F.R. § 56.12-37, and the condition or practice described on the face of the citation is as follows: "Fuse tongs were not being used to remove and replace fuses in the electrical

circuit box for the overhead crane in the shop." Mandatory safety standard 30 C.F.R. § 56.12-37, provides as follows: "Fuse tongs or hotline tools shall be used when fuses are removed or replaced in high-potential circuits." The term "high potential" as used in section 56.12-37, is defined by section 56.1, as "more than 650 volts."

The citation was subsequently amended by Inspector Pappas on November 17, 1980, to reflect a correction in the citation to the mandatory standard which Mr. Pappas intended to cite, namely section 56.12-36, which provides as follows: "Fuses shall not be removed or replaced by hand in an energized circuit, and they shall not otherwise be removed or replaced in an energized circuit unless equipment and techniques especially designed to prevent electrical shock are provided and used for such purpose."

At the hearing, the respondent conceded that it was aware of the modified citation, that it was served with a copy of same, and was not prejudiced in its ability to present a defense to the alleged violation of section 56.12-36, as reflected in the modified citation (Tr. 4-5).

Petitioner's Testimony and Evidence

MSHA inspector Michael J. Pappas confirmed that he conducted an inspection at the mine site in question on June 21, 1978, and while in the garage area one of the mechanics, a Mr. Feasal, brought to his attention a problem that he was having concerning the rails on the overhead crane. Before climbing up to the crane area, Mr. Feasal deenergized it by walking to the fuse box which supplied power to the crane, opening the box, and reaching in with his hand and pulling out one of the fuses. Mr. Pappas expressed concern over this act on the part of Mr. Feasal because the floor was wet and he did not use any fuse tongs to remove the fuse. After showing him the problem with the crane rails, Mr. Feasal replaced the fuse in the box by hand and turned the switch back on (Tr. 18-22).

Mr. Pappas stated that simply because the handle to the fuse box is turned or pulled down, this does not insure that the box is totally deenergized. Mr. Feasal removed the fuse so quickly, and it was done before he realized what had happened, and since he was standing on a wet floor and did not check to insure that the fuse knives were down, Mr. Pappas was concerned about a shock hazard and believed that a violation occurred. He also indicated that unless the main power switch is disconnected, part of the fuse box is still energized even though the door is open, and he determined that the main power switch had not been turned off because the garage lights were on and other electical power was being used. He determined that fuse tongs were not used to remove the fuses, and he did so by asking the safety foreman and superintendent who informed him that fuse tongs were not used but that they would obtain them (Tr. 23-24).

On cross-examination, Mr. Pappas stated that when Mr. Feasal removed the first fuse he advised him that he should not do so, but that Mr. Feasal proceeded to remove the remaining two fuses by hand after he had warned him not

to. Mr. Pappas confirmed that the floor was wet and he could not recall observing a rubber mat under the fuse box (Tr. 24-28). He also confirmed that he modified the citation after learning that the fuse box was less than 600 volts, and when he returned to the mine at a later time to look at the box in the company of a mine electrical inspector, he recalled that he stated that the back of the box was not deenergized (Tr. 28-29).

In response to further questions, Mr. Pappas indicated that abatement was achieved with the purchase of fuse tongs by the respondent, and he could not recall if the use or nonuse of such fuse tongs at the mine site was discussed with any of his fellow inspectors. He did recall that respondent advised him that tongs were never used, he observed none in use at the mine, and could not recall discussing the matter with any mine personnel (Tr. 34-35).

When called in rebuttal, Mr. Pappas stated that when he questioned Mr. Feasal about the procedure he normally used to deenergize the box in the event he had to perform mechanical work on the crane, Mr. Feasal told him that he never used fuse tongs and that he and another mechanic always removed them by hand (Tr. 75). Mr. Pappas also indicated that a fuse tong is an electrical tool not a mechanic's normal tool. He also questioned why an electrician would need a voltmeter if the box in question was in fact foolproof (Tr. 76). He also candidly admitted that if he observed a mechanic pull a fuse by hand with the switchbox in the OFF position, he would cite him for a violation, but if he observed an electrician checking the box with a voltmeter and it indicated no voltage, he would probably not cite the electrician if he pulled the fuse by hand. But in the instant case, Mr. Feasal expressed complete ignorance as to the use of a fuse tong and he was not an electrician (Tr. 77).

Respondent's Testimony and Evidence

Ronald Stapley, testified that he has been employed as an electrical supervisor for the respondent for 18 years, supervises a crew of five people in the mine electrical department, and that his department handles electrical installations and maintenance. He was called to the scene of the citation in question shortly after Mr. Pappas issued it. His people are equipped with all the necessary protective equipment required to perform their jobs, and fuse tongs were located in the electrical shop. All of his electricians are supplied with voltage-metering devices which they carry with them to determine whether any of the circuits they work on are electrically alive. He identified the fuse box in question (Exh. R-1) as the 450-volt Trumbull disconnect switch which is the subject of the citation in question, and indicated that it provides 440 volts to operate the crane in the garage. He also indicated that he tested the box after the citation issued and identified Exhibit R-5 as a memorandum dated November 19, 1979, which he prepared, and he read the following pertinent portion into the record (Tr. 43): "The Trumbull three-phase 30-amp fuse disconnect switch was checked from phase to phase and to ground on load side and was found to be zero voltage on both checks with switch in OFF position. All points of access were checked and found to have zero voltage readings."

Mr. Stapley testified that he tested every accessible area inside the opened switchbox with a voltmeter and he indicated that the switch is enclosed in a metal enclosure, that the live voltage area between the switch and the box itself could only be reached with great difficulty, and one would have to have "pretty small hands" to reach into that area. The box has a cover lid enclosing it and in order for the switch to be in an ON position the lid has to be closed and there is a mechanical interlock installed on it and one cannot gain access to the inside of the box until the switch is turned to the OFF position. He traced the path of any current entering the box with the switch in the ON position, and indicated that power enters the box at the upper lefthand corner through the first fuse, and in this position a spade at the bottom of the fuse position is in a closed position. When the switch is OFF, the spades are open, and no current passes through the box, but rather, stops at the top of the box where it is "alive." If the switch is in the OFF position, everything in the box itself is "cold", and if one were to reach in and grab one of the fuses he would not receive a shock. He identified Exhibit R-2 as a schematic of the current path to the box and indicated that current enters the box at the top left fuse and exits at the lower right end of the third fuse to the load (Tr. 44-50).

Mr. Stapley stated that the switchbox in question is manufactured to provide maximum protection to an individual in that the box has a safety interlock and when the switch is on all three fuses are energized at the same time, and when it is off all three are deenergized simultaneously. In his opinion, the box is deenergized with the switch in an OFF position, and if the main plant switch were turned off all of the power in the plant would be shut down and the plant could not operate (Tr. 50-52).

On cross-examination, Mr. Stapley indicated that in the event of a mechanical failure within the switchbox, it is possible that the blades may not be completely pulled out when the box door is open, but this would happen if the bar actually broke and was stuck in the closed position. He conceded that in the event the secondary circuit within the box were deenergized, that portion of the circuit stopping at the first fuse would still be energized (Tr. 52-54).

In response to further questions, Mr. Stapley stated that an electrician would never reach in and pull out a fuse by hand as Mr. Feasal did, and that the usual procedure that an electrician would follow would be to turn the box switch off and lock it out before performing any maintenance work on the box. He could not explain why Mr. Feasal did what he did since lock-out procedures were in effect at the time the citation issued. The switchbox in question does not require frequent maintenance, and he speculated that the fuses were pulled by hand simply to turn off the power to the crane. He explained the procedure followed by his electricians in checking for bad fuses. An electrician would throw the switch to the OFF position, open the switch door, check it for power, turn the switch on and make a voltage check with a voltmeter to determine which fuse was bad, and he would then turn the switch to the OFF position and remove the defective fuse by hand (Tr. 54-59).

Mr. Stapley indicated that the fuse box is part of the circuit from the main power source to the box, but that it would only be energized up to the top of the box disconnect (Tr. 60).

Harold McKinnon, testified that he has been employed by the respondent for 32 years and that he is the safety supervisor for all of its plants. He was present at the facility on June 21, when the inspection took place and confirmed Inspector Pappas' recollection concerning Mr. Feasal pulling the fuses by hand, and recalled that the area was damp. A rubber mat was in place under the fuse box in question, and he indicated that one can determine whether the switchbox is "hot" by visually observing the knives on the foot bar from the side of the fuses. When the switch is in the ON position, the knives are up and insert themselves into the contact point, and when they are down, the switch is disconnected and OFF, and safe in that position. He was with Mr. Stapley when he tested the switchbox and confirmed his findings that "everything" was in order. When the switch is OFF, one would have to make an effort to reach around behind the box to touch an energized circuit, and the box itself is designed to preclude this from happening (Tr. 61-67).

On cross-examination, Mr. McKinnon stated that he never observed a mechanic remove a fuse by hand and that he was as surprised as Inspector Pappas was when Mr. Feasal did it (Tr. 67). In response to further questions, he candidly admitted that fuses were supposed to be removed by fuse tongs, that tongs were available long before the citation issued, "but there is probably not as much emphasis put on it as they are right now" (Tr. 68). When asked whether the box could become energized when it was in the OFF position, he answered as follows (Tr. 69):

> No. That particular switch, if you know what to look for on there, I don't think you got any worries at all. If you know what to look for. It is designed in such a manner that you can see the working parts in there and if that knife doesn't drop down out of there, you better stay out.

When asked whether the fuse knife could hang up and not completely close when the switch was in the OFF position, he answered: "I'm sure that there is a possible [sic] something might go wrong. It's not a hundred percent". If two of the knives closed and the other one did not, he indicated that "you are going to get poked on the one that the knife didn't drop down" (Tr. 70). When the fuse box switch is in the ON position, the circuit coming into the box would complete itself by going through all of the fuses and out to the load, and if the switch is OFF, current stops at the point where it enters the top of the box at the first fuse and there is no completed circuit through the box since the current would stop at that point (Tr. 71). Mr. McKinnon stated that in his capacity as safety director he always strives to educate his personnel to use proper safety procedures in their work, and that in dealing with the different types of switchboxes in the plant he would prefer that they use fuse tongs when fuses are changed out, but that the switchbox in

question is not the type of box where this is required, and when one is "troubleshooting" a box he may not have tongs readily available and he would simply reach in and remove a fuse (Tr. 72).

Findings and Conclusions

Fact of Violation

The citation in this case concerns a Trumbull 30-amp, 450-volt fuse interlock switch box located at respondent's plant garage. The box serves as the only source of electrical power to an overhead crane located nearby in the garage through which electrical energy passes to service the crane. The critical question presented is whether the box in question constituted an energized circuit on the day the citation issued. Petitioner takes the position that while the box may have been disconnected and deenergized at the point where the power cable enters the top of the box where it is normally connected to the first fuse inside the box, the failure to deenergize and lock out the box at the main plant power switch constituted a deenergization of a portion of the circuit but not of the entire circuit itself. Since a portion of the circuit was still energized at the time the fuse was pulled and replaced by hand, the petitioner asserts that the situation presented a potential danger in the event of a mechanical failure in the box itself. In short, petitioner's view is that the entire circuit consisted of a "primary side," consisting of the main power cable which entered the box at the top, and a "secondary side," which consisted of the fuses and wiring inside the box. Further, notwithstanding the fact that the circumstances presented posed an unlikely probability of an actual accident and that the hazard presented was minimal, petitioner nonetheless maintains that the failure to deenergize the entire circuit at the plant main power source constitutes a violation of the cited safety standard (Tr. 9-12).

Respondent takes the position that the term "energy" is defined by Webster's Third New International Dictionary at pages 751 and 408 as "To impart energy; make active; to make energetic or vigorous; to make an electric circuit alive electrically by applying voltage," and "the complete path of an electric current including any displacement current." Respondent argues that the box in question is fed by electric current, but that when the box is opened to expose the inner accessible parts which are within reach of someone placing their hand into the box, the box is deenergized and therefore no circuit or flow of current passes through the fuse holders to the load side of the box. Conceding that there is current to the backside of the box, respondent asserts that any access to this area is protected by insulation and a person cannot be electrically shocked by the current flow itself, and suggests that the standard on its face provides an exception which states "unless equipment and techniques especially designed to prevent electrical shock are provided and used for that purpose" (Tr. 12-13). In this regard, respondent asserted that the box in question was specifically purchased and installed to provide maximum protection to personnel and that one cannot have access to the inside of the box unless the switch is off and covered up, and that at the time the fuse was pulled by hand the circuit

was deenergized through the mechanical function of the box itself and that testing of the box at the time the citation issued established that fact (Tr. 15-16).

Petitioner's initial view of the language of the standard, which provides for an exception, was that only fuse tongs or similar devices for removing and replacing fuses are acceptable and that MSHA would object to the existence of any mechanism within the box itself as an absolute defense to the standard. As an example, MSHA counsel stated that in the event of a mechanical failure in the box an employee opening it may not notice that the "knives" behind the fuses had not disengaged and that this presents a chance that the employee will be shocked (Tr. 15). However, during closing arguments, counsel candidly admitted that while the first phrase of the language of section 56.12-36 is direct and absolute in that it proscribes the removal of fuses by hand, the remaining portion dealing with an exception which states "unless equipment and techniques especially designed to prevent electrical shock are provided and used for such purposes" is ambiguous (Tr. 84).

On the facts presented in this case, it could be argued that the switchbox in question is engineered in such a fashion as to provide maximum safety protection. The manufacturer's specifications (Exh. R-3), reflect that the box contains some rather sophisticated interlocking safety devices, including a locking mechanism that locks the switch into a full OFF position when activated, has visible fuse contact blades, and is enclosed in a heavy gauge steel container provided with fixtures to facilitate padlocks. In addition, while it is true that the voltmeter test conducted by Mr. Stapley and Mr. McKinnon (Exh. R-5), was conducted sometime after the citation issued, the fact remains that the test was conducted on the identical box cited and it confirmed that access to the fuses cannot be made unless the switch is in the OFF position, and in that position, the voltage meter indicated no voltage when checked from phase-to-phase and to ground on the load side.

The first question to be addressed is whether or not the switchbox mechanism in this case, while in the OFF position, constitutes an energized circuit within the meaning of the standard. Respondent's position is that under the definition of an electrical energized circuit, a switchbox which is turned off simply is not an energized circuit, even though the power cable feed line to the top of the box is energized to that point. Although respondent agrees that the practice of removing fuses by hand is not a good one, and that as a result of the citation, fuse tongs are now provided wherever there is an electrical box containing fuses, it still maintains that no current passes through the box when the cover lid is opened and is in the OFF position, and the result is that there is no energized circuit within the box (Tr. 86-87).

A second issue which needs to be addressed is the question of interpretation and application of that part of the standard which seems to provide for an exception to the requirement that fuse tongs be used when removing and replacing fuses. The question is whether or not the exception relates to, or is limited to, methods for removing and replacing fuses and whether the

asserted built-in safety features of the box itself, coupled with the testing procedures followed by trained electricians, are sufficiently reliable so as to come within the exception. In this regard, and in response to my questions, the respondent conceded that the switchbox in question has not been designated as a "fail-safe" device by MSHA, and neither the inspector or the respondent were aware of any MSHA approval labels affixed to the box (Tr. 81).

An inherent basic problem presented in this case lies with the ambiguity of the language used in section 56.12-36 as it relates to the exception and the requirement for the use of fuse tongs. The term "energized circuit" is not further defined by the definitions found in section 56.1, and I take note of the fact that while section 56.12-36, uses the phrase energized circuit, section 56.12-37, which requires the use of fuse tongs or hotline tools with no exceptions, does not use the phrase energized. It simply refers to high-potential circuits without qualification, and "high-potential" is defined as "more than 650 volts", while "low-potential" is defined as "650 volts or less".

The Dictionary of Mining, Mineral, and Related Terms, published by the U.S. Department of the Interior, 1968 Edition, defines the term "circuit" in pertinent part as follows at page 210: "A conducting part of a system of conducting parts through which an electric current is intended to flow. The course followed by an electric current passing from its source through a succession of conductors and back to its starting point."

The term "switch" is defined in pertinent part at page 1111 of the Mining Dictionary as: "[M]echanical device for opening and closing an electric circuit." The term "fuse" is defined in pertinent part at page 471 as: "An overcurrent protective device with a circuit-opening fusible member directly heated and destroyed by the passage of overcurrent through it."

Upon consideration of the language contained in sections 56.12-36 and 56.12-37, it occurs to me that if these standards are intended to provide protection against accidental electrical shocks or accidents, or to absolutely require the use of fuse tongs or other mechanical devices when removing or replacing fuses, it would have been a simple matter for the standards writers to state that proposition by specifically requiring the use of such mechanical devices for both high and low potential circuits. However, by including an exception as part of section 56.12-36, I can only assume that the drafters of the standards may have believed that a low-potential circuit is not as critical, in terms of safety as a high-potential circuit, and therefore provided for an exception for the removal and replacement of fuses as long as "equipment and techniques especially designed to prevent electrical shock are provided and used for such purposes." As an alternative, and in order to dispel any ambiguity that arises from the language of the two standards, I suppose that the Secretary could have promulgated a standard requiring that all power in a mine be turned off when fuses are removed and replaced.

Petitioner offered no expert testimony from any of its electrical personnel to explain the distinctions made by the standards in question. On the other hand, respondent's testimony and evidence reflects that company safety policy and procedure dictates that only trained electricians are authorized to perform maintenance on electrical equipment such as the box in question. Aside from the interlocking safety device on the box itself, which automatically triggers an OFF switch when the box cover lid is opened, respondent asserts that a trained electrician would normally look into the box to insure himself that the fuse knives are disconnected, and he would also apply a voltmeter to the box to satisfy himself that there is no "live" current in the box before proceeding to remove a fuse or otherwise perform maintenance on the box. I conclude that the use of the voltage meter and the visual inspection procedure by trained electricians is to prevent electrical shock, and if such procedures were used they would fall within the exception language noted in section 56.12-36. Further, there is an inference in this case that the inspector who issued the citation is in agreement with my conclusion in this regard since he candidly admitted that had he observed an electrician checking the box with a voltage meter he would not have cited him for pulling out the fuse by hand. His concern was the fact that he observed a non-electrician mechanic doing this without making any additional tests or observations.

It seems clear to me that the switchbox in question, including the three fuses and wiring inside the box are incorporated as part of the total electrical circuit providing power to the crane. The path of current within the circuit is from the main plant power source to the top of the switchbox, through the fuses and switching circuit inside the box, and out to the load. It also seems clear to me that the current passing through the completed circuit may be interrupted in several ways. An overload or mechanical failure on the circuit would obviously cause a fuse to blow and interrupt the flow of current. The circuit is also interrupted when the switchbox is turned to the OFF position and this is accomplished by opening the cover lid to the box.

In its posthearing arguments filed August 18, 1980, respondent asserts that when the fuse box in question is in the OFF position there is no complete path of electric current and that the box includes a roller cam action and a multiplying linkage design with a powerful spring action that always throws to full OFF or ON and that there is no halfway position because there is no dead center. In these circumstances, respondent maintains that since the box is especially designed to prevent electrical shock and used for that purpose, the exception provided in section 56.12-36 is applicable in this case and that an energized circuit was not present.

In addition to the foregoing, respondent states that MSHA has accepted a lock-out procedure wherein respondent is permitted to throw a switch to the OFF position, lock it out and proceed with repairs since the current is deenergized. Yet, in this case, MSHA insists that the power must be shut off at its source in order to have the circuit deenergized. Respondent fails to perceive any difference as the fuses are deenergized when the interlock doors of the switchbox in question are opened.

Respondent's assertion that it is unreasonable and somewhat inconsistent to require it to shut off the main plant power source when performing work or changing fuses in the box is not really the critical issue in this case. In this regard, I reject the petitioner's argument made during the hearing that the failure to turn off the main power supply, thereby deenergizing the complete circuit, including the box and fuses, constituted a violation of the cited standard. Failure to deenergize or to lock out circuits and equipment while performing maintenance work are separate conditions or practices covered by sections 56.12-16 and 56.12-17, and if the inspector believed that these sections were violated it was incumbent on him to specifically cite the respondent accordingly.

The critical issue presented in this case is not the fact that the main power switch was not turned off, but rather, the fact that an employee was observed removing and replacing fuses by hand contrary to the stated requirements of section 56.12-36. On the facts presented in this case, it is clear that the fuses in question were in fact removed from the box by hand and replaced by hand contrary to the clear prohibition against such a practice. The critical question is whether the box and fuses constituted an energized circuit. If the answer to this question is in the affirmative, then the citation must be affirmed unless the respondent can establish that "equipment and techniques especially designed to prevent electrical shock" were provided and in fact used at the time the fuses were pulled and replaced by hand, thereby making the exception found in section 56.12-36 applicable.

Respondent's reliance on the exception found in section 56.12-36 is based on the following factors:

1. The switchbox is manufactured to provide maximum protection in that the fuses are automatically deenergized simultaneously when the box is opened, thereby resulting in the switch being placed in a complete OFF position. With the switch in this position, the circuit is interrupted and that portion within the confines of the box itself is "cold" and completely deenergized.

2. A test conducted on the identical box in question with a voltmeter confirmed the fact that no current flows through the box circuitry with the switch in the OFF position.

3. With the switchbox opened and in the OFF position, one can visually observe whether the fuse spades are opened and not engaged, thereby confirming the fact that they are deenergized.

4. Trained electricians perform maintenance on the boxes and check them out with voltmeters before attempting to remove fuses.

After a careful review and consideration of all of the arguments presented in this case, I conclude and find that the facts presented support a finding of a violation of section 56.12-36, and the citation is AFFIRMED. Although the respondent has advanced several meritorious arguments in support of its case, and particularly with regard to the exception noted in section 56.12-36, the fact is that at the precise moment Inspector Pappas observed Mr. Feasal reach in and pull the fuses by hand, none of the aforementioned factors cited by respondent in support of the proposed application of the exception were present. On the facts presented in this case, it seems clear that at the time Mr. Feasal pulled the fuses out of the box by hand, he had conducted no tests with any meters to ascertain whether the box was hot or cold.

With regard to the test conducted by the respondent subsequent to the issuance of the citation, the record reflects that the box was tested with a voltmeter well over a year later and the fact that the tests indicated a "cold" circuit inside the box is of little value in determining the condition of the box at the time the citation issued. As for the asserted built-in safety features of the box in question, while it is true that it is engineered in such a way as to provide maximum protection against accidental electrocution or shock, the fact is that respondent's own testimony indicated that the box is not an absolute failsafe device and that it can malfunction. For example, Mr. Stapley testified that while the box is normally deenergized when the switch is in an OFF position, it was possible that in the event of an accident, the fuse bar blades could remain engaged even with the box door opened, and if this occurred, current would continue flowing through the first engaged fuse. Mr. Stapley also testified that while the current stopped at the top of the box when the switch was in the OFF position with the box door opened, there was an area between the switch and the box itself which remained energized and accessible to a person with small hands. Mr. McKinnon conceded that someone could conceivably reach behind this area, but that it would take some effort. And, while he believed the box in question presented no problems when it was in the OFF position, he tempered his statement by indicating that this was true only if one "knew what to look for," and he conceded that it was possible for a fuse knife to remain open and not fully engage, and that if this occurred the circuit through the fuse would stll be "hot." Finally, both Mr. Stapley and Mr. McKinnon expressed surprise over the fact that a nonelectrician such as Mr. Feasal would reach in and pull fuses by hand contrary to company policy and procedure.

With regard to the question as to whether the fuse box in question constituted an "energized circuit" at the time Mr. Feasal was observed pulling the fuses by hand, on the facts presented in this case it seems clear that even though the box was opened and the switch was in the OFF position, current flowed to the top of the box and into the small area characterized as somewhat inaccessible between the switch and the box. In the event the fuse blades failed to disengage, current would continue to flow through the fuses. The standard, on its face, does not differentiate between a completed and partial energized circuit, and respondent urges a restrictive interpretation which would terminate the energized circuit at the point where it enters the

box, while petitioner urges a broad interpretation which would take into account possible accidents and failures within the box itself, thus permitting the circuit to remain open and completed. On balance, I believe that petitioner has the better part of the argument, particularly on the facts and circumstances presented in this case, where a nonelectrician acting on his own volition, either out of total ignorance or lack of concern for his own safety, places himself in jeopardy. I believe that the standard was intended to preclude just such an occurrence.

Negligence

Petitioner conceded that the facts presented in this case do not indicate that the respondent had any prior knowledge concerning Mr. Feasal's pulling the fuses by hand or that the respondent condoned such a procedure by its mechanics when the switchbox was required to be turned off for maintenance purposes. Petitioner suggests that if any negligence were present, it was minimal (Tr. 78). On the facts and circumstances here presented, I cannot conclude that Mr. Feasal's unexplained and foolhardy act of reaching into the box and removing the fuses by hand with no apparent examination of the fuse knives or testing of the box to make sure that it was in fact "cold" can be attributed to the respondent. I find that the respondent was not negligent.

Good Faith Compliance

Petitioner concedes that the citation was abated in good faith by the respondent (Tr. 78), and I adopt this as my finding in this proceeding.

Gravity

Although one can conclude that the practice of a mechanic, who is not a trained electrician, reaching into a switchbox to remove a fuse by hand without conducting any tests to insure that the box is not alive with current is a serious matter. While it has not been established that the switchbox in question was in fact failsafe, there was a potential, although somewhat remote, of someone being electrocuted by pulling the fuses by hand (Tr. 84). Petitioner conceded that it was extremely remote that someone could have been injured on the day the citation issued (Tr. 85). Even so, I cannot overlook the testimony of Mr. McKinnon who candidly admitted that the area behind the box was still energized even though the switch was off, that it was possible for a mechanical failure to occur which may have prevented the fuse knives from completely closing, thereby permitting current to continue through the circuit inside the box, and that a novice who opens the box without examining it closely to ascertain whether the knives are open or fails to test it with a voltmeter could be subjected to a potential hazard. Under these circumstances, I find that the condition cited was a serious violation.

History of Prior Violations

Petitioner conceded that respondent's history of prior violations is a good one and does not warrant any increased assessment (Tr. 82), and I adopt this as my finding on this issue.

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

The parties stipulated that respondent is a medium-sized operator and that the proposed civil penalty assessment will not adversely affects its ability to remain in business, and I adopt this stipulation as my finding in this regard.

Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, a civil penalty of $50 is assessed for Citation No. 368661, June 21, 1978, for a violation of 30 C.F.R. § 56.12-36.

ORDER

Respondent IS ORDERED to pay the civil penalty assessed by me in the amount of $50 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 11 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. CENT 80-180-M A/O No. 39-00700-05001
v.		
DAN NEVILLE, d/b/a NEVILLE CONSTRUCTION,	Respondent	Matson Gravel Pit

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S Department of Labor, Kansas City, Missouri, for Petitioner;
Wilson Kleibacker, Esq., Lammers, Lammers, Kleibacker & Casey, Madison, South Dakota, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, referred to as the Act). The hearing in this matter was held on September 19, 1980, in Brookings, South Dakota.

At the conclusion of the presentation of evidence and oral argument by the part ies on an issue-by-issue basis, a decision was rendered from the bench. The decision is reduced to writing in substance as follows, pursuant to the Commission's Rules of Procedure, 29 C.F.R. § 2700.65:

> My ruling on the issue of the jurisdictional question concerning Respondent's impact on interstate commerce is as follows: Section 3 of the Federal Mine Safety and Health Act of 1977 states at Section 3(d) that 'operator' means any owner, lessee, or any other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." Section 3(h)(1) of the Act provides that 'coal or other mine' means (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

by Section 103(a) of the Act. Upon his arrival at the pit the conditions were obvious and could be seen by a person without requesting leave of the operator to conduct an inspection.

After the inspection had been started, the representative of the operator, Mr. Dan Neville, Jr., did not voice an objection to the inspection or in any way demand that the inspector leave the property. Although the inspector did not have a search warrant, he was not required to have a search warrant under the sections or the provisions of the Act. The inspector initiated the inspection strictly in accordance with the provisions of the Act and the provisions of the regulations promulgated pursuant thereto.

Respondent's counsel has stated that it was familiar with the case law with regard to such inspections. This case law fully establishes the right of the inspector, a representative of the Secretary of Labor, to conduct inspections, such as the inspection conducted by Inspector Elvestron, without a search warrant. I therefore find that the inspection by the inspector was an authorized inspection.

Citation No. 334333 was issued on 9-27-79 by MSHA Inspector Allen Elvestron citing a Violation 56.14-1 of Title 30, Code of Federal Regulations. The condition or practice noted on the citation was as follows: "The drive unit for the Simons crusher was not guarded". The testimony adduced at the hearing has established that the crusher was, in fact, a Cedar Rapids crusher and not a Simons crusher as alleged. This does not affect the issue as to whether or not there was a violation of the mandatory safety standard since more specificity in allegations by MSHA is not required and the Respondent was adequately informed as to the nature of the condition leading to the citation.

30 CFR 56.14-1 provides as follows: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

The evidence establishes that the equipment against which the citation was directed did include drive pulleys which are within the provisions of the mandatory safety standard cited. The record further establishes that these parts could be contacted by persons and that they could cause injury to persons.

The inspector has testified that there was a fence which he termed a snow fence approximately three and a half to four feet high, installed as a guard around the equipment. The hazardous part of the equipment or some of it was approximately five feet high, and the fence was so near the equipment that it could be contacted by a person in a manner to result in injury to the person. The snow fence guard was described as a fence through which laths were woven.

The evidence establishes that the crusher had not been operated for approximately one month prior to 9-27-79, the date of the citation, and that the equipment was in the process of being dismantled with the intention of moving it a short distance away. However, there was nothing to prevent the crusher from being used.

Since there was a possibility that the machinery could be operated and that a person could be injured, the inadequate guarding did constitute a violation of 30 CFR 56.14-1. As to gravity, I find that although a serious injury might occur, it was improbable that an injury would occur. The testimony establishes that the crusher had not been operated for approximately six months before the date the citation was issued, that the machinery was being dismantled for movement to a different location nearby; and that when the machinery was in operation, it was not in a place which was well traveled by miners or other persons.

The evidence establishes that the operator had made an attempt to guard the machinery by installation of a fence around the equipment. The inspector determined that this fence was too close to the equipment and that a person could be injured due to this proximity of the fence to the equipment. The condition was abated by moving the fence away from the equipment a short distance. I am unable to find that this violation was due to negligence on the part of the operator. Even though the condition was obvious, there was some judgment to be exercised as to the best type of guarding to be used under the circumstances that would allow for maintenance and the application of belt dressing.

Petitioner has acknowledged that the guarding was changed and that a new fence was constructed to abate the violation. I therefore find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of a violation.

In consideration of the circumstances of this case and the application of the statutory criteria, I find that an appropriate penalty is $36.00. An assessment of $36.00 is accordingly entered.

The parties proposed settlement of this proceeding with regard to three citations - Nos. 334334, 334335 and 334336. The settlement terms and assertions in support thereof were given by counsel for Petitioner as follows:

> Citation Nos. 334334, 334335, and 334336 are consolidated; in effect eliminating Citations 334335 and 334336. The penalty for the remaining Citation 334334 is raised to the amount set for the three violations, the prior three violations, those amounts totaling $100.00. The citations involved, guarding of the same Cedar Rapids, Iowa, crusher on three separate areas of that crusher, and that the increased hazard and gravity due to the combination would warrant the increased fine.
>
> The Secretary and the Respondent agree that the negligence exhibited was minimal; that the probability of occurrence would be rated improbable; that the Respondent exhibited good faith in his attempts to correct the possible hazards created as listed in the citations now combined; and that the history of the Respondent is good and warrants the settlement. The Secretary believes that the settlement reached is in the interest of the Mine Safety and Health Act of 1977.

The settlement was approved at the hearing as follows:

> The agreed upon settlement is approved. It is found in consideration of the circumstances of this case and of the statutory criteria to be applied under the Act that a penalty of $100.00 is appropriate. A monetary penalty of $100.00 is therefore entered.
>
> Respondent is ordered to pay petitioner within 30 days of the date of this order the sum of $136.00.

At the conclusion of the hearing, counsel for Petitioner acknowledged receipt from Respondent the sum of $136 in full payment of the assessed penalties. In view of the payments of the assessed penalties, the above-captioned proceeding was thereupon dismissed.

ORDER

It is ORDERED that the bench decision and approval of settlement rendered in the above-captioned proceeding is hereby AFFIRMED.

It is further ORDERED that the above captioned proceeding is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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DEC 15 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF LESTER N. SIMMONS, Complainant	:	Complaint of Discrimination
	:	Docket No. YORK 80-86-DM
	:	Balmat No. 4 Mine
v.	:	
ST. JOE ZINC COMPANY, Respondent	:	

FINAL ORDER

Pursuant to the attached decision and order, the parties have agreed that the amount of back pay due complainant is $78.12 plus interest at 8% from December 7, 1979 to the date of payment. Respondent also requests reconsideration of the penalty on the ground that this was an inadvertent, first offense not likely to be repeated. Based on an independent evaluation and de novo review I find settlement of the back pay claim in the amount proposed is fair, equitable and in accord with the purposes and policy of the Act. I further find that in view of the mitigating circumstances shown the amount of the penalty should be reduced to $50.00.

Accordingly, it is ORDERED that on or before Wednesday, December 24, 1980, respondent pay complainant the back pay agreed upon, $78.12 plus interest at 8% to date of payment. It is FURTHER ORDERED that on or before the same date the operator pay a penalty of $50.00 for the violation found.

Joseph B. Kennedy
Administrative Law Judge

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October 28, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discrimination
	:	Docket No. YORK 80-86-DM
On behalf of:	:	Balmat No. 4 Mine
LESTER N. SIMMONS, Complainant	:	
v.	:	
ST. JOE ZINC COMPANY, Respondent	:	

DECISION AND ORDER

This is a discrimination complaint brought pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act, as amended, 30 U.S.C. § 815(c)(2), on behalf of Lester N. Simmons, a miner employed at the St. Joe Zinc Company.

The operator moves for summary decision on the ground there is no genuine issue of fact material to the question of liability, and that it is entitled as a matter of law to an order dismissing the complaint. The Solicitor, on behalf of the Secretary and the complainant, opposes the motion on the ground there are genuine disputes as to facts material to respondent's liability, but that if there are not, complainant is entitled as a matter of law to an order directing payment of the compensation claimed.

Based on an independent evaluation and de novo review of the circumstances, I find the following facts material to liability are undisputed, 1/ and that complainant is entitled as a matter of law to recover.

Undisputed Facts

During the week of December 3, 1979, complainant Lester N. Simmons was employed at the St. Joe Zinc Company's Balmat No. 4 Mine, and was vice-president, chairman of the safety committee and the designated safety and health representative of Local 3701, United Steelworkers of America (Simmons

1/ Counsel for the Secretary asserts there are factual differences which preclude a summary decision in this matter. A careful review of the record discloses, however, that the factual disputes cited are not material to the question of liability, and are relevant, if at all, only to the quantum of relief.

The Solicitor claims that Mr. Simmons cleaned 11 toilets each week as part of his usual duties (Simmons Affidavit at 6, 7), whereas respondent claims Mr. Simmons actually cleaned only 10 toilets each week since the toilet located at 1700 Sylvia Lake has been inaccessible since July 16, 1979 (Kreider Affidavit). The operator did pay Mr. Simmons for 11 toilets each week, but the superintendent claims he was unaware that Mr. Simmons claimed to be cleaning the toilet at 1700 Sylvia Lake since he "did not closely examine [the] list, but gave it a casual glance" (Kreider Affidavit).

Another factual dispute cited by the Solicitor concerns the number of hours for which Mr. Simmons was actually paid during the week of December 3, 1979. Mr. Simmons states he was paid for 37 hours that week because he spent 3 hours on union business on Monday, December 3, 1979 (Simmons Affidavit at 16). Respondent's motion states that Mr. Simmons was paid for 40 hours that week. There is no actual dispute, however, since respondent's own pay records (Exh. 4 to Secretary's Opposition) disclose complainant's statement is correct. Respondent has not challenged its own records.

Neither of these disputes are material to the question of liability, and the only actual dispute, i.e., whether complainant regularly cleaned 10 or 11 toilets, is material, if at all, only to the quantum of relief. It is conceivable that if it is proven Mr. Simmons only cleaned 10 toilets the operator may have an equitable defense of unclean hands as to the compensation claimed for the 11th toilet. If necessary, the parties will, of course, be heard on this issue.

Affidavit at 11). He was classified as an oiler-tool nipper, and was compensated at the rate of $6.25 per hour (Simmons Affidavit at 2, 3). For the past 20 years, the responsibilities of oiler-tool nippers have included the cleaning of toilets (Answer to Interrogatory No. 12) and for at least 4 years the oiler-tool nippers have received 1.25 hours of pay at their base rate for each toilet cleaned per week (Answer to Interrogatory No. 10). At the end of each week, Mr. Simmons would send a list of the toilets he claimed to have cleaned to the mine superintendent (Simmons Affidavit at 6, 7).

A regular inspection of the entire mine pursuant to section 103(a) of the Mine Act was conducted by MSHA during the period of November 26, 1979, through December 10, 1979. On Monday, Tuesday and Wednesday, November 26, 27 and 28, 1979, Mr. Simmons accompanied the inspection party as designated walkaround representative. On Thursday and Friday, November 29 and 30, 1979, he performed his normal work assignments including his sanitation duties. His pay for that week included the usual amount attributable to toilet cleaning (Exh. 3 to Secretary's Opposition).

On Monday, December 3, 1979, Mr. Simmons spent 5 hours at his normal work duties, and 3 hours on union business for which he was not paid (Simmons Affidavit at 13, Exh. 4 to Secretary's Opposition). On Tuesday, December 4, 1979, he spent 8 hours in mine-rescue training for which he was paid (Simmons Affidavit at 14, Exh. 4 to Secretary's Opposition). On Wednesday, December 5, 1979, he spent 8 hours greasing machinery for which he was paid (Simmons Affidavit at 15). On Thursday and Friday, December 6 and 7, 1979, he accompanied two MSHA inspectors as designated walkaround representative (Simmons

Affidavit at 12). Mr. Simmons did not clean any toilets that week, and he was paid for a total of 37 hours rather than the 50-3/4 hours he claims was owed him (Simmons Affidavit at 16, 17; Exh. 3 to Secretary's Opposition).

Discussion

On April 21, 1980, the Secretary of Labor filed this complaint alleging respondent interfered with the exercise of the statutory rights of Mr. Simmons as a representative of the miners in violation of section 105(c)(1) of the Act. The act of discrimination alleged is the operator's refusal to pay complainant his full weekly salary as a result of his spending 2 days as designated walkaround representative on a regular inspection of the mine pursuant to section 103(a) of the Act. Complainant prays that the operator be ordered to pay the amount of compensation withheld, $85.94, with interest at 8 percent; that respondent expunge any and all references to the incident from complainant's work records; and that respondent be assessed an appropriate civil penalty for its interference with complainant's exercise of his statutory rights.

At issue in this litigation is the proper construction of the requirement contained in section 103(f), 30 U.S.C. § 813(f), of the Act that a designated walkaround representative "shall suffer no loss of pay during the period of his participation in the inspection." 2/ Complainant contends that the plain

2/ Section 103(f), 30 U.S.C. § 813(f), of the Act provides:
"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to

language of the statute requires he be paid all his usual weekly compensation without regard to his failure to carry out all his assigned duties. He asserts that cleaning toilets was an integral part of his job, and has been part of the regularly assigned duties of oiler-tool nippers for over 20 years. He argues that the fact his employer took into account the number of toilets cleaned each week in calculating his pay is irrelevant since the statute requires he be paid all the remuneration he would have received but for the time spent in the exercise of his walkaround rights. Complainant relies on Consolidation Coal Company, 2 FMSHRC 1056 (May 5, 1980), in support of his position. In that case, a scraper operator was prevented from performing grade 5 overburden removal work when he was assigned walkaround duties. As a result of missing the premium rate work, he was paid at the grade 3 or regular rate. The operator argued that the wage agreement contemplated that the higher rate need only be awarded when the specified work is actually performed. The judge found, however, that the miner was unfairly penalized for exercising his walkaround rights, and that the failure to compensate him

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fn. 2 (continued)
participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with the subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." (Emphasis added.)

at the rate applicable to the duties he would otherwise have performed was an act of discrimination within the meaning of section 105(c) of the Act.

Respondent claims that toilet cleaning is done on a piecework basis for which miners receive bonus pay for each toilet cleaned, and that therefore it is required to pay Mr. Simmons only his regular hourly rate for the time spent accompanying the inspectors. The operator maintains it would be unfair to require it to pay him for housekeeping duties not actually performed since it had to pay another miner to clean the toilets, and since Mr. Simmons could have rearranged his work schedule to clean toilets on other days. 3/

Whether or not Mr. Simmons could have rearranged performance of his sanitation duties is immaterial since his toilet-cleaning duties were as much a part of his regularly assigned responsibility as his equipment maintenance work. Thus, while complainant was regularly employed to work a 40-hour week at both his equipment maintenance and sanitation duties he was compensated for 53-3/4 hours. The sanitation duties were not extra or piecework performed in addition to his regular 40-hour work week, but were performed as part of that regular 40-hour work week (Answer to Interrogatory No. 4). Obviously,

3/ The operator argues that although it was Mr. Simmons' usual practice to clean the toilets on Thursdays and Fridays, he had done so on other days on three prior occasions and that "there was no absolute routine which prevented Mr. Simmons from cleaning the toilets on days other than Thursday and Friday" (Kreider Affidavit). Mr. Simmons claims, however, that "he cleaned the toilets on Thursday and Friday of each week since these days were most convenient for David Lane, who operated the underground utility vehicle and drove him to the various toilets in the mines and carried the emptied waste products to the surface" (Simmons Affidavit at 9). Complainant also requests that official notice be taken that the three prior occasions on which he cleaned toilets on other days were all in weeks which had holidays falling on Thursday or Friday. For the reasons stated in the text, this dispute is irrelevant to the disposition of the motion.

when complainant was performing his sanitation duties he was not performing his equipment maintenance work. No one has suggested that had Mr. Simmons chosen to clean toilets rather than maintain equipment he should be docked pay for his failure to do maintenance work. If nonperformance of his maintenance duties is excused by the walkaround provision, then nonperformance of his sanitation duties must likewise be excused.

That the requirement of section 103(f) that miners exercising their walkaround rights "shall suffer no loss of pay" means they are to receive their customary and usual compensation is made abundantly clear in the legislative history. In the Senate's consideration of the Mine Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits explained the critical importance of the walkaround right as part of a comprehensive scheme to improve both safety and productivity in the mines:

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.
>
> In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.

> In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property to go around with an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess. (July 1978) at 1054-1055 (hereinafter cited as Leg. Hist.)

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

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

Leg. Hist. at 616-617.

Since the purpose of the compensation provision of the walkaround right is to encourage miner participation in inspections, I must conclude that a

practice which has the effect of discouraging such participation is clearly contrary to the intent of the statute. Consolidation Coal Company, supra. Accordingly, I find that the operator's refusal to pay Mr. Simmons his full compensation as a result of his participation in the regular inspection on Thursday and Friday, December 6 and 7, 1979, is contrary to the requirement of the statute and constitutes an act of discrimination.

Conclusions of Law

1. Section 105(c)(1), the discrimination provision of the Act, which prohibits any form of interference with the exercise of the statutory rights of a miner or representative of miners, is a proper vehicle for review of an operator's refusal to fully compensate a representative of miners pursuant to section 103(f).

2. The requirement of section 103(f) that a miner who exercises his walk-around rights "shall suffer no loss of pay" contemplates that he will receive his regular, usual compensation without regard to whether he completely carried out all his normal duties.

3. Complainant as a matter of law is entitled to recover the back pay wrongfully withheld by the operator.

4. A civil penalty of $100 for the violation of section 103(f) found is consistent with the purposes and policy of the Act.

ORDER

WHEREFORE, IT IS ORDERED THAT:

1. Jurisdiction is reserved over this matter until the question of the amount of back pay due complainant is resolved.

2. On or before Friday, November 14, 1980, the parties will confer and agree upon the amount of the back pay due complainant, Lester N. Simmons, with interest at 8 percent from December 7, 1979, or file herein their separate proposals with respect to the amount due.

3. Ten (10) days after a final order issues with respect to back pay, respondent will pay a civil penalty for the violation found of $100.

4. The operator cease and desist from any conduct calculated to have a chilling effect on the exercise of the walkaround rights guaranteed miners by the Mine Safety Law.

5. Respondent expunge all references to this incident from complainant's employment records.

6. Within 15 days from the date of this order, respondent post a copy of this decision and order on a bulletin board at the mine where notices to miners are normally placed, and shall keep it posted there, unobstructed and protected from the weather, for a consecutive period of 60 days.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 16 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-233-M
v.	)	A/O CONTROL NO. 02-000954-05002
JAQUAYS MINING CORPORATION,	)	MINE: JAQUAY'S MILL
Respondent.	)	

APPEARANCES:

Mildred L. Wheeler, Esq., Office of the Solicitor,
United States Department of Labor, 450 Golden Gate Avenue, Box 36017
San Francisco, California 94102
for the Petitioner,

H. R. Gannan, Esq., 635 N. Craycroft, Suite 101, Tucson, Arizona 85711
for the Respondent.

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with a violation of 30 CFR 57.6-1,[1] a regulation adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801, et. seq. Respondent denies the violation and contests the appropriateness of the penalty.

Respondent also asserts that the explosives in question did not belong to it and, therefore, MSHA had no jurisdiction over them. Additionally, respondent asserts that the Bureau of Alcohol, Tobacco and Firearms rather than MSHA has jurisdiction over explosives. Jacquays also contends that the MSHA assessment form attached to the petition for civil penalty is prejudicial. Based on these contentions, respondent has moved to dismiss the case.

ISSUES

1. Whether MSHA had the authority to issue a citation concerning explosives which belonged to another but were located on respondent's premises.

2. Whether MSHA had jurisdiction over the explosives in question.

1/ 57.6-1 Mandatory. Detonators and explosives other than blasting agents shall be stored in magazines.

3. Whether the attachment of the MSHA assessment form to the Secretary's petition was prejudicial to respondent.

4. Whether respondent violated the Act.

5. The determination of a penalty, if a violation is found

FINDINGS OF FACT

Citation No. 379250 was issued because of the alleged failure of respondent to properly store detonator cords in a magazine. The following facts are uncontroverted.

1. Thirty boxes of detonator cords were stacked by the walkway which leads from the mill office to the mill (Tr. 29).

2. The boxes were marked as explosives (Tr. 32, 47).

3. The boxes of detonators were on the premises of respondent (Tr. 29, 92).

4. Miners use the walkway where the detonator cords were stacked (Tr. 30).

DISCUSSION

Respondent states that the explosives were not owned by Jacquays Mining Corporation, but were the property of B. W. Jacquays Equipment Company (Tr. 92). This fact, if true, does not affect the validity of the citation. The explosives were at respondent's mine and were not stored in a magazine. The danger created by the detonators stacked near a walkway was not lessened by the fact that they may not have belonged to respondent. Respondent certainly had control over the activities which took place at its mine and, therefore, could have stored the detonators in a magazine or had them removed from the mine area.

MSHA has jurisdiction to inspect the mine of respondent. The mill office and any walkway leading from it are part of Jacquays' mine. 30 USC 802 § 3(h)(C). The standard requires that explosives at a mine be stored in a magazine. Respondent failed to comply with the regulation.

Jacquays also asserts that the Bureau of Alcohol, Tobacco, and Firearms (ATF) has jurisdiction over the explosives rather than MSHA. A memorandum of understanding submitted by the Secretary and testimony at trial shows that MSHA has an agreement with ATF which gives MSHA jurisdiction over explosives on mine property (Tr. 111, Exhibit P-3).

Respondent's final contention in support of a motion to dismiss is that the attachment of MSHA's proposed penalty form (Exhibit A) to the proposal for assessment of civil penalty is prejudicial to its case. I disagree. The Secretary is

required to include a proposed penalty for every citation in issue, 29 CFR 2700.27(c). The MSHA form is merely an attachment to the proposal for assessment of penalty which explains the criteria considered by MSHA in making its penalty determination. The Secretary must still prove at trial the six criteria which must be considered by the Commission before it assesses a penalty. The Commission is not bound by the Secretary's proposal, nor is it required to follow the formula for assessing penalties established by the Secretary. 29 CFR 2700.29(b). Secretary of Labor v. Co-op Mining Co., FMSHRC Docket No. DENV 75-207-P (1980), 1 MSHC 2356.

Respondent contests the amount of the penalty as proposed by MSHA. Having reviewed the Secretary's criteria upon which the penalty was proposed and the record, I find that there is no evidence to support MSHA's calculation of respondent's history of violations. Accordingly, the penalty should be reduced. Further, considering all the criteria in 30 USC 820(i) I assess a penalty of $100 for the violation.

CONCLUSIONS OF LAW

For the reasons stated above, I conclude that a violation of 30 CFR 57.6-1 did occur. MSHA has jurisdiction to issue a citation for this violation. Respondent's motion to dismiss is denied.

ORDER

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

Respondent's motion to dismiss is denied. Citation No. 379250 is affirmed and the penalty is reduced to $100.00.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 16 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY ACTION
	)	DOCKET NO. DENV 79-458-M
v.	)	ASSESSMENT CONTROL NO. 02-00951-05002
JAQUAYS MINING CORPORATION, Respondent.	)	EL DORADO MINE

APPEARANCES:

Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, San Francisco, California
for the Petitioner,

H. R. Gannan, Esq., Attorney at Law, Tucson, Arizona
for the Respondent.

Before: Judge John J. Morris

DECISION

The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) has charged the respondent with a violation of 30 CFR 57.13-21[1] a regulation issued under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et. seq. (the Act). In addition to denying the violation and the appropriateness of the penalty the respondent moved to dismiss the case on procedural grounds.

Respondent contends that the period of time between the issuance of the citation and the hearing was unreasonable. Respondent also asserts that the petition for assessment of a civil penalty filed by the Secretary failed to allege that respondent's mine affects interstate commerce. Respondent argues that these procedural flaws compel the dismissal of this case. Respondent also asserts that the attachment of MSHA's assessment form to the petition for a penalty is prejudicial, and therefore, the case should be dismissed.

1/ 57.13-21 Mandatory. Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch diameter or larger, where a connection failure would create a hazard.

ISSUES

1. Whether the lapse of time between the issuance of the citation and the hearing was unreasonably long and, if so, whether such a delay warrants a dismissal of the case.

2. Whether the failure to include a jurisdictional statement in the petition for assessment of a civil penalty removes this case from the jurisdiction of the Commission.

3. Whether the attachment of the MSHA assessment form is prejudicial to respondent.

4. Whether respondent violated the Act.

5. The determination of a penalty, if a violation is found.

DISCUSSION OF RESPONDENT'S MOTION TO DISMISS

Respondent contends that the lapse of fifteen months between the time the citation was issued and the hearing date is an unreasonable delay in violation of the Act. Respondent asserts that it was the duty of the Secretary to provide a hearing at an earlier date.

There are several procedural steps to review in order to determine if the Secretary is guilty of laches. The interim rules of procedure govern the relevant actions of the petitioner since the petition was mailed to respondent prior to the effective date of the present rules of procedure. See 29 CFR 2700.84 of the present rules of procedure.

Pursuant to the Act, the penalty is to be proposed a "reasonable time" after the inspection. 30 U.S.C. 815(a). The Secretary issued its proposed assessment on March 5, 1979, approximately two months after the date of the inspection.

Interim rule 2700.24(a) required the Secretary to file a petition for assessment of a civil penalty "promptly" after receipt of respondent's notice of its intent to contest the proposed penalty. MSHA received respondent's notice on March 9, 1979. The petition was filed on July 31, 1979, four and a half months later.

It was not the intention of Congress that any delay should prevent the execution of the Act by the Secretary. The discussion by the Senate Committee of the requirement that penalties be promptly proposed provides guidance in the enforcement of filing deadlines against the Secretary.

> To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding. Senate Report 95-181, 95th Cong. 1st Sess. 34 (1977).

Courts have held that the necessity for enforcement of safety and health standards outweighs any procedural deficiencies concerning filing requirements, unless the operator is prejudiced by such delays. Todd Shipyards Corp. v. Secretary of Labor and OSHRC 566 F.2d 1327 (9th Cir. 1977). Stephenson Enterprises, Inc., v. Secretary of Labor and OSHRC 578 F.2d 1021 (5th Cir. 1978); Jensen Construction Co., v. OSHRC and Secretary of Labor 597 F.2d 246 (10th Cir. 1979). Respondent failed to present any evidence that it was prejudiced by the delay in the proposal of the penalty or in the filing of the petition.

Respondent also asserts that the Secretary had a duty to have the case actually brought to a hearing prior to March 20, 1980. After the Secretary files his petition, it is the duty of the Review Commission to schedule a hearing. Unless a party moves for an expedited hearing, the case is heard at a time convenient to the administrative law judge and the parties. As with all adjudicatory bodies, the caseload does not always allow for the immediate trial of any particular case.

Respondent did not request an expedited hearing, therefore, the trial was set at the earliest convenient date. For the reasons stated above, respondent's motion to dismiss based on laches is denied.

Respondent also asserts that the failure of the Secretary to include a statement of Jacquays' effect on interstate commerce in the petition for assessment of a penalty removes the case from the jurisdiction of the Commission. At the time the petition was prepared and mailed, the interim rules of procedure were in force. These interim rules did not contain a provision comparable to the present rule 2700.5(a) which requires the jurisdictional statement referred to by respondent. The Secretary was in compliance with the rules of procedure. Accordingly, respondent's motion to dismiss based on the above contention is denied.

Respondent's final argument in support of a motion to dismiss is that the attachment of MSHA's proposed penalty form (Exhibit A) to the petition for civil penalty is prejudicial to its case. I disagree. The Secretary is required to include a proposed penalty for every citation. 29 CFR 2700.24(b) (Interim rules). The MSHA form is merely an exhibit which explains the criteria considered by MSHA in making its penalty determination. The Secretary must still prove at trial the six criteria which must be considered by the Commission before it assesses a penalty. The Commission is not bound by the Secretary's proposal, nor is it required to follow the formula for assessing penalties established by the Secretary. 29 CFR 2700.27(c). (Interim rules) Sec. of Labor v. Co-op Mining Co., FMSHRC Docket No. DENV 75-207-P (1980), 1 MSHC 2356.

FINDINGS OF FACT

The Secretary charges respondent with a violation of 30 CFR 57.13-21. I find the following facts to be supported by the evidence.

1. The connection between the pressure (bull) hose and compressor machine number five did not have a safety chain (Tr. 53-61, 98).

2. Automatic shutoff valves were not in use (Tr. 66).

3. There was no other suitable locking device being used on the connection (Tr. 66, 128).

4. The air compressor was under pressure of approximately 80 - 90 lbs. per square inch (Tr. 54, 110).

5. The inside diameter of the hose was approximately 2 inches (Tr. 67). The hose itself was 4 1/2 - 5 1/2 feet long (Tr. 61).

6. The connection is inspected daily for air leaks. At this time, the miner is in close proximity to the connection while the compressor is on (Tr. 77, 99).

7. A miner who was servicing the machine was observed by the MSHA inspector near the connection (Tr. 56).

8. The vibration of the compressor and the change in temperature on the connection could cause the hose to disconnect from the machine (Tr. 55, 62, 80, 109, 126).

9. There is a danger that if the connection becomes loose the pressure from the air would cause the hose to whip back and forth which could injure anyone in the area (Tr. 55, 109).

10. The mine operator was aware of the standard requiring the use of a safety chain. Two other compressors had safety chains on the same kind of connection (Tr. 98).

A hazard to the miners was created by respondent's failure to provide a safety chain across the connection on the number five air compressor machine. The standard was violated.

Respondent contests the amount of the penalty as proposed by MSHA. Having reviewed the Secretary's criteria upon which the penalty was proposed and the record, I find that there is no evidence to support MSHA's calculation of respondent's history of violations. Accordingly, the penalty should be reduced. Further, considering all the criteria in 30 U.S.C. 820(i) I assess a penalty of $ 46 for the violation.

CONCLUSIONS OF LAW

For the reasons stated above, respondent's motions to dismiss should be overruled and the citation affirmed.

ORDER

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

Respondent's motions to dismiss are overruled. Citation No. 376110 is affirmed and a penalty of $46 is assessed.

John J. Morris
Administrative Law Judge

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DEC 16 1980

CLIMAX MOLYBDENUM COMPANY, A Division of AMAX, INC.,	:	Application for Review
Applicant	:	Docket No. DENV 79-122-M
v.	:	
	:	Citation No. 332535
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	November 17, 1978
Respondent	:	Henderson Mine and Mill

ORDER APPROVING STIPULATIONS FOR RESOLUTION OF NOISE CITATION ON THE BALL MILL AT THE HENDERSON MINE AND GRANTING APPLICANT'S MOTION TO WITHDRAW APPLICATION FOR REVIEW

Climax Molybdenum Company (Climax) filed an application for review in the above-captioned proceeding pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. An answer was filed by the Mine Safety and Health Administration (MSHA). Thereafter, various orders of continuance were issued to permit the parties an opportunity to evaluate the feasibility of potential noise controls.

On November 6, 1980, Climax and MSHA filed a stipulation for resolution of the noise citation on the Ball Mill at the Henderson Mine. The stipulation states as follows:

> This Agreement is made and entered into by Henderson Mine and Mill, Climax Molybdenum Company, a Division of AMAX Inc. (hereinafter "Climax"), and the Department of Labor and Mine Safety and Health Administration (hereinafter collectively referred to as "MSHA") and executed in their behalf by their respective attorneys.
>
> WHEREAS Climax has filed Applications for Review of a certain citation issued by MSHA, being Citation 332535 (Docket No. DENV 79-122-M), and
>
> WHEREAS as the result of the work done since the filing of that Application for Review, Climax and MSHA believe that the above-referenced citation can be resolved without litigation.

NOW THEREFORE Climax and MSHA enter into the following agreement:

1. During the course of the examination of ball mill noise, the Henderson Mine and Mill of Climax has significantly expanded its noise control program for equipment and facilities at the Henderson Mine and Mill. MSHA recognizes that the Henderson Mine and Mill has developed a substantial ongoing hearing conservation and engineering noise control program for the ball mills and the Henderson Mine and Mill agrees to continue its implementation of that program.

2. Climax and MSHA are in agreement that the primary burden for further developing new quieter milling equipment at the Henderson Mill should fall upon the manufacturers of milling equipment. The Henderson Mill has and will continue to evaluate commercially available potential engineering noise controls, as manufacturers make them available or as suggested by MSHA, but will no longer pursue the type of research and development work which it has done over the past two years.

3. The Henderson Mill will, as a part of this settlement, continue to utilize rubber liner materials installed in ball charging and shaker screens at the Henderson Mill.

4. With respect to the citation itself, the parties agree that Citation 332535, involving the ball mill operator, will be abated and Climax will pay a penalty of $25.

5. Climax and MSHA agree that their personnel will continue to communicate regarding developments with respect to noise control. The extent of time required for in-mill evaluation of any potential noise control will vary depending upon the control, the piece of equipment involved, and the commercial availability of the control. In the future, MSHA will make a reasonable attempt to advise Henderson personnel of any new potential engineering noise controls which may be feasible for use at the Henderson Mill and allow a reasonable time for in-mill evaluation and implementation of that control, if it is found feasible, before any citations are issued. It is acknowledged that ultimately Climax and MSHA may disagree as to the feasibility of a particular engineering noise control. In the event that Henderson personnel are in the process of or have already evaluated the particular control referred to them, information regarding the results of that evaluation will be made available to MSHA personnel upon request.

On November 20, 1980, Climax filed a motion to withdraw the application for review. The motion states as follows:

> COMES NOW Climax Molybdenum Company, a Division of AMAX Inc., by and through its undersigned attorneys, and moves that the Court approve the Stipulation for Resolution of Noise Citations on the Ball Mills at the Henderson Mine, direct that the above-captioned citation be abated and assessed as provided in that Stipulation, and dismiss the above-captioned Application for Review.
>
> As grounds therefor Climax states as follows:
>
> 1. As more fully outlined in the Stipulation for Resolution previously filed with the Court, the parties have agreed after extensive technical study that their differences with respect to the above-captioned citations can be resolved without the need for lengthy, complex, and expensive litigation.
>
> 2. This motion has been discussed with Robert Cohen, counsel for MSHA, and he agrees that it should be granted.
>
> WHEREFORE, Climax Molybdenum Company respectfully moves that this Court grant the relief requested herein.

By letter dated November 28, 1980, the parties were advised that the agreement to pay a civil penalty, as set forth in paragraph No. 4 of the November 6, 1980, stipulation, was beyond the scope of an application for review proceeding, and, accordingly, that one of several alternative courses of action would have to be followed before action could be taken on the stipulation and the motion to withdraw the application for review. In response thereto, the parties filed a supplemental stipulation on December 9, 1980. The supplemental stipulation states as follows:

> 1. With respect to the civil penalty matters set forth in Paragraph 4 of the Stipulation previously filed, Climax and the Secretary of Labor agree as follows:
>
> A. MSHA's Office of Assessments has not yet proposed civil penalties for the citation mentioned in Paragraph 4 pursuant to Part 100, Title 30, Code of Federal Regulations because the citation has not yet been abated.
>
> B. Upon the Administrative Law Judge's approval of the Stipulation and Climax's Motion to Withdraw its Application for Review, Climax and the Secretary of Labor will follow the following procedures to dispose of the civil penalty matters:

i. Counsel for the Secretary will recommend to MSHA's Office of Assessments that a civil penalty of $25.00 be proposed for Citation 332535 (Docket No. [DENV] 79-122-M).

ii. Climax will pay said proposed $25.00 assessment within 30 days after the civil penalty is assessed by MSHA.

The proposed disposition of this case, as set forth in the stipulations filed by MSHA and Climax, have been reviewed. It appears that approval of the stipulations will adequately protect the public interest.

It is understood, in accordance with the agreement set forth in the December 9, 1980, supplemental stipulation, that upon approval of the November 6, 1980, stipulation and the granting of the motion to withdraw the application for review, MSHA will recommend that the Office of Assessments propose a $25 civil penalty for Citation No. 332535. It is further understood that Climax will pay such civil penalty within 30 days of the date of assessment. Accordingly, it is considered unnecessary to specifically order the termination or abatement of the citation and the assessment of a civil penalty.

In view of the foregoing, Climax's motion to withdraw its application for review is GRANTED. IT IS THEREFORE ORDERED that the stipulations filed on November 6, 1980, and December 9, 1980, be, and hereby are, APPROVED, and that the above-captioned proceeding be, and hereby is, DISMISSED.

John F. Cook
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 16 1980

CLIMAX MOLYBDENUM COMPANY, A Division of AMAX, Inc., Applicant	:	Applications for Review
	:	Docket No. DENV 78-541-M
v.	:	
	:	Citation No. 333624
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	July 31, 1978
	:	
Respondent	:	Docket No. DENV 78-545-M
	:	Citation No. 331731
CLIMAX MOLYBDENUM WORKERS, LOCAL NO. 2-24410, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,	:	July 26, 1978
	:	
Respondent	:	Docket No. DENV 78-546-M
	:	Citation No. 332973
	:	July 26, 1978
	:	
	:	Docket No. DENV 78-547-M
	:	
	:	Citation No. 332974
	:	July 26, 1978
	:	
	:	Docket No. DENV 78-548-M
	:	
	:	Citation No. 332976
	:	July 27, 1978
	:	
	:	Docket No. DENV 78-549-M
	:	
	:	Citation No. 333626
	:	July 26, 1978
	:	
	:	Docket No. DENV 78-550-M
	:	
	:	Citation No. 333627
	:	July 26, 1978
	:	
	:	Docket No. DENV 78-551-M
	:	
	:	Citation No. 333628
	:	July 27, 1978

:
: Docket No. DENV 78-552-M
:
: Citation No. 333629
: July 28, 1978
:
: Climax Mine

ORDER APPROVING STIPULATIONS FOR RESOLUTION OF NOISE CITATIONS AT THE CLIMAX MINE AND GRANTING APPLICANT'S MOTION TO WITHDRAW APPLICATIONS FOR REVIEW

Climax Molybdenum Company (Climax) filed applications for review in the above-captioned proceedings pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. Answers were filed by the Mine Safety and Health Administration (MSHA) and Local No. 2-24410 of the Oil, Chemical and Atomic Workers International Union (Union).

Thereafter, the parties entered into an agreement to study the feasibility of possible noise controls on the equipment cited in the citations. Various orders of continuance were issued on this basis.

On November 20, 1980, Climax and MSHA filed a stipulation for resolution of the noise citations at the Climax Mine. The stipulation bears the signature of Mr. David A. Jones, Jr., who has represented the Union in these proceedings. The stipulation states as follows:

> This Agreement is made and entered into between Climax Molybdenum Company, a Division of AMAX Inc. (hereinafter "Climax"), and the Department of Labor and Mine Safety and Health Administration (hereinafter collectively referred to as "MSHA") and executed in their behalf by their respective attorneys.
>
> WHEREAS Climax has filed Applications for Review of certain citations issued by MSHA, being Citations 333624 (Docket No. DENV 78-541-M), 331731 (Docket No. DENV 78-545-M), 332973 (Docket No. DENV 78-546-M), 332974 (Docket No. DENV 78-547-M), 332976 (Docket No. DENV 78-548-M), 333626 (Docket No. DENV 78-549-M), 333627 (Docket No. DENV 78-550-M), 333628 (Docket No. DENV 78-551-M), and 333629 (Docket No. DENV 78-552-M), and
>
> WHEREAS the parties entered an agreement for the study of feasibility of possible noise controls on equipment involved in the above-referenced citations on August 16, 1979, and
>
> WHEREAS as a result of that study the parties now believe they can resolve their differences with respect to the above-referenced citations without the need of litigation.

NOW THEREFORE Climax and MSHA enter into the following agreement:

1. During the course of the above-referenced feasibility study, the Climax Mine of Climax has significantly expanded its noise control program with respect to rock drills and LHDs at the Climax Mine. MSHA recognizes that the Climax Mine has developed a substantial ongoing noise control program with respect to rock drills and LHDs and the Climax Mine agrees to continue its implementation of that program.

2. Climax and MSHA have previously agreed that Climax will not undergo major capital expenditures to evaluate the feasibility of cabs or panelling on LHDs, but rather the Climax Mine will review the results of the Henderson LHD work at the conclusion of that work. The Climax and Henderson Mines will continue their cooperation in this area. The Climax Mine will, as a part of this settlement, install mufflers on LHDs to the extent there is physical space available on the machine to do that. Some of the smaller sized LHDs are so compact that they may not be able to accommodate a muffler. Climax personnel will inform MSHA personnel of their findings on this issue as soon as they have made a determination regarding the availability of space for installation of a muffler on a retro-fit basis. The Climax Mine will continue its evaluation of sound-absorption material for use in the falling object protection structure on the LHDs. The parties acknowledge that it will take until January 1, 1981, to determine whether space is available and review potential mufflers for use on these machines and to conclude evaluation of sound-absorption materials. While there is some uncertainty as to a final installation schedule because of uncertainty as to availability of as yet unselected mufflers, and falling object protection structure materials, coverings, and installation techniques, the parties anticipate this installation can be accomplished by July 1, 1981. In any event, once a muffler for a particular LHD has been selected and falling object protection structure material, accompanying material coverings, and installation techniques have been selected, that muffler/material will be immediately ordered and installed as soon as practicable after it is received.

3. As a part of its ongoing noise control program, the Climax Mine will continue to evaluate and implement, if found feasible, possible noise controls as they become commercially available for use on the rock drills and LHDs involved in the citations listed above. Climax and MSHA

are in agreement that the primary burden for the basic research and development of new engineering noise controls for rock drills and LHDs should fall upon the manufacturers of mining equipment. As controls are being developed by manufacturers and evaluated by Climax, Climax will, if necessary, make in-mine adjustments to the equipment and work with the manufacturers for equipment modifications in determining whether the equipment will be feasible for use at the Climax Mine; this cooperation will continue to be an integral part of Climax's noise control program. At this time, it does not appear that there are feasible controls for ring drills because of icing problems. When the icing problem is resolved, additional controls will be evaluated. Climax will evaluate and implement, if found feasible, any additional controls recommended by MSHA for ring drills. The mini-bore drill will be muffled.

4. With respect to jackleg drills, Climax will continue to pursue its evaluation of the Canadian PRM 15 muffler and the so-called "Aurora Muffler." In the interim, the rubber-tire muffler will be installed on all unmuffled jackleg drills, except for the LeRoi drills, and that will be taken as compliance with the standard until such time as a feasible control with significantly greater noise attenuation is available. At the conclusion of these reviews, the Climax Mine will then determine whether one of these two mufflers or the rubber-tire muffler is suited for installation on a retro-fit basis on its jackleg drills. At the present time, because of maintenance problems, mufflers cannot be retro-fitted onto the LeRoi jackleg drill. However, Climax has begun the process of phasing LeRoi drills out of its operation. That phaseout will be completed as soon as feasible replacement drills are located and can be acquired. Because of the prior experience which Climax has had, for example, with the Holman jackleg, it is acknowledged that a wide-scale implementation of the rubber-tire muffler or other rock drill engineering noise controls may give rise to problems of feasibility not discovered during initial testing. Should that occur, issues of feasibility may need to be reevaluated to determine whether or not the control should remain in place.

5. With respect to the citations themselves, the parties agree as follows:

a. Citation 333624, involving a Jarvis-Clark LHD and a Gardner-Denver 83 jackleg drill, will be abated and Climax will pay a penalty of $25.

b. Citation 331731, involving a mini-bore drill, will be abated and Climax will pay a penalty of $25.

c. Citation 332973, involving a ring drill, will be vacated.

d. Citation 332974, involving a ring drill, will be vacated.

e. Citation 332976, involving a ring drill, will be vacated.

f. Citation 333626, involving a Jarvis-Clark LHD, will be vacated.

g. Citation 333627, involving a jumbo drill, will be vacated.

h. Citation 333628, involving a LeRoi jackleg drill and Remington chain saw, will be abated and Climax will pay a penalty of $25.

i. Citation 333629, involving a Wagner ST5E LHD will be abated and Climax will pay a penalty of $25.

The parties have agreed that penalties for the abated citations will be assessed at $25 per citation because of the amounts spent in evaluating possible noise controls and the degree of good faith shown by Climax in pursuing its noise control program as a means to abate the citations.

6. Climax and MSHA agree that their personnel will continue to communicate regarding developments with respect to noise control. The extent of time required for in-mine evaluation of any potential noise control will vary depending upon the control, the piece of equipment involved, and the commercial availability of the control. In the future, MSHA will make a reasonable attempt to advise Climax Mine personnel of any new potential engineering noise controls which may be feasible for use at the Climax Mine and allow a reasonable time for in-mine evaluation and implementation of that control, if it is found feasible, before any citations are issued. It is acknowledged that ultimately Climax and MSHA may disagree as to the feasibililty of a particular engineering noise control. In the event that Climax Mine

personnel are in the process of or have already evaluated the particular control referred to them, information regarding the results of that evaluation will be made available to MSHA technical personnel upon request.

Additionally, on November 20, 1980, Climax filed a motion to withdraw the applications for review. The motion states as follows:

> COMES NOW Climax Molybdenum Company, a Division of AMAX, Inc., by and through its undersigned attorneys, and moves that the Court approve the Stipulation for Resolution of Noise Citations at the Climax Mine, direct that the above-captioned citations be vacated, or abated and assessed, as provided in that Stipulation, and dismiss the above-captioned Applications for Review.
>
> As grounds therefor Climax states as follows:
>
> 1. As more fully outlined in the Stipulation for Resolution previously filed with the Court, the parties have agreed after extensive technical study that their differences with respect to the above-captioned citations can be resolved without the need for lengthy, complex and expensive litigation.
>
> 2. This motion has been discussed with Robert Cohen, counsel for MSHA, and David Jones, President of the O.C.A.W., and they agree that it should be granted.
>
> WHEREFORE, Climax Molybdenum Company respectfully moves that this Court grant the relief requested herein.

By letter dated November 28, 1980, the parties were advised that the agreement to pay civil penalties, as set forth in paragraph No. 5 of the stipulation, was beyond the scope of an application for review proceeding, and, accordingly, that one of several alternative courses of action would have to be followed before action could be taken on the stipulation and the motion to withdraw the application for review. In response thereto, the parties filed a supplemental stipulation on December 9, 1980. The supplemental stipulation states as follows:

> 1. With respect to the civil penalty matters set forth in Paragraph 5 of the Stipulation previously filed, Climax and the Secretary of Labor agree as follows:
>
> A. MSHA's Office of Assessments has not yet proposed civil penalties for the citations mentioned in Paragraph 5 pursuant to Part 100, Title 30, Code of Federal Regulations, because none of the citations have as yet been abated.

B. Upon the Administrative Law Judge's approval of the Stipulation and Climax's Motion to Withdraw its Applications for Review, Climax and the Secretary of Labor will follow the following procedures to dispose of the civil penalty matters:

i. Counsel for the Secretary will recommend to MSHA's Office of Assessments that a civil penalty of $25.00 be proposed for each of the following citations:

333624 (Docket No. DENV 78-541-M)
331731 (Docket No. DENV 78-545-M)
333628 (Docket No. DENV 78-551-M)
333629 (Docket No. DENV 78-552-M)

ii. Climax will pay said proposed $25.00 assessments within 30 days after the civil penalty is assessed by MSHA.

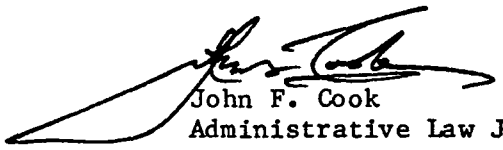
2. The Oil, Chemical and Atomic Workers International Union, Local No. 2-24410, has been informed of this Supplemental Stipulation; however, because the Union is not a party to the civil penalty proceedings, the Union's signature has not been included.

The proposed disposition of these cases, as set forth in the stipulations filed by MSHA and Climax, have been reviewed. It appears that approval of the stipulations will adequately protect the public interest.

It is understood, in accordance with the agreement set forth in the December 9, 1980, supplemental stipulation, that upon approval of the November 20, 1980, stipulation and the granting of the motion to withdraw the applications for review, MSHA will recommend that the Office of Assessments propose $25 civil penalties for each of the following citations: Citation Nos. 333624, 331731, 333628, and 333629. It is further understood that Climax will pay such civil penalties within 30 days of the date of assessment. Accordingly, it is considered unnecessary to specifically order the termination or abatement of the citations and the assessment of civil penalties.

In view of the ultimate disposition of these cases, i.e., dismissal, it is considered inappropriate to enter an order vacating Citation Nos. 332973, 332974, 332976, 333626, and 333627. It is understood that MSHA will fulfill the agreement by vacating these citations.

In view of the foregoing, Climax's motion to withdraw its applications for review is GRANTED. IT IS THEREFORE ORDERED that the stipulations filed on November 20, 1980, and December 9, 1980, be, and hereby are, APPROVED, and that the above-captioned proceedings be, and hereby are, DISMISSED.



John F. Cook
Administrative Law Judge

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 16 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY ACTION
Petitioner,	)	DOCKET NO. WEST 80-1-M
v.	)	A/O CONTROL NO. 02-00954-05003
JAQUAYS MINING CORPORATION,	)	MINE: JAQUAYS MILL
Respondent.	)	

APPEARANCES:

Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, San Francisco, California
for the Petitioner,

H. R. Gannan, Esq., Tucson, Arizona
for the Respondent.

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Jaquays Mining Corporation with several violations of regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. Respondent denies the violations and contests the appropriateness of the penalty. Jacquays also moves for an order of dismissal on the grounds that the Secretary did not propose a penalty within a reasonable length of time, and that the attachment of the MSHA assessment form to the proposal for assessment of civil penalty was unduly prejudicial to respondent.

ISSUES

1. Whether the attachment of the MSHA assessment form to the proposal of a civil penalty is prejudicial to respondent.

2. Whether the lapse of time between the issuance of the citation and MSHA's proposal of a penalty was unreasonably long and, therefore, warrants the dismissal of the case.

3. Whether respondent violated the Act.

4. The determination of a penalty, if a violation is found.

DISCUSSION OF RESPONDENT'S MOTIONS TO DISMISS

The attachment of the MSHA proposed assessment form to the proposal of assessment of civil penalty filed by the Secretary is not prejudicial to respondent. The Secretary is required to include a proposed penalty for every citation in issue. 29 CFR 2700.27(c). The MSHA form is merely an attachment to the proposal of a civil penalty which explains the criteria considered by MSHA in making its penalty determination. The Secretary must still prove at trial the six criteria which must be considered by the Commission before it assesses a penalty. The Commission is not bound by the Secretary's proposal, nor is it required to follow the formula for assessing penalties established by the Secretary. 29 CFR 2700.29(b). Sec. of Labor v. Co-op Mining Co., FMSHRC Docket No. DENV 75-207-P (1980), 1 MSHC 2356.

As to Respondent's second ground for dismissal, the Act requires the Secretary to propose a penalty for an alleged violation within a "reasonable time", 30 USC 815(a). The penalty assessments in this case were transmitted to the respondent approximately 5 months after the mine was inspected.

It was not the intention of Congress that any delay should prevent the execution of the Act by the Secretary.

> To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding. Senate Report 95-181, 95th Cong., 1st Sess. 34 (1977)

Courts have held that the necessity for enforcement of safety and health standards outweighs any procedural deficiencies concerning filing requirements, unless the operator is prejudiced by such delays. Todd Shipyards Corp. v. Sec. of Labor & OSHRC 566 F.2d 1327 (9th Cir.), Stephenson Enterprises, Inc. v. Sec. of Labor & OSHRC 578 F.2d 1021 (5th Cir. 1978); Jensen Construction Co. v. OSHRC & Sec. of Labor 597 F. 2d 246 (10th Cir. 1979). Respondent failed to present any evidence that it was prejudiced by the delay in the proposal of the penalty by the Secretary.

For the reasons stated above, I conclude that respondent's motions to dismiss should be denied.

FINDINGS OF FACT

Citation No. 379251

The Secretary alleges that respondent violated 30 CFR 57.9-22 [1] by failing to provide a berm on an elevated roadway. I find the following facts are supported by the evidence.

1. A roadway 12 feet wide and 50 feet long gradually rose to a height of 12 feet; it did not have a berm on its west side (Tr. 21, 22, 34, 100).

2. The roadway is used by dump trucks to feed the main hopper (Tr. 22).

3. The roadway is on mill property (Tr. 101).

4. The hazard is that a truck could roll off the roadway if its brakes failed or if the truck was not driven properly (Tr. 22, 37, 48, 100).

5. If a truck rolled off the side of the road, the driver could be fatally injured (Tr. 23).

The standard requires that berms be provided on the outer bank of all elevated roadways with no exceptions. Respondent failed to comply with the standard.

Citation 379252

The Secretary contends that Jacquays did not have a proper guard over the pinchpoint of the number 1 roll motor, contrary to 30 CFR 57.14-1.[2] I find the following facts to be supported by the evidence:

1. A pinchpoint located where the v-belt rolls over a pulley of the number 1 roll motor was not adequately guarded (Tr. 24, 25, 107, 120, 123, P-2)

2. The pinchpoint was approximately 2 - 3 feet from a platform and 3 feet above the floor of the mill (Tr. 24, 45).

3. The walkway was not used frequently by miners, but anyone had access to the area where the pinchpoint was located (Tr. 86, 102).

4. At times, miners are in the area to do maintenance work or to observe the operation of the roll motor (Tr. 25, 41, 87, 89).

1/ 57.9-22 Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

2/ 57.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

5. The hazard is that a miner could be seriously or fatally injured if they fell into the pinchpoint.

Respondent argues that the area near the roll motor was not a working area or near a frequently used walkway. This fact, however, does not eliminate the possibility that a miner in the area doing maintenance work or for any other reason, could fall into the pinchpoint and be severely injured.

Accordingly, I affirm the citation.

Citation 379253

Petitioner charged respondent with another violation of 30 CFR 57.14.1. The evidence was conflicting. I find the following facts to be credible:

1. The v-belt pinchpoint on the number one willow motor was not guarded (Tr. 26).

2. The willow motor is located 15 feet above the floor and 10 - 12 feet above a workdeck (Tr. 88).

3. To get to the pinchpoint a miner would have to climb up the frame that holds the motor and onto the motor itself (Tr. 88, 89).

The standard requires that moving machine parts be guarded if they can be contacted by someone. It is difficult to visualize how a miner could come in contact with a pinchpoint that is at the very least ten feet above the floor. Petitioner failed to prove that a miner could be exposed to this unguarded pinchpoint. Accordingly, the citation should be vacated.

ASSESSMENT OF PENALTY

Respondent contests the amount of the penalties as proposed by MSHA. Having reviewed the Secretary's criteria upon which the penalty was proposed and the record, I find that there is no evidence to support MSHA's calculation of respondent's history of violations. Accordingly, the penalties for citation nos. 379251 and 379252 should be reduced. Further, considering all the criteria in 30 U.S.C. 820(i) I assess a penalty of $ 75 for each violation.

ORDER

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

Respondent's motion to dismiss is denied. Citation No. 379253 and the proposed penalty are vacated. Citation Nos. 379251 and 379252 are affirmed and a penalty of $75.00 is assessed for each.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 16 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HOMESTAKE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 80-92-M MSHA CASE NO. 39-00055-05021 H MINE: Homestake Mine

DECISION

Appearances:

James Barkley, Esq., Office of the Solicitor,
U. S. Department of Labor
1585 Federal Building, 1961 Stout Street
Denver, Colorado 80294,
for the Petitioner

Robert A. Amundson, Esq.,
215 West Main
Lead, South Dakota 57754,
for the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Petitioner seeks an order assessing a civil monetary penalty against the respondent for its alleged violation on July 12, 1979, of 30 C.F.R. 57.3-20[1]. The cited regulation was issued under authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978). In connection with the citation, the MSHA inspector issued a withdrawal order and alleged on the citation, inter alia, that in the 4400 foot main ledge header area there were fresh signs that the back and ribs were taking pressure, including fresh cracks. The citation and order attached to the petition show that they were terminated July 17, 1979.

The respondent denies in its answer that the condition alleged violated the standards cited and if there was any ground support problem, the normal mining sequence would have corrected it.

1/ Mandatory. Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used.

FINDINGS OF FACT

1. The area of the mine which was inspected by an MSHA inspector and which gave rise to the issuance of the citation in question is referred to as the 4400 foot main ledge and 3 winze corner (Tr. 5, Exh. P-1).

2. The 3 winze is a shaft that runs from the 4100 foot level to the 5000 foot level and is used as a secondary escape way (Tr. 5).

3. Tracks for the main haulage way on the main ledge at the 4400 foot level lead to a "Y": the fork to the left leading to the chute and manway to which ore is hauled; the fork to the right leading to the waste dump area where rock which is too low in grade to be processed is taken; and continuing directly through the middle of the "Y", the track leads to the 3 winze. (Tr. 6, Exh. P-1).

4. There had been no mining done in the area described for approximately 15 years (Tr. 181).

5. The ground support used in the described area subject to the citation included timber, rail sets, shot crete, rock bolt and a cement pillar (Exh. P-1 through P-9).

ISSUE

The issue is whether or not the support was consistent with the nature of the ground and the mining method used.

DISCUSSION AND CONCLUSIONS

The MSHA inspector testified that the second sentence of 30 C.F.R. 57.3-20 was violated by the respondent. That sentence states as follows: "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."

In the opinion of the inspector, the area in question was not being adequately supported for the amount of stress it was taking. He based this conclusion on his observations, including the following: a vertical support post which was split vertically at the top and an adjoining horizontal cross member which was loose on one end (Tr. 11); rail sets which were sinking into a supporting wooden slab (Tr. 17); a rock weighing between one and two tons which was protruding from the roof of a six-foot drift and was supported by rock bolts attached to a plate at the bottom of the rock (Tr. 19, 224); some cracks in the roof which "appeared" to be fresh (Tr. 27); and some shot crete which had peeled off the ribs.[2] (Tr. 30).

The observations of the inspector were supported by the testimony of three employees of the respondent.

2/ Shot crete is a mixture of a type of concrete and water which is forced through air pressure onto rocks or timber (Tr. 30).

In regard to the shot crete, the inspector stated that he "surmised" that it was pressure on the rocks that caused the shot crete to peel, but he also stated that it might not have been properly applied. The inspector further testified on cross-examination that blasting in the area could cause the shot crete to peel.

A witness for the petitioner stated on cross-examination that the protruding rock had ground support and had to be blasted down. He further testified that since the rock was located low in the drift, the plate on the bottom could be "pulled off by hitting". Thus, the problem with the protruding rock was the hazard presented by its location and not that the method used for its support was inconsistent with the nature of the ground in the area.

The respondent's evidence shows that the post which was split and the loose horizontal timber observed by the inspector was a "tie". The witness defined a tie as timber used to spread other timber apart and not used to support any weight. Thus, the respondent contends that it was not used for purposes of ground support.

An employee of the respondent who had worked in the area in question for several years testified that after the citation was issued, the rail sets were removed, new posts were set, and the rails were then put in horizontal to the cap in the timber line. By raising the rail sets an additional three to four inches clearance was gained, but no additional ground support was provided by the procedure.

The evidence is also in dispute as to whether or not there were any fresh cracks in the area. The petitioner's witnesses testified that there were fresh cracks and old cracks in the area. The respondent's witnesses testified that they saw no fresh cracks and this included a witness who accompanied the inspector at the time of the inspection. These witnesses testified that there were some cracks in the area, but they were of long duration and unchanged. I find the evidence inconclusive on this point.

Out of approximately 100 stopes at the respondent's mine, only three or four were "timber stopes", including the area covered by the citation at issue. A witness for the respondent testified that more care had to be taken with a timbered stope because of the problem of "taking weight". However, the evidence did not show that the support used by the respondent was inconsistent with the nature of the ground.

I conclude that the evidence presented by the petitioner falls short of proving the violation of the cited regulation by a preponderance of the evidence.

The petitioner's evidence does not show that support consistent with the nature of the ground and mining method was not being used by the respondent. On the contrary, the evidence showed that in the normal sequence of operations in the area in question, the respondent replaces timbers that deteriorate, installs additional timbers and rock bolts, and utilizes shot crete. In fact, several days before the inspection, a work order had been submitted to perform ground support work in the area, including rock bolting (Tr. 300, 301, 302).

In the normal sequence of its mining operations the respondent has taken steps to provide adequate support consistent with the nature of the ground in compliance with the cited regulation. Petitioner's evidence to the contrary does not outweigh that of respondent. Thus, the petitioner has failed to sustain the burden of proof to a preponderance of the evidence that the regulation was violated.

ORDER

Citation No. 329646 and the proposed penalty therefor are VACATED.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceeding	
v.	: Docket Nos.	Assessment Control Nos.
LITTLE BILL COAL COMPANY, INC., Respondent	: PIKE 78-308-P	15-03738-02002
	: No. 3 Mine	
	: PIKE 78-451-P	15-07311-02009V
	: PIKE 78-458-P	15-07311-02010
	: PIKE 79-25-P	15-07311-03001
	: PIKE 79-50-P	15-07311-03002
	: PIKE 79-77-P	15-07311-03003
	: PIKE 79-99-P	15-07311-03004
	: KENT 79-1	15-07311-03006
	: KENT 79-125	15-07311-03005
	: No. 2 Mine	
	: KENT 79-151	15-11645-03001
	: KENT 80-28	15-11645-03004
	: KENT 80-31	15-11645-03005
	: KENT 80-32	15-11645-03006
	: No. 4 Mine	
	: KENT 80-33	15-10394-03008
	: KENT 80-68	15-10394-03010
	: No. 6 Mine	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Herman W. Lester, Esq., Combs & Lester, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing dated June 7, 1979, as amended June 25, 1979, July 6, 1979, and September 5, 1979, a hearing in the above-entitled

consolidated proceeding 1/ was held on October 16, 17, and 18, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977. The hearing had not been completed at the end of the day on October 18, 1979.

The hearing was scheduled to be reconvened on March 18, 1980, but, at the request of MSHA's counsel, was thereafter continued to be reconvened on July 29, 1980. At the request of respondent's counsel, the hearing was again continued to August 5, 1980. Thereafter, counsel for MSHA advised me that the parties had settled all issues which had not been the subject of the hearing held in 1979. Consequently, this decision will dispose of all contested issues which were the subject of the hearing held in 1979 and will grant the motion for approval of settlement which was filed by MSHA's counsel on October 15, 1980, with respect to all issues other than those which were the subject of the 1979 hearing.

Several inspectors appeared as witnesses at the hearing held in 1979. In order that the inspectors' time could be used to maximum advantage, MSHA's counsel introduced evidence with respect to all notices of violation or citations which had been written by a given inspector irrespective of whether the notices of violation or citations written by a given inspector were the subject of more than one Petition for Assessment of Civil Penalty in more than one docket number. Therefore, the Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-308-P, PIKE 79-77-P, and PIKE 79-99-P will be considered in this decision under both contested and settled issues. The Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-451-P, PIKE 78-458-P, and KENT 79-1 will be disposed of entirely in the portion of this decision which is devoted to the contested issues considered at the hearing held in 1979.

The dates of filing and the number of violations alleged in each Petition for Assessment of Civil Penalty are listed in the following tabulation:

Docket Nos.	Dates of Filing	Number of Alleged Violations
PIKE 78-308-P	April 24, 1978	12
PIKE 78-451-P	August 28, 1978	1
PIKE 78-458-P	August 29, 1978	17
PIKE 79-25-P	November 15, 1978	20
PIKE 79-50-P	December 6, 1978	2
PIKE 79-77-P	January 17, 1979	7
PIKE 79-99-P	February 2, 1979	4
KENT 79-1	June 15, 1979	1

1/ The original hearing in October of 1979 involved nine cases. Six additional cases were added after the initial hearing was held. The six cases which were consolidated subsequent to October 1979 were in Docket Nos. KENT 79-151, KENT 80-28, KENT 80-31, KENT 80-32, KENT 80-33, and KENT 80-68.

KENT 79-125	May 30, 1979	8
KENT 79-151	July 9, 1979	1
KENT 80-28	April 7, 1980	2
KENT 80-31	April 7, 1980	17
KENT 80-32	April 7, 1980	4
KENT 80-33	April 7, 1980	6
KENT 80-68	April 1, 1980	7
Total Alleged Violations in This Proceeding		109

CONTESTED ISSUES

Evidence at the hearing was completed with respect to 27 alleged violations and, because of the unavailability of a witness, counsel for MSHA asked that the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P be dismissed to the extent that it seeks assessment of a penalty for the violation of section 75.400 alleged in Notice of Violation No. 3 VEH (7-50) dated August 1, 1977 (Tr. 119).

The issues raised in civil penalty proceedings are whether any violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. It is usually possible to make a general consideration as to some of the criteria. In this proceeding, one set of findings may be made as to the criteria of the size of respondent's business, the question of whether the payment of penalties would cause respondent to discontinue in business, the matter of whether respondent demonstrated a good faith effort to achieve rapid compliance after notices of violation, citations, and orders were written, and respondent's history of previous violations.

The size of respondent's business and the question of whether payment of penalties would have an adverse effect on respondent's ability to continue in business will first be considered. Little Bill Coal Company, Inc., is owned by two men named John McGuire and Bill Leslie. The company's name, Little Bill Coal Company, was conceived by reference to Mr. Bill Leslie who happens to be small in stature.

The company has operated several mines at various times. The No. 2 Mine was operated until about October 1978 when it was closed because all of the coal reserves had been exhausted (Tr. 65). When the No. 2 Mine was producing at its peak, the mine employed about 14 persons on two shifts. The equipment used in the mine consisted of a continuous-mining machine, two shuttle cars, two roof-bolting machines, and conveyor belts (Tr. 37).

The No. 3 Mine was operated for only a short period of time. The owners say that a total of 115 MSHA inspectors examined the No. 3 Mine over a period of 41 days with the result that the mine had to be closed (Tr. 66). The owners alleged that they had an altercation with a first cousin of a supervisory inspector employed by MSHA and that their No. 3 Mine was excessively inspected for the sole purpose of causing the company to stop mining coal (Tr. 774-775).

The No. 4 Mine has been a disappointment because it encountered a coal seam which is only about 20 inches high. As a result, that mine was subleased to some other miners who have been producing about 50 or 60 tons per day. Respondent agreed to pay them $15 per ton for the coal they produced and respondent also agreed to pay the electric power bill, provide insurance, and furnish an end loader for the loading of their coal (Tr. 772).

In 1976, Little Bill Coal Company was a relatively successful operation which sold about 90,000 tons of coal for which it received a gross income of $2,169,887. Respondent's income tax return, however, shows that the company's costs were $2,209,017 which produced a loss of $39,130. Nevertheless, in 1976, the owners were able to pay themselves a total of $172,000 in salaries, or $86,000 each (Tr. 706-707; Exh. F). In 1977, the company had a gross income of $1,035,377 and its expenses were $1,040,149 with a resulting loss of $3,371. In 1977, the owners were able to pay themselves total salaries of $128,000 or $64,000 each (Tr. 719; Exh. G).

The company's business continued to decline after 1977 so that by the 11 months ending August 31, 1979, the company had lost a total of $266,706 or $6.23 for each ton of coal produced. During the single month of August 1979, the company lost $6,369 despite the fact that the owners paid themselves no salary at all that month. It is true that during the preceding 10 months, the owners had paid themselves total salaries of $80,000, or $40,000 each, but during that same period of time, Mr. Leslie had had to advance the company $105,000 from his personal funds and Mr. McGuire loaned the company $108,000 from his personal funds. Mr. McGuire had to mortgage his personal residence for $80,000 in order to loan the company $108,000 (Tr. 753; Exh. I).

Based on the facts set forth above, I find that respondent operates a very small business at the present time and that payment of penalties will have an adverse effect on its ability to continue in business.

The evidence introduced at the hearing with respect to each alleged violation indicates that respondent abated the violations within the time given in the inspectors' notices of violation or citations. There is no testimony by any inspector indicating that respondent failed to make a good faith effort to achieve compliance. Therefore, I find that respondent did make a normal good faith effort to achieve compliance and, in the assessment of penalties, credit for that mitigating factor will be given.

During the hearing held in 1979, MSHA introduced 72 exhibits, but none of those exhibits provided any information with respect to the criterion of history of previous violations. The attorney who represented MSHA at the hearing held in 1979 resigned between the time that the 1979 hearing was held and the time that the 1980 hearing was scheduled to commence. The attorney who was assigned to represent MSHA at the 1980 hearing submitted, prior to the convening of the supplemental hearing, proposed Exhibit Nos. 72A through 196. Two of those proposed exhibits, Nos. 72A and 143, are computer printouts showing prior violations for which respondent has paid penalties.

I have examined proposed Exhibit Nos. 72A and 143 and those exhibits show that respondent has violated the same sections of the regulations involved in this proceeding on from none to nine previous occasions. Two types of violations which I consider to be especially serious are section 75.400 which pertains to the accumulation of combustible materials and section 75.200 which concerns violations of a respondent's roof-control plan. Respondent's largest number (nine) of previous violations is of section 75.400, but the trend in those violations has been downward from six in 1976 to one in 1977 by October 3, 1977. Respondent has violated section 75.200 on two previous occasions, but the trend in those violations is also downward from two in 1975 to none in 1977 by July 15, 1977.

It is my practice to consider an operator's history of previous violations on an individual basis when assessing each penalty, but in this proceeding, since the criterion of the effect that payment of penalties will have on respondent's ability to continue in business is the overriding consideration in the assessment of each penalty, I am finding, in the circumstances which exist in this proceeding, that no useful purpose would be achieved by giving individual consideration to the criterion of history of previous violations because that history is not substantial in the first instance and would, in final analysis, have little effect on the ultimate penalty to be assessed because I would, in the circumstances of this case, merely reduce the amount of a given penalty assessed under the other five criteria so as to allow for the assessment of a minor amount under the criterion of history of previous violations.

There is one other important reason for not giving individual consideration to the criterion of history of previous violations. That reason relates to the fact, as stated above, that no evidence as to the criterion of history of previous violations was presented by MSHA's counsel during the hearing held in 1979. If the supplemental hearing had gone forward in 1980 as scheduled, the proposed exhibits which I have referred to in discussing respondent's history of previous violations would have been offered in evidence at a hearing where respondent's counsel could, if he had been so inclined, have objected to the receipt in evidence of such evidence and could, if he had been so inclined, have introduced evidence with respect to the criterion of history of previous violations. Inasmuch as that criterion was not the subject of any evidence at the hearing held in 1979, it would be unfair to respondent for me to consider <u>proposed</u> exhibits, submitted <u>after</u> the 1979 hearing, for the purpose of assessing penalties with respect to contested issues which are being decided on the basis of evidence presented by the parties at a hearing during which neither party introduced any evidence whatsoever with respect to the criterion of history of previous violations.

In the portion of this decision which follows, I shall give individual consideration to the evidence presented by both MSHA and respondent for the purpose of determining whether each alleged violation occurred. If I hereinafter find that violations have occurred, I shall give individual consideration to the remaining two criteria of gravity and negligence and shall assess penalties on the basis of those two criteria and the findings made above as to the other four criteria.

any leaks in the hydraulic hoses, did not know what the operator's cleanup plan was, and did not know how long the accumulations had existed (Tr. 121-138). The operator had a regular cleanup program under which the equipment was washed down with a high pressure hose twice a week and the operator agreed that some accumulations could occur within a 2-day period between cleanups which were performed on the maintenance shift between midnight and 8 a.m. (Tr. 421-430).

Conclusions. At the time the testimony and exhibits in this proceeding were received in evidence, the elements of evidence required to prove a violation of section 75.400 were those which the former Board of Mine Operations Appeals had set forth in Old Ben Coal Co., 8 IBMA 98 (1977). In the interim between the receipt of evidence in this proceeding and the rendering of this decision, the Commission issued its decision in Old Ben Coal Co., 1 FMSHRC 1954 (1979), reversing the former Board's Old Ben decision and holding that combustible accumulations must be prevented from occurring and declaring that a violation of section 75.400 does not depend upon the question of whether the operator cleans up a given accumulation within a reasonable period of time. I am not in doubt about the fact that I must follow Commission precedents which become effective between the receipt of evidence and the time I render a decision based on that evidence because I was reversed for failing to do so in C.C.C.-Pompey Coal Co., 2 FMSHRC 1195 (1980).

Since the operator was unable to present a witness who had personally examined the shuttle car on the day the violation was cited, I find that the accumulation described by the inspector existed and was moderately serious. There was a low degree of negligence since the accumulation had occurred in a short time between the operator's biweekly cleanings. In view of the operator's small size and difficult financial condition, a penalty of $15 will be assessed for this violation of section 75.400.

Notice No. 2 EDF (7-64) 10/12/77 § 75.400 (Exhibit 4)

Findings. The only difference between the violation of section 75.400 alleged in Exhibit 4 and the violation of that section alleged in Exhibit 1 is that the combustible materials had accumulated on the standard-drive Joy 21 shuttle car instead of the off-drive shuttle car. Since the witnesses agreed that the same circumstances prevailed for the two violations of section 75.400, I find that the violation was moderately serious, that there was a low degree of negligence, and a penalty of $15 will also be assessed for this violation of section 75.400 (Tr. 140-145; 431-434).

Notice No. 3 EDF (7-65) 10/12/77 § 75.503 (Exhibit 7)

Findings. Section 75.503 requires each operator to maintain equipment used inby the last open crosscut in a permissible condition. Respondent violated section 75.503 because two bolts were missing from the foot-control switch of the standard-drive Joy 21 shuttle car. The violation was moderately serious because no methane had ever been detected in respondent's No. 2 Mine either with a hand-held methane detector or by analysis of a

bottle sample of air obtained in the mine atmosphere. Respondent was negligent for failing to replace the bolts, but there is no way to know whether the violation occurred between the weekly inspections of electrical equipment (Tr. 149-157).

Conclusions. Respondent's witness testified that the cover fits so tightly over the foot-control switch that he thinks it would be permissible even with all four bolts missing (Tr. 435), but he stated that he did not personally inspect the shuttle car after the notice of violation was written (Tr. 439). Since respondent could present no evidence showing that the cover was still in a permissible condition on the day the notice was written, I conclude that the preponderance of the evidence supports a finding that the violation occurred. Since the circumstances as to gravity and negligence for this violation are the same as they were for the previous violations of section 75.400, a penalty of $15 will also be assessed for this violation of section 75.503.

Notice No. 5 EDF (7-67) 10/12/77 § 75.400 (Exhibit 11)

Findings. The inspector alleged that coal dust and oil had accumulated on the roof-bolting machine to the same degree that he had observed such accumulations on the two shuttle cars described above. The operator violated section 75.400 by failing to keep the combustible materials off the roof-bolting machine. The violation was moderately serious and there was a low degree of negligence (Tr. 158-172).

Conclusions. The primary difference between the inspector's testimony with respect to the accumulations on the roof-bolting machine, as opposed to those on the two shuttle cars previously considered, is that the inspector stated that in his opinion, the accumulations had occurred over a period of at least 1 week (Tr. 168-172). Respondent's witness testified that the roof-bolting machine was cleaned twice a week, but since the inspector did not inquire into the operator's cleanup program, there is no evidence to cast any doubt on respondent's claims (Tr. 443-445). On the other hand, respondent's witness did not personally inspect the roof-bolting machine on the day the notice was written and could not say for certain that the roof-bolting machine was free of accumulations of combustible materials (Tr. 446). Inasmuch as the evidence fails to show that this violation of section 75.400 was serious or that respondent had failed to comply with its cleanup program, I shall assess a penalty of $15 for this violation of section 75.400.

Notice No. 6 EDF (7-68) 10/12/77 § 75.807 (Exhibit 14)

Findings. Section 75.807 requires, among other things, that all underground high-voltage cables be guarded where miners are required to work. Respondent violated section 75.807 because a 4,160-volt cable transmitting power to a transformer was looped beside the transformer and lying on the mine floor where a miner would have to step over it to plug or unplug circuit breakers used for energizing equipment. The violation was serious because such cables are subject to blowing up for no apparent reason. Respondent

was negligent for failing to place the cable in a protected place where miners, including the mine foreman and electrician, would not have to step over the cable to get to the transformer (Tr. 173-189).

Conclusions. Respondent's witness inspected the cable at the time Notice No. 6 EDF was written and agreed that the cable had been looped beside the transformer as shown on Exhibit 15A (Tr. 446). Although respondent's witness said that a person could get around the cable without stepping over it, he said that the transformer is 8 feet wide and 34 feet long and fills up most of a 20-foot entry when the cable is attached (Tr. 456). Respondent's witness also stated that he was not afraid to step over the cable or handle it with gloves (Tr. 451). The fact that respondent's witness is not afraid of the cable does not prevent it from being a source of danger. Respondent's witness also emphasized the fact that the type of cable cited in Notice No. 6 EDF has two ground wires, a monitoring wire, and an individual ground for each of the three phases as well as shielding tape (Tr. 452).

I do not think that any of the facts stated by respondent's witness justify respondent's failure to guard the high-voltage cable or place it in a less hazardous position than it was placed when the notice was written. Since this was a serious violation and was associated with a fairly high degree of negligence, I believe that a penalty of $25 should be assessed for it despite respondent's difficult financial position.

Notice No. 8 EDF (7-70) 10/12/77 § 75.507 (Exhibit 21)

Findings. Section 75.507 requires the operator to place all nonpermissible power connection points in intake air if they are located outby the last open crosscut. Respondent violated section 75.507 because its 4,160-volt, nonpermissible transformer was situated in return air. The violation was moderately serious because the hazard involved is that a combustible amount of methane might accumulate in the return air passing over the transformer and cause an explosion. Inasmuch as no methane has ever been detected in respondent's mine, the likelihood of an explosion was less than it would have been in a mine which is known to liberate methane. The violation was associated with a high degree of negligence (Tr. 205-210).

Conclusions. Respondent's defense was presented by Mr. Leslie who stated that he entered the mine on the evening shift after Notice No. 8 EDF had been issued on the day shift. Mr. Leslie testified that the transformer was situated in a crosscut and that a curtain had been installed between the transformer and the return entry (Tr. 461). The inspector testified on rebuttal that he would not have cited a violation if the curtain had existed at the time he examined the transformer (Tr. 464). Mr. Leslie thereafter testified that it was possible that the curtain was installed between the time that he entered the mine and the time the violation was cited by the inspector (Tr. 467). The difference in time between Mr. Leslie's and the inspector's examination is also an explanation for the fact that Mr. Leslie claims the transformer was not moved between the time the violation was cited and the time it was abated, whereas the inspector contended that the violation was abated by the movement of the transformer into intake air.

The factors I have just given show that there was no inconsistency in the two witnesses' testimony if consideration is given to the difference in time of the two inspections. There was a greater degree of negligence in this instance than in most of the previous violations. Therefore, a penalty of $20 will be assessed for this violation of section 75.507. It should be borne in mind that the low penalties I am assessing are based to a very large extent on the criterion that payment of penalties would cause respondent to discontinue in business.

Notice No. 1 EDF (7-71) 10/13/77 § 75.1725 (Exhibit 24)

Findings. Section 75.1725 requires, among other things, that an operator maintain mobile and stationary equipment in a safe operating condition and that any unsafe equipment must immediately be removed from service. Respondent violated section 75.1725 because the covers on the transformer were bent sufficiently to expose internal wires and all bolts designed to hold the covers in place were missing. The violation was only moderately serious because the insulation on all wires was in good condition and the covers were recessed into the transformer's side to such an extent that a person would be unlikely to come into contact with the exposed insulated wires. There was a high degree of negligence in respondent's failure to keep the covers properly bolted (Tr. 213-221).

Conclusions. A great deal of testimony was presented by respondent through its witness, Mr. Leslie, but when the testimony is analyzed, it all boils down again to the fact that Mr. Leslie examined the transformer on the night shift, whereas the inspector examined it and wrote the notice of violation on the day shift. The inspector stated that all bolts were missing from the two bent covers or panels when he examined them, whereas Mr. Leslie testified that only two of the six bolts in the panels were missing when he examined the panels (Tr. 505). Mr. Leslie agreed that it would have been possible for an electrician to have installed four bolts on each panel so as to pull them back into place between the time that the inspector cited the violation and the time Mr. Leslie examined the transformer (Tr. 476; 504). It must be borne in mind that the panels were only slightly bent and installation of the bolts would have drawn them down so as to reveal no indication that they had been bent as they appeared at the time the notice of violation was written.

In view of Mr. Leslie's statement that the transformer cost $50,000, it is easy to understand why an employee would want to conceal from Mr. Leslie the fact that he had abused two of the panels sufficiently to bend them. When all the evidence is carefully examined, it appears that the violation here cited was very minor in nature and may have consisted solely of a failure of the electricians to replace the bolts when they were working on the transformer. That kind of carelessness should be discouraged because it can lead to other and more serious violations than the one here involved. In such circumstances, and in view of respondent's difficult financial condition, a penalty of $5 will be assessed for this violation of section 75.1725.

the criterion of negligence. There was a relatively high degree of negligence, so a penalty of $15 will be assessed for this violation after giving considerable weight to respondent's difficult financial condition.

Notice No. 4 EDF (7-80) 10/20/77 § 75.516-2 (Exhibit 48)

Findings. Section 75.516-2 requires that communication wires be supported on insulated hangers or insulated J-hooks. Respondent violated section 75.516-2 because the communication wires were entangled with the fire-sensor cable and belt-control cable. The violation was potentially serious because if the insulation on the 110-volt control cable had been defective and had happened to touch the communication wire at a place where the insulation was also defective, a person handling the phone might be shocked because of energy from the control wire being transferred to the communication wire. Respondent was negligent for failing to have all the wires separated and installed on their own insulated hangers (Tr. 375-387).

Conclusions. Mr. Leslie testified that respondent's communication wires carried only 12 volts from two batteries and that the sensor cable also carried only 12 volts from two batteries, but he agreed that a potential shock existed if the communication wire had come into contact with the control wire which carried 110 volts. There was only a remote possibility of shock in this instance because all wires were well insulated (Tr. 377; 568-569; 572). Here again, the penalty to be assessed should be done primarily under the criterion of negligence because there was little gravity involved, but there is always a potential for injury and it existed here because of the negligence of respondent to see that the wires were properly placed on insulators. Therefore, a penalty of $15 will be assessed, keeping in mind respondent's poor financial condition.

Notice No. 7 EDF (7-69) 10/12/77 § 75.200 (Exhibit 17)

Findings. Respondent's roof-control plan requires that roof bolts be installed on 4-foot centers (Exh. 1B, p. 9). Respondent violated section 75.200 because roof bolts in the No. 1 and No. 2 pillar splits had been installed from 4-1/2 to 6 feet apart for a distance of about 20 feet. In this instance, the violation did not expose the miners to any serious danger as the roof appeared to be in good condition, but there existed the potential of a rock falling between roof bolts which were up to 2 feet wider than the plan permitted. There was a high degree of negligence because the inspector said that respondent frequently installed roof bolts farther apart than the 4-foot spacing required by the roof-control plan (Tr. 190-203).

Conclusions. Respondent's witness, Mr. McGuire, testified that he was present in the mine on the day Notice No. 7 EDF was written because he had gone into the mine for the purpose of replacing the pump motor on the continuous-mining machine. Mr. McGuire says that he measured the distance between the bolts with a 42-inch stick which they kept on the roof-bolting machine and that he found about 10 or 12 bolts to be about 44 inches apart (Tr. 578)

Both the inspector and Mr. McGuire agreed that the continuous-mining machine was broken down and was being repaired. The inspector found it necessary to extend the time for compliance because it was not possible for the roof-bolting machine to pass by the inoperative continuous-mining machine for the purpose of installing additional bolts (Exh. 19). The inspector eventually terminated the notice of violation when he was told that they had withdrawn from the pillar split cited in his notice. The inspector stated that he did not go back to check the area cited in his notice because he agreed that no bolts needed to be installed in an area where no further mining would be done (Tr. 196-198). Mr. McGuire testified that they completed mining of coal in the area after the continuous-mining machine was repaired and that they did not install any additional roof bolts because they did not need to do so (Tr. 577).

Once again, I find that the inspector's testimony is more credible than Mr. McGuire's because Mr. Puckett, the mine foreman, was with the inspector when the inspector made his measurements and all discussions about the abatement of the violation were with Mr. Puckett rather than with Mr. McGuire. Additionally, Mr. McGuire stressed in his testimony the difficulty he was having replacing the pump motor. The inspector stated that Mr. McGuire continued to work on the continuous-mining machine all the time the inspector was examining the section (Tr. 195). As interested as Mr. McGuire was to restore the continuous-mining machine to operation, it is unlikely that he would have taken out time from that important matter to check the distance between roof bolts and if he had, his statements in this proceeding have shown that he would have hotly contested an inspector's claim that roof bolts had been installed excessively wide apart if, in fact, they had not been so installed.

As the inspector testified, rocks may fall from the area between roof bolts when they are installed on an excessively wide spacing, but in this instance, the violation appears to be moderately serious since the inspector did not observe any obviously bad roof. There was a high degree of negligence because respondent has previously been cited for installing roof bolts on a wider spacing than its roof-control plan permits (Tr. 197; Exh. 18). In such circumstances, a penalty of $50 is warranted, keeping in mind respondent's difficult financial condition.

Docket No. PIKE 78-308-P

Notice No. 3 EDF (7-40) 7/15/77 § 75.326 (Exhibit 51)

Findings. Section 75.326 requires that return air courses be separated from belt haulage entries. Respondent violated section 75.326 because there were holes ranging from 1/3 of an inch to 2 inches in length in three permanent stoppings located outby spad No. 5162 (Tr. 389). The violation was only moderately serious because it was not proven that the holes extended all the way through the stoppings and no methane has been detected in respondent's mine. The inspector did not take either a methane reading or a bottle sample of air to check for methane on the day the notice was written (Tr. 392; 396-399). There was a low degree of negligence because both sides of the cinder

Since the violation was very serious and there was a rather high degree of negligence, a penalty of $100 will be assessed for this violation of section 75.400, bearing in mind respondent's difficult financial condition.

Order No. 65862 3/15/78 § 75.1725 (Exhibit 57)

Findings. Order No. 65862, discussed above, also alleged a violation of section 75.1725 which provides that machinery and equipment shall be maintained in a safe operating condition and that equipment in an unsafe condition shall be removed from service immediately. Respondent violated section 75.1725 because the stuck rollers, float coal dust, and loose coal along the conveyor belts had created unsafe conditions, but the conveyor belts were being used for producing coal despite the fact that they were exposing the miners to a possible fire or explosion because of the stuck rollers and undue amount of combustible materials which existed along and under them (Tr. 823; 861).

Conclusions. The violation of section 75.1725 is interrelated with the violation of section 75.400. I frequently have cases in which violations of section 75.400 are cited and the inspectors state that they also found stuck rollers which produce an ignition hazard. The ignition hazard is taken into consideration under the criterion of gravity in assessing a penalty for the violation of section 75.400. All inspectors could technically cite a violation of section 75.1725 every time they find stuck rollers, but it has been my experience that they rarely cite section 75.1725 in conjunction with stuck rollers associated with loose coal and coal-dust accumulations. Since I have taken the gravity of the violation of section 75.1725, having to do with stuck rollers, into consideration in the assessment of the penalty for the violation of section 75.400 also cited in Order No. 65862, I believe that the additional violation of section 75.1725 should not be given an incrementally high penalty. In such circumstances, a penalty of $5 will be assessed for this violation of section 75.1725, bearing in mind respondent's difficult financial condition.

Order No. 65862 3/15/78 § 75.1101-1 (Exhibit 57)

Findings. Order No. 65862, discussed above, also alleged a violation of section 75.1101-1 which provides that deluge-type spray systems shall be installed at main and secondary belt-conveyor drives. Such sprays become operative when there is a rise in temperature great enough to cause a fire sensor to activate a control valve. Respondent violated section 75.1101-1 because the deluge-type spray system at the No. 3 conveyor-belt drive was rendered inoperative by disconnection of the chain and sensors which cause the control valve to open. Additionally, some of the water sprays were broken (Tr. 825). The violation was serious because combustible materials were present in the vicinity of the No. 3 belt head and the deluge-type spray system would not have assisted in putting out any fire which might have occurred (Tr. 828; 861). There was a high degree of negligence because the preshift examiner should have observed that the chain to the valve was disconnected or broken with the result that the deluge-type water system would not work if needed (Tr. 826).

Conclusions. Respondent's witness, Mr. McGuire, stated that the fire-suppression system and chain controlling the valve were connected when he inspected the conveyor-belt drives cited in Order No. 65862 (Tr. 878). Inasmuch as Mr. McGuire was not present at the time the inspector observed the conditions along the conveyor belts, I conclude that the inspector's testimony is sufficiently credible to support my findings above that the violation occurred, that it was serious, and that respondent was negligent. The inoperative water-deluge system was taken into consideration above in assessing a penalty for the violation of section 75.400 cited in Order No. 65862. In view of the interrelated overlapping of the violations cited in Order No. 65862, a penalty of $25 will be assessed for this violation of section 75.1101-1.

Docket No. PIKE 79-77-P

Citation No. 65863 3/21/78 § 75.601 (Exhibit 60)

Findings. Section 75.601, to the extent here pertinent, provides that the disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and that such devices shall be designed so that it can be determined by one's eyesight that the power is disconnected. The preponderance of the evidence shows that no violation of section 75.601 occurred (Tr. 883-905). The sole action that respondent had to take to abate the alleged violation was to paint the female and male receptacles for each piece of equipment a matching color so that an illiterate person would theoretically be able to determine which circuit breaker should be connected to a given piece of equipment. Respondent's power center had been manufactured specifically for the types of equipment used in respondent's mine (Tr. 892). Therefore, each circuit breaker and trailing cable had already been labeled, before Citation No. 65863 was written, so that a person who can read would know which circuit breaker to connect for the continuous-mining machine, or roof-bolting machine, or shuttle car. Moreover, a chain was attached to each disconnect device so that the power for the shuttle car, for example, could not be plugged into the circuit for the continuous-mining machine or roof-bolting machine. Consequently, even an illiterate person would not be able to connect the wrong trailing cable to the wrong circuit in the power center. There is nothing in section 75.601 which specifically requires respondent to paint the disconnect devices with different colors of paint so that an illiterate person would be able to determine, for example, that a pink plug is to be connected only with a matching pink receptacle in the power center. Finally, since the circuit breakers for the off-drive shuttle car and the standard-drive shuttle car are the same size, an illiterate person would be unable to determine, if, for example, he were sent to the power center to disconnect the trailing cable for the off-drive shuttle car, whether he would be supposed to disconnect the circuit breaker painted blue or the circuit breaker painted yellow in order to be sure that he was disconnecting the off-drive shuttle car instead of the standard-drive shuttle car.

Conclusions. In this instance, I have chosen to accept the testimony of respondent's witness, Mr. Leslie, as being more credible than that of the

inspector. Mr. Leslie was with the inspector when Citation No. 65863 was written and Mr. Leslie's testimony shows that he is more familiar with the electrical equipment in the mine than the inspector was. Mr. Leslie testified that it was necessary for him to purchase five different colors of paint for application to the disconnect devices in order to abate the citation (Tr. 892). The inspector claimed that the disconnect devices were neither marked nor color-coded (Tr. 891), but Mr. Leslie claimed that the power center was ordered from the factory with labels for the various types of equipment already installed on the equipment (Tr. 893). Mr. Leslie introduced as Exhibit E a picture of the type of device which is used to connect equipment at the power center (Tr. 902). There is no reason to believe that Mr. Leslie was mistaken about the types of labels which he had requested the manufacturer to place on the disconnect devices (Tr. 894).

It should be noted that the language used in Citation No. 65863 is susceptible to the interpretation of the facts given by Mr. Leslie because the citation alleges that the "* * * connecting plugs were not plainly marked or colored" (Exh. 60). Since the connecting plugs had already been plainly marked before the citation was written, it was necessary for the inspector to use the words "plainly marked or colored" in his citation in order to show that the conditions he observed constituted a violation of section 75.601 because the language in that section requires plain marking but fails to mention color-coding. If respondent's disconnect devices had not already been plainly marked, the inspector could have required color-coding as one way of accomplishing the plain marking required by section 75.601, but the inspector cannot properly cite respondent for violating section 75.601 when plugs and receptacles have already been plainly marked, but the inspector additionally wants the disconnect devices painted with matching colors as a means of further plainly marking the disconnect devices for the benefit of illiterate persons who are unable to read the labels which respondent had already placed on the disconnect devices.

For the foregoing reasons, the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P will be dismissed insofar as it alleges a violation of section 75.601 in Citation No. 65863 dated March 21, 1978.

Citation No. 65864 3/21/78 § 75.503 (Exhibit 62)

Findings. Section 75.503 requires that electrical equipment used inby the last open crosscut be permissible. Respondent violated section 75.503 because an opening in excess of .005 of an inch was present between the cover plate at the top of the trailing cable junction box and at the bottom of the main panel box on the continuous-mining machine (Tr. 907). The violation was moderately serious because, although no methane was present at the time the violation was observed, it is always possible for methane to accumulate in a coal mine so as to cause an explosion (Tr. 911). There was a low degree of negligence because no bolts were missing and the machine vibrates constantly so that it may jar bolts loose. The inspector did not know how long the .005 of an inch opening had existed (Tr. 913).

Conclusions. The operator's witness, Mr. Leslie, testified that he could not dispute the existence of the .005 of an inch opening because he personally observed the inspector insert the .005 of an inch gauge into the opening (Tr. 917). Since the violation was moderately serious and there was a low degree of negligence, a penalty of $15 will be assessed for this violation of section 75.503, bearing in mind respondent's difficult financial condition.

Citation No. 65865 3/21/78 § 75.503 (Exhibit 64)

Findings. Respondent violated section 75.503 again because an opening in excess of .005 of an inch existed on the No. 2 Joy shuttle car between the cover plate and the panel box. Additionally, the headlights were inoperative on both ends of the shuttle car. The violation was moderately serious as to the opening in the panel box, but the lack of headlights on either end of the shuttle car was serious because the shuttle car is driven around corners and through crosscuts where the shuttle car becomes a hazard for miners who are working on the section. There was a high degree of negligence in respondent's permitting the shuttle car to be driven without having the lights replaced (Tr. 921-929).

Conclusions. Respondent's primary defense as to the violation of section 75.503 alleged in Citation No. 65865 was that headlights on shuttle cars glare in the eyes of the operator of the continuous-mining machine and consequently the operators of the shuttle cars do not use the headlights even when the lights are capable of being operated (Tr. 930-931). The inspector stated that the operator of the shuttle car normally turned off the light on the end next to the continuous-mining machine when coal was being loaded into the shuttle car and turned on the light on the outby end of the shuttle car so as to avoid blinding the operator of the continuous-mining machine. The inspector stated that he had driven shuttle cars while using only his cap light for illumination, as was being done in this instance, and that he felt he had less light than is needed to permit safe operation of the shuttle car (Tr. 928-929). Inasmuch as the violation was serious and there was a high degree of negligence, a penalty of $25 will be assessed for this violation of section 75.503, bearing in mind respondent's difficult financial condition.

Citation No. 65866 3/21/78 § 75.503 (Exhibit 66)

Findings. Respondent again violated section 75.503 by failing to have operative headlights on either end of the No. 1 Joy shuttle car (Tr. 932-933). Both the inspector and respondent's witness stated that their testimony with respect to the lack of headlights on the No. 1 shuttle car would be identical with the testimony they had already given with respect to the lack of headlights on the No. 2 shuttle car (Tr. 933).

Conclusions. Since this violation was identical with the previous violation as to the No. 2 shuttle car, the same findings would apply and a penalty of $25 should be assessed for this violation of section 75.503.

Citation No. 65867 3/22/78 § 77.1605(a) (Exhibit 68)

Findings. Section 77.1605(a) provides that cab windows shall be in good condition and shall be kept clean. Respondent violated section 77.1605(a) because a truck loading coal at respondent's loading chute had three or four cracks in the windshield on the driver's side. The violation was moderately serious because glares from the cracks in the windshield might have caused the driver to have an accident resulting from his inability to see clearly through the cracked windshield. Respondent was not negligent because the truck with the cracked windshield was used to haul one load of coal from respondent's mine. The truck had never been driven to respondent's mine on any occasion prior to the time the cracked windshield was observed by the inspector and was never used to haul coal from respondent's mine on any other occasion (Tr. 937-946; 947-949).

Conclusions. The truck involved in the violation alleged in Citation No. 65867 was driven to respondent's mine to obtain a single load of coal. The circumstances were that the independent contractor's regular truck needed to have a tire repaired. While the tire was being repaired, the person who normally hauled coal for respondent asked a substitute driver to use that driver's own truck to transport a load of coal from respondent's mine. The substitute truck had the cracked windshield described in Citation No. 65867, but respondent was unaware that the substitute truck and driver had been asked to haul a load of coal from respondent's mine and respondent's owners were not close enough to the truck on its single visit to respondent's mine to know that it had a cracked windshield (Tr. 948-949). Moreover, the inspector terminated the citation without ever knowing whether the crack in the windshield was ever replaced because the citation was terminated with an explanation that the truck left mine property and was no longer used to haul coal from respondent's mine (Exh. 70).

The Commission held in Republic Steel Corp., 1 FMSHRC 5 (1979), Kaiser Steel Corp., 1 FMSHRC 343 (1979), Consolidation Coal Co., 1 FMSHRC 347 (1979), Old Ben Coal Co., 1 FMSHRC 1480 (1979), and Monterey Coal Co., 1 FMSHRC 1781 (1979), that an operator may be held liable for violations by independent contractors even if the independent contractors' employees are the only persons involved in a particular violation. Therefore, the inspector properly cited respondent for the violation of the substitute independent contractor in this instance because respondent would have been liable for a violation committed by the driver of the truck which was normally used to haul coal from respondent's mine and can be held liable for violations committed by a substitute driver who is hired by the independent contractor who normally hauls respondent's coal.

In view of the fact that only one load of coal was hauled by the truck involved in Citation No. 65867, I think that only a nominal penalty should be assessed in the circumstances which prevailed in this instance. Therefore, a penalty of only $1 will be assessed for this violation of section 77.1605(a).

Docket No. KENT 79-1

Citation No. 64600 11/16/78 § 75.1722(b) (Exhibit 71)

Findings. Section 75.1722(b) provides that guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Respondent violated section 75.1722(b) because an adequate guard had not been provided for the No. 2 conveyor belt drive and discharge roller inasmuch as a person could become caught between the belt and pulley. The inadequate guard was located at the point where the No. 2 belt dumps coal on the No. 1 belt. Spillage of coal occurs at that discharge point and it is necessary for a miner to clean up the spillage. Therefore, the violation was serious because an inadequate guard exposes the miner who is cleaning up the coal to becoming caught between the belt and the pulley. Respondent was negligent because a chain-link fence had been erected around the exposed machine parts, but the guard had been taken down so that it provided no protection at the time the violation was observed by the inspector. The examiner of the belt should have noticed the absence of the guard and should have had it reinstalled in proper position (Tr. 951-961).

Conclusions. Respondent's witness, Mr. McGuire, testified that he was one of the first persons ever to use a chain-link fence as a guard at conveyor belt drives, but Mr. McGuire was not present at the time Citation No. 64600 was written and conceded that someone could have shoveled coal from under the belt drive and could have left the fence down. He said it was the responsibility of the person who takes the fence down to rehang it (Tr. 974; 977). It is respondent's duty to see that its employees comply with the safety standards, so I cannot find that respondent has a valid defense in this instance. Since the violation was serious and respondent was negligent, a penalty of $25 will be assessed for this violation of section 75.1722(b), bearing in mind respondent's difficult financial condition.

SETTLED ISSUES

The matters to be considered in this portion of my decision are discussed in the 47-page motion for approval of settlement filed on October 15, 1980, by MSHA's counsel. Under the settlement agreement, respondent would pay penalties totaling $4,631 instead of the penalties totaling $8,031 proposed by the Assessment Office. The motion for approval of settlement disposes of the remaining 82 violations which were not the subject of the hearing held in 1979. The motion considers violations alleged in Petitions for Assessment of Civil Penalty which were filed in 12 different docket numbers. As previously indicated on page 2 of my decision, all of the violations alleged in the Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-451-P, PIKE 78-458-P, and KENT 79-1 were the subject of testimony introduced at the hearing held in 1979 and the issues raised in those three Petitions have been entirely disposed of in the first portion of this decision which deals with contested issues.

Also, as previously indicated on page 2 of my decision, some of the issues raised by the Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-308-P, PIKE 79-77-P, and PIKE 79-99-P are partially disposed of in the portion of my decision devoted to the contested issues and the remainder of the issues raised by the Petitions filed in those three docket numbers are disposed of by the motion for approval of settlement. Finally, the issues raised by the Petitions filed in the remaining nine docket numbers involved in this consolidated proceeding are disposed of by the motion for approval of settlement.

As to the six criteria which are used in determining penalties, it should be noted that my decision on the contested issues has already made findings as to three of those criteria, namely, the size of respondent's business, the question of whether payment of penalties would cause respondent to discontinue in business, and respondent's history of previous violations. The findings as to the aforesaid three criteria are based on the evidence received during the hearing held in 1979 and they are applicable to the settled issues as well as to the contested issues which have already been considered above.

The finding made in my decision with respect to a fourth criterion, namely, that respondent had demonstrated a normal good faith effort to achieve rapid compliance is applicable to the settled issues except for the alleged violations which became the subject of withdrawal orders issued under section 104(b) of the Act. The motion for approval of settlement takes the position that respondent did not demonstrate a good faith effort to achieve rapid compliance with respect to all violations involving issuance of withdrawal orders under section 104(b) of the Act. Under the settlement agreement, respondent has agreed to pay the full penalty proposed by the Assessment Office in all instances involving issuance of withdrawal orders.

The motion for approval of settlement agrees that the evidence introduced at the hearing held in 1979 shows that payment of penalties will have an adverse effect on respondent's ability to continue in business. The motion states that respondent will have to secure a loan in order to pay the settlement penalties totaling $4,631 and asks that I give respondent a period of 90 days after issuance of my decision within which to pay the penalties because respondent needs more than the normal 30-day period for obtaining the loan before payment is due. I find that the request for a 90-day period within which to pay penalties is reasonable and the order accompanying this decision will so provide. That request is especially reasonable when it is considered that my decision with respect to the contested issues requires respondent to pay penalties totaling $636 in addition to the settlement penalties totaling $4,631.

I shall now give consideration to the matters discussed in the motion for approval of settlement.

Docket No. PIKE 78-308-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P seeks assessment of penalties for 12 alleged violations. Two of

those violations have already been disposed of under the portion of this decision devoted to contested issues. Respondent has agreed to pay the full amount of the penalties proposed by the Assessment Office with respect to the remaining 10 alleged violations except for Notices of Violation Nos. 4 RM (7-45) and 2 RM (7-47) dated July 14 and July 15, 1977, respectively, as to which MSHA's counsel indicates that no penalty should be paid for the two violations of section 75.403 alleged in those notices because MSHA does not have the results of the laboratory analyses of dust samples which are required for proof of such violations (Hall Coal Co., Inc., 1 IBMA 175 (1972), and Valley Camp Coal Co., 1 IBMA 243 (1972)).

The motion for approval of settlement states that MSHA declined to settle the two violations alleged in Notice Nos. 1 RM (7-42) and 2 RM (7-43) both dated July 14, 1977, for less than the penalties of $106 each proposed by the Assessment Office because respondent failed to abate the alleged violations until after withdrawal orders were issued under section 104(b). The motion avers that the failure to abate the alleged violations before withdrawal orders were issued indicated a failure of respondent to demonstrate a good faith effort to achieve rapid compliance.

I find that the motion for approval of settlement (pp. 7-11) has provided ample reasons for approving the settlement agreement under which respondent would pay total penalties of $534 instead of total penalties of $621 as proposed by the Assessment Office for the remaining 10 alleged violations involved in Docket No. PIKE 78-308-P.

Docket No. PIKE 79-25-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-25-P seeks to have penalties assessed for 20 alleged violations. None of those alleged violations were the subject to any testimony at the hearing held in 1979. The Assessment Office proposed penalties totaling $3,509 in this docket. Under the settlement agreement, respondent would pay reduced penalties totaling $960. More of the reductions in penalties involved in the parties' settlement agreement relate to the violations alleged in Docket No. PIKE 79-25-P than are involved in any of the other docket numbers. The motion for approval of settlement (pp. 12-22) justifies many of the reductions on the basis that respondent's mine has never shown a history of releasing methane and on the fact that respondent has proven that it is in a very difficult financial condition. Additionally, it is a fact that the Assessment Office rated all of the violations alleged in Docket No. PIKE 79-25-P as being more serious and involving a greater degree of negligence than it did for similar violations involved in the other dockets. I find that the motion for approval of settlement has shown adequate reasons for reducing the penalties to the total of $960 which respondent has agreed to pay.

Docket No. PIKE 79-50-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-50-P seeks to have penalties assessed for two violations, neither of which

was considered at the hearing held in 1979. Under the settlement agreement, respondent would pay penalties totaling $85 instead of the penalties totaling $174 proposed by the Assessment Office. The motion for approval of settlement (pp. 14 and 22) justifies the reduction in the proposed penalties on the grounds, as to the permissibility violation, that no methane has ever been detected in respondent's mine and that no negligence on the part of respondent could be shown. As to the alleged violation of section 75.603, the reduction is based on the fact that respondent was aware of the existence of two temporary splices in the trailing cable and was in the process of obtaining a new trailing cable. I find that adequate reasons have been given for approving the reductions agreed upon as to the Petition filed in Docket No. PIKE 79-50-P.

Docket No. PIKE 79-77-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P seeks to have penalties assessed for seven alleged violations. All but one of the alleged violations were the subject of evidence presented during the 1979 hearing and have been disposed of in the section of this decision devoted to the contested issues. Under the settlement agreement, respondent has agreed to pay in full the penalty of $40 proposed by the Assessment Office for the remaining alleged violation of section 75.1704 involved in this docket number. The motion for approval of settlement (p. 22) justifies the proposed penalty of $40 by noting that the circumstances of the violation are such that negligence on the part of the operator cannot be established. I find that the penalty of $40 is reasonable and that the settlement agreement with respect to this alleged violation of section 75.1704 should be approved.

Docket No. PIKE 79-99-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-99-P seeks to have penalties assessed for four alleged violations. Three of those alleged violations were the subject of testimony introduced at the 1979 hearing and have been disposed of in the section of this decision devoted to contested issues. Under the settlement agreement, respondent would pay a reduced penalty of $40 instead of the penalty of $80 proposed by the Assessment Office for the violation of section 75.400 which has not already been considered as a part of the contested issues. The motion for approval of settlement (pp. 23-24) justifies the reduction primarily on the ground that respondent is in a difficult financial condition. I find that a sufficient reason has been given for approving the parties' settlement as to Docket No. PIKE 79-99-P.

Docket No. KENT 79-125

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-125 seeks to have penalties assessed for eight alleged violations, none of which were the subject of the hearing held in 1979. Under the settlement agreement, respondent would pay reduced penalties of $443 instead of the

penalties totaling $618 proposed by the Assessment Office. The motion for approval of settlement (pp. 14; 23-26) discusses each of the eight alleged violations in detail. All of them were from moderately serious to serious and each was accompanied by at least ordinary negligence. Therefore, the primary reason for the parties' agreement to reduce the penalties in this docket number is that respondent is in a difficult financial condition. That has been the primary reason for the fact that I assessed low penalties in the portion of this decision which was devoted to the contested issues and those findings support the parties' settlement agreement which I find should be approved as to Docket No. KENT 79-125.

Docket No. KENT 79-151

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-151 seeks to have a civil penalty assessed for a single violation of section 75.400. Under the settlement agreement, respondent would pay the full penalty of $445 proposed by the Assessment Office. The motion for approval of settlement (p. 27) states that this alleged violation of section 75.400 was not considered at the hearing held in 1979. While it is true that Inspector McClanahan, who wrote the citation and order involved in Docket No. KENT 79-151, did not testify at the hearing held in 1979, some of the testimony at the 1979 hearing did show that one of respondent's owners and Inspector McClanahan had had an altercation which caused the co-owner to order the inspector off of mine property (Tr. 782-783).

Inasmuch as the hearing was never reconvened so that the inspector could give his version of the facts which led to the altercation, I am not making any findings about the merits of the dispute between the inspector and one of respondent's owners, but I think that the testimony as to the respondent's version of the controversy should be mentioned in view of the fact that the motion for approval of settlement (p. 28) primarily bases MSHA's refusal to reduce the proposed penalty in this instance on the fact that respondent declined to allow the inspector to come on mine property to determine whether the alleged violation of section 75.400 had been abated. The fact that respondent has agreed to pay a rather high penalty for what would otherwise have been considered to be a moderately serious violation is sufficient reason to approve the settlement agreement with respect to the violation of section 75.400 alleged in Docket No. KENT 79-151.

Docket No. KENT 80-28

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-28 seeks to have penalties assessed for two alleged violations. Under the settlement agreement, respondent would pay reduced penalties totaling $360 instead of the penalties of $650 proposed by the Assessment Office. Respondent has agreed to pay the full amount of $60 proposed by the Assessment Office with respect to an alleged violation of section 75.1725. The other alleged violation related to a charge that respondent had violated its ventilation, methane and dust-control plan by failing to install a proper seal at a point where the operator had cut into an abandoned mine. Respondent had constructed a seal made of cinder blocks, but the seal was required

to be made of concrete blocks and be provided with a water seal. It was necessary for a withdrawal order to be issued before the violation was abated. The motion for approval of settlement (p. 30) indicates that MSHA agreed to reduce the proposed penalty proposed by the Assessment Office from $590 to $300 primarily for the reason that respondent is in a difficult financial condition. I find that adequate reasons have been given for approving the settlement agreement with respect to the Petition filed in Docket No. KENT 80-28.

Docket No. KENT 80-31

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-31 seeks to have penalties assessed for 17 alleged violations. Under the settlement agreement, respondent would pay the total penalties of $772 proposed by the Assessment Office. The Proposed Assessment sheet in this docket indicates that the Assessment Office had current information about respondent's size at the time the penalties here involved were determined under the formula provided for in 30 C.F.R. § 100.3. The Assessment Office assigned penalty points based on a finding that respondent is a very small operator. The Assessment Office found that ordinary negligence was associated with all of the 17 alleged violations and that all of them were either moderately serious or serious. The motion for approval of settlement states that MSHA's counsel considers several of the violations to be serious enough to warrant assessment of penalties larger than those proposed by the Assessment Office, but MSHA's counsel states that he agreed to settle all of the alleged violations at the amounts proposed by the Assessment Office under the criterion that payment of large penalties would have a very adverse effect on respondent's ability to continue in business. I find that adequate reasons have been shown to approve the settlement agreed upon as to the 17 violations alleged in Docket No. KENT 80-31.

Docket No. KENT 80-32

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-32 seeks to have penalties assessed for four alleged violations. In this docket, the Assessment Office also rated respondent as operating a very small business and proposed low penalties totaling $200 based on findings that each violation was associated with ordinary negligence and was moderately serious or serious. Under the settlement agreement, respondent would pay penalties totaling $173. The only penalty which was reduced below the amount proposed by the Assessment Office is for a violation of section 75.316 alleged in Citation No. 703939 dated April 30, 1979. As to that violation, which was based on the inspector's charge that only 2 of 24 water sprays on the continuous-mining machine were operable, the motion for approval of settlement states that the reduction from a proposed penalty of $72 to a settlement penalty of $45 was based on respondent's difficult financial condition. I find that an adequate reason has been given for approving the settlement agreed upon in Docket No. KENT 80-32.

Docket No. KENT 80-33

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-33 seeks to have penalties assessed for six alleged violations. Under the settlement agreement, respondent would pay penalties totaling $340 instead of the penalties totaling $358 proposed by the Assessment Office. The only penalty reduced by the settlement agreement below the amount proposed by the Assessment Office relates to Citation No. 713703 dated May 14, 1979, alleging a violation of section 75.1725 because a shuttle car's brakes were inoperative. The Assessment Office proposed a penalty of $78 for the violation of section 75.1725. The motion for approval of settlement (p. 29) had agreed to settle a previous violation of section 75.1725, pertaining to a shuttle car's brakes, on the basis of a $60 penalty involving a very similar violation. The settlement agreement consistently agreed to reduce the $78 penalty proposed by the Assessment Office for this very similar violation to the same amount, that is, $60. MSHA's counsel agreed on a penalty of $60 in each instance because of respondent's poor financial condition. I find that the settlement agreement proposed in Docket No. KENT 80-33 should be approved for the reason stated above.

Docket No. KENT 80-68

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-68 seeks penalties for seven alleged violations. Under the settlement agreement, respondent would pay total penalties of $439 instead of the total penalties of $560 proposed by the Assessment Office. The Assessment Office considered that all of the alleged violations were associated with ordinary negligence and considered all of the violations to be moderately serious or serious. The Assessment Office proposed a penalty of $140 for a permissibility violation alleged in Citation No. 713717 dated May 31, 1979. Since respondent's mine has never been known to liberate methane, permissibility violations have not been considered to be very serious in this proceeding. In this instance, however, the Assessment Office proposed a large penalty of $140 because the respondent failed to abate the violation in a timely manner which resulted in the issuance of a withdrawal order. The Assessment Office, therefore, assigned 10 penalty points under 30 C.F.R. § 100.3 because it believed that respondent had failed to demonstrate a good faith effort to achieve compliance. The motion for approval of settlement (p. 44) shows that MSHA's counsel would not agree to a reduction of that relatively large penalty because of respondent's lack of good faith abatement.

The settlement agreement indicates that MSHA's counsel agreed to reduce three of the seven violations by a total of $121. A reduction of $10 in the $60 penalty proposed for the violation of section 75.601 alleged in Citation No. 713719 dated May 31, 1979, was agreed upon because of respondent's poor financial condition (Motion, p. 45). A reduction of $46 in the penalty of $106 proposed for the violation of section 77.504 alleged in Citation No. 714047 dated June 11, 1979, was made in the settlement agreement because of respondent's poor financial condition (Motion, p. 46). Finally, a reduction of $65 was made in the penalty of $90 proposed for the violation of

section 77.512 in Citation No. 714048 dated June 12, 1979, partly because of respondent's poor financial condition and partly because the condition described in Citation No. 714048 was also covered by the condition described in Citation No. 714047 for which respondent is paying a penalty of $60 (Motion, p. 47). I find that adequate reasons have been given for approving the settlement agreed upon by the parties for the violations alleged by the Petition filed in Docket No. KENT 80-68.

Summary of Assessments and Conclusions

(1) On the basis of all the evidence received at the hearing held in this proceeding in October 1979 and the parties' motion for approval of settlement filed on October 15, 1980, the following civil penalties should be assessed:

Docket No. PIKE 78-308-P

Notice No. 3 EDF (7-40) 7/15/77 § 75.326 .. (Contested) ..	$	15.00
Notice No. 4 EDF (7-41) 7/15/77 § 75.200 .. (Contested) ..		50.00
Notice No. 1 RM (7-42) 7/14/77 § 75.200 ... (Settled)		106.00
Notice No. 2 RM (7-43) 7/14/77 § 75.200 ... (Settled)		106.00
Notice No. 3 RM (7-44) 7/14/77 § 75.400 ... (Settled)		61.00
Notice No. 4 RM (7-45) 7/14/77 § 75.403 ... (Dismissed) ..		0.00
Notice No. 1 RM (7-46) 7/15/77 § 75.302-1 . (Settled)		34.00
Notice No. 2 RM (7-47) 7/15/77 § 75.403 ... (Dismissed) ..		0.00
Notice No. 3 RM (7-48) 7/15/77 § 75.400 ... (Settled)		102.00
Notice No. 1 RM (7-49) 7/19/77 § 75.326 ... (Settled)		46.00
Notice No. 2 RM (7-50) 7/19/77 § 75.316 ... (Settled)		36.00
Notice No. 2 RM (7-52) 7/20/77 § 75.301-1 . (Settled)		43.00
Total Contested and Settled Penalties in Docket No. PIKE 78-308-P	$	599.00

Docket No. PIKE 78-451-P
(All Contested)

Notice No. 1 JM (7-57) 8/18/77 § 75.200	$	100.00
Total Contested (None Settled) Penalties in Docket No. PIKE 78-451-P	$	100.00

Docket No. PIKE 78-458-P
(All Contested)

Notice No. 3 VEH (7-50) 8/1/77 § 75.400 .. (Dismissed) ...	$	0.00
Notice No. 1 EDF (7-63) 10/12/77 § 75.400		15.00
Notice No. 2 EDF (7-64) 10/12/77 § 75.400		15.00
Notice No. 3 EDF (7-65) 10/12/77 § 75.503		15.00
Notice No. 5 EDF (7-67) 10/12/77 § 75.400		15.00
Notice No. 6 EDF (7-68) 10/12/77 § 75.807		25.00
Notice No. 7 EDF (7-69) 10/12/77 § 75.200		50.00
Notice No. 8 EDF (7-70) 10/12/77 § 75.507		20.00

Notice No. 1 EDF (7-71) 10/13/77 § 75.1725	5.00
Notice No. 1 EDF (7-72) 10/14/77 § 77.1605(k)	20.00
Notice No. 1 EDF (7-73) 10/17/77 § 75.604	15.00
Notice No. 2 EDF (7-74) 10/17/77 § 75.200 .. (Dismissed) .	0.00
Notice No. 1 EDF (7-75) 10/18/77 § 75.316	5.00
Notice No. 2 EDF (7-76) 10/18/77 § 75.316	15.00
Notice No. 2 EDF (7-78) 10/20/77 § 75.1101-1	5.00
Notice No. 3 EDF (7-79) 10/20/77 § 75.1102	15.00
Notice No. 4 EDF (7-80) 10/20/77 § 75.516-2	15.00
Total Contested (None Settled) Penalties in Docket No. PIKE 78-458-P	$ 250.00

Docket No. PIKE 79-25-P
(All Settled)

Citation No. 63654 6/19/78 § 75.1722	$ 45.00
Citation No. 63655 6/19/78 § 75.200	50.00
Citation No. 63656 6/19/78 § 75.200	35.00
Citation No. 63657 6/19/78 § 75.1722	45.00
Citation No. 63658 6/19/78 § 75.503	50.00
Citation No. 63659 6/19/78 § 75.313	35.00
Citation No. 63660 6/19/78 § 75.301-4	46.00
Citation No. 63801 6/19/78 § 75.523-2	60.00
Citation No. 63802 6/19/78 § 75.503	50.00
Citation No. 63803 6/19/78 § 75.503	50.00
Citation No. 63804 6/19/78 § 75.1704-2(d)	50.00
Citation No. 63805 6/19/78 § 75.1710	50.00
Citation No. 63806 6/19/78 § 75.1710	50.00
Citation No. 63807 6/19/78 § 75.1722	49.00
Citation No. 63809 6/19/78 § 75.1100-2	50.00
Citation No. 63810 6/19/78 § 75.316	50.00
Citation No. 63811 6/20/78 § 75.1101-6	60.00
Citation No. 63812 6/20/78 § 75.316	50.00
Citation No. 63813 6/20/78 § 75.316	50.00
Citation No. 63814 6/20/78 § 75.503	35.00
Total Settled (None Contested) in Docket No. PIKE 79-25-P	$ 960.00

Docket No. PIKE 79-50-P
(All Settled)

Citation No. 63815 6/20/78 § 75.503	$ 35.00
Citation No. 63816 6/20/78 § 75.603	50.00
Total Settled (None Contested) in Docket No. PIKE 79-50-P	$ 85.00

Docket No. PIKE 79-77-P

Notice No. 1 EDF (7-81) 10/31/77 § 75.1100-2 (Dismissed)	$ 0.00
Citation No. 65863 3/21/78 § 75.601 ..... (Dismissed)...	0.00

Citation No. 65864 3/21/78 § 75.503 ..... (Contested) ...		15.00
Citation No. 65865 3/21/78 § 75.503 ..... (Contested) ...		25.00
Citation No. 65866 3/21/78 § 75.503 ..... (Contested) ...		25.00
Citation No. 65867 3/22/78 § 77.1605 .... (Contested) ...		1.00
Citation No. 63817 6/21/78 § 75.1704 .... (Settled)		40.00
Total Contested and Settled Penalties in Docket No. PIKE 79-77-P	$	106.00

Docket No. PIKE 79-99-P

Order No. 65862 3/15/78 § 75.400 ..... (Contested) ...	$	100.00
Order No. 65862 3/15/78 § 75.1725 ..... (Contested) ...		5.00
Order No. 65862 3/15/78 § 75.1101-1 ..... (Contested) ...		25.00
Citation No. 63808 6/19/78 § 75.400 ..... (Settled)		40.00
Total Contested and Settled Penalties in Docket No. PIKE 79-99-P	$	170.00

Docket No. KENT 79-1
(All Contested)

Citation No. 64600 11/16/78 § 75.1722(b)	$	25.00
Total Contested (None Settled) Penalties in Docket No. KENT 79-1	$	25.00

Docket No. KENT 79-125
(All Settled)

Citation No. 64310 9/18/78 § 75.1710	$	52.00
Citation No. 64311 9/18/78 § 75.503		50.00
Citation No. 64312 9/18/78 § 75.400		40.00
Citation No. 64313 9/18/78 § 75.515		56.00
Citation No. 64314 9/18/78 § 75.515		56.00
Citation No. 64315 9/18/78 § 75.601		75.00
Citation No. 64330 9/18/78 § 75.400		66.00
Citation No. 64331 9/19/78 § 75.512		48.00
Total Settled (None Contested) Penalties in Docket No. KENT 79-125	$	443.00

Docket No. KENT 79-151
(All Settled)

Citation No. 64969 12/13/78 § 75.400	$	445.00
Total Settled (None Contested) Penalties in Docket No. KENT 79-151	$	445.00

Docket No. KENT 80-28
(All Settled)

Citation No. 703899 4/26/79 § 75.1725	$	60.00
Citation No. 703940 5/4/79 § 75.316		300.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-28	$	360.00

Docket No. KENT 80-31
(All Settled)

Citation No. 703896 4/26/79 § 77.701	$	52.00
Citation No. 703898 4/26/79 § 77.701		60.00
Citation No. 703900 4/26/79 § 77.506		40.00
Citation No. 703930 4/26/79 § 75.1725		52.00
Citation No. 703931 4/26/79 § 75.400		40.00
Citation No. 703932 4/26/79 § 75.316		40.00
Citation No. 703933 4/26/79 § 75.200		56.00
Citation No. 703935 4/26/79 § 75.1103		52.00
Citation No. 703961 4/26/79 § 75.523		34.00
Citation No. 703936 4/30/79 § 75.200		36.00
Citation No. 703937 4/30/79 § 75.200		56.00
Citation No. 703962 4/30/79 § 75.604		38.00
Citation No. 703963 4/30/79 § 75.604		56.00
Citation No. 703964 4/30/79 § 75.503		38.00
Citation No. 703965 4/30/79 § 75.503		30.00
Citation No. 703967 4/30/79 § 75.523		36.00
Citation No. 703968 4/30/79 § 75.1722		56.00
Total Settlement (None Contested) Penalties in Docket No. KENT 80-31	$	772.00

Docket No. KENT 80-32
(All Settled)

Citation No. 703897 4/26/79 § 77.1605(a)	$	40.00
Citation No. 703934 4/26/79 § 75.1100-2		52.00
Citation No. 703938 4/30/79 § 75.400		36.00
Citation No. 703939 4/30/79 § 75.316		45.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-32	$	173.00

Docket No. KENT 80-33
(All Settled)

Citation No. 713455 5/2/79 § 75.604	$	60.00
Citation No. 713456 5/2/79 § 75.200		66.00
Citation No. 713703 5/14/79 § 75.1725		60.00
Citation No. 713707 5/14/79 § 75.603		60.00
Citation No. 713708 5/14/79 § 75.503		34.00
Citation No. 713710 5/14/79 § 75.200		60.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-33	$	340.00

Docket No. KENT 80-68
(All Settled)

Citation No. 713717 5/31/79 § 75.503	$	140.00
Citation No. 713718 5/31/79 § 75.1177		52.00

Citation No. 713719 5/31/79 § 75.601		50.00
Citation No. 713720 5/31/79 § 77.505		52.00
Citation No. 714581 5/31/79 § 77.700		60.00
Citation No. 714047 6/11/79 § 77.504		60.00
Citation No. 714048 6/11/79 § 77.512		25.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-68	$	439.00
Total Contested and Settled Penalties in This Proceeding	$	5,267.00

(2) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P should be dismissed insofar as it seeks to have penalties assessed for the violations of section 75.403 alleged in Notice Nos. 4 RM (7-45) and 2 RM (7-47) dated July 14 and July 15, 1977, respectively, because the motion for approval of settlement (p. 9) states that the analyses of the dust samples required to prove those alleged violations are unavailable.

(3) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P should be dismissed to the extent that it seeks assessment of a penalty for the violation of section 75.400 alleged in Notice No. 3 VEH (7-50) dated August 1, 1977, because MSHA's counsel stated at the hearing that the inspector who wrote Notice No. 3 VEH was unavailable to testify in support of the alleged violation (Tr. 119).

(4) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P should also be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.200 alleged in Notice No. 2 EDF (7-74) dated October 17, 1977, because of MSHA's failure to prove that the violation occurred.

(5) The Petition for Assessment of Civil Penalty filed in Docket No PIKE 79-77-P should be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.1100-2 alleged in Notice No. 1 EDF (7-81) dated October 31, 1977, because of MSHA's failure to prove that the violation occurred.

(6) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P should also be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.601 alleged in Citation No. 65863 dated March 21, 1978, because of MSHA's failure to prove that the violation occurred.

(7) Respondent, as the operator of the Nos. 2, 3, 4, and 6 Mines involved in this proceeding, is subject to the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) Pursuant to the parties' settlement agreement and to my decision concerning the contested issues, Little Bill Coal Company is ordered, within

90 days from the date of this decision, to pay civil penalties totaling $5,267.00, as summarized above in paragraph (1).

(B) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P is dismissed to the extent and for the reason given in paragraph (2) above.

(C) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P is dismissed to the extent and for the reasons given in paragraphs (3) and (4) above.

(D) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P is dismissed to the extent and for the reasons given in paragraphs (5) and (6) above.

(E) The motion for approval of settlement filed on October 15, 1980, is granted and the settlement agreement described therein is approved.

Richard C. Steffey

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

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Herman W. Lester, Jr., Esq., Attorney for Little Bill Coal Company, Inc., Combs and Lester, P.S.C., 207 Caroline Avenue, P.O. Box 551, Pikeville, KY 41501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. VA 80-84
Petitioner	:	A.C. No. 44-00294-03032V
v.	:	
	:	Virginia No. 1 Mine
EASTOVER MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Catherine Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Karl S. Forester, Esq., Harlan, Kentucky, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess a civil penalty against Eastover Mining Company (hereinafter Eastover) for a violation of a mandatory standard. The proposal for assessment of a civil penalty alleges a violation of 30 C.F.R. § 75.507 in that nonpermissible power connection points were located in return air.

The parties filed preliminary statements and a hearing was held in Abingdon, Virginia, on November 5, 1980. Inspector Herman Lucas testified on behalf of MSHA. Larry Baker, David Gilly, and Robert Jessee testified on behalf of Eastover. The parties submitted closing arguments at the hearing.

ISSUES

Whether Eastover violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 75.507 provides as follows: "Except where permissible power connections are used, all power connection points outby the last open crosscut shall be in intake air."

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

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

STIPULATIONS

The parties stipulated the following:

1. Eastover owns and operates Virginia No. 1 Mine, and both Eastover and the mine are subject to the jurisdiction of the Act.

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to the Act.

3. The subject order, No. 682886, and termination thereto, were properly served by a duly authorized representative of MSHA, Herman Lucas.

4. A copy of Order No. 682886 attached to the petition for adjudication of a civil penalty is an authentic copy of the original order.

5. The assessment of a civil penalty in this proceeding will not affect Eastover's ability to continue in business.

6. The pump control box which is the subject of Order No. 682886 was located in the last open crosscut of the 2 Right Section, which is a return airway.

7. The subject pump control box did not have permissible power connection points at the time the subject order was issued.

8. The computer printout reflecting the operator's history of violations is an authentic copy and may be admitted as a business record of MSHA.

9. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that Virginia No. 1 Mine has an annual tonnage of 236,248 and Eastover has an annual tonnage of 1,679,965.

SUMMARY OF THE EVIDENCE

During the course of a spot inspection of Eastover's Virginia No. 1 Mine on September 12, 1979, MSHA inspector Herman Lucas issued an order of

withdrawal pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. § 75.507. The order in question alleged, in part, as follows: "Nonpermissible power connection points, Gorman Rupp water pump control box was being used in the last open crosscut in return air of 2 Right Section." As noted in the stipulations in this case, Eastover admits that the pump control box did not have permissible power connection points and was located in a return airway at the time the order was issued. However, Eastover contends that the pump control box was not energized at the time the order was issued. Hence, it asserts that there was no violation of the regulation and no civil penalty should be assessed.

Inspector Lucas testified that he did not know whether the pump was working or whether the pump control box was energized at the time he issued the order. He stated that he assumed that the pump control box was energized or that it had been energized previously. The inspector admitted that Robert Jessee, the assistant mine foreman and the operator's escort during this inspection, told him that the pump control box was not energized. Inspector Lucas did not attempt to make a determination whether the pump control box was energized. He stated that, in his opinion, if the equipment had never been energized, there would be no violation of the regulation.

Larry Baker, formerly Eastover's general mine foreman on the third shift, testified that he installed the pump on the shift prior to the one on which the order was issued. After he set the pump in water, he found that there was not enough cable to connect the pump to the power center. Since he could not complete the installation of the pump, he hung the nonpermissible pump control box on a roof bolt in return air to keep it out of the mud. He asserted that he was familiar with the regulation in question and would not have left the pump control box in the return air if it were energized.

Robert Jessee, Eastover's assistant mine foreman on the day shift, testified that he accompanied the inspector on the day in question. He testified that he told the inspector that the pump control box was not connected. He walked to the power center and confirmed the fact that the pump control box was not energized.

The undisputed evidence on the remaining issues indicate that energized, nonpermissible power connection points in return air could cause a methane explosion which could be fatal. At the time of the order, .1 to .2 percent methane was found at the working places in this section. This mine has a history of methane liberation. However, if the pump control box was not energized, it could not cause an explosion and the violation would not be serious. In May 1979, there was a violation of this regulation, 30 C.F.R. § 75.507, at this mine.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. Eastover contends that the pump control box was not energized and, hence, no violation of the regulation occurred. The

inspector admitted that he did not know whether the pump control box was energized at the time he issued this order. He assumed that it had been energized at some prior time in nonpermissible condition but testified that if the box had not been energized at any time since its placement in return air, no violation would occur. However, whether or not the pump control box was ever energized is irrelevant to a determination of whether the regulation was violated.

Eastover should be aware that its defense, that the nonpermissible power connnection points were not energized, is no defense to a charge of violation of 30 C.F.R. § 75.507. In Secretary of Labor v. Eastover Mining Company, Docket Nos. NORT 78-54-P and NORT 78-55-P (November 8, 1978), Judge Steffey rejected Eastover's defense as follows:

> Since section 75.507 prohibits the placing of nonpermissible power connection points in return air outby the last open crosscut, I think the inspector is correct in stating that respondent violated section 75.507 by placing the charger in return air even though the charger was not being used at the time Order No. 1 MLH was written.

Eastover did not seek review of that decision.

Thereafter, in Secretary of Labor v. Southern Ohio Coal Company, Docket Nos. VINC 79-109-P, et al. (October 19, 1979), Judge Koutras rejected the same defense to the same regulation as follows:

> I find and conclude that the petitioner has established a violation as charged in the citation by a preponderance of the evidence. Respondent's contention that petitioner must first establish that the battery charger unit in question was energized in order to support a violation of section 75.507 is rejected, notwithstanding the inspector's practice of not issuing citations if it is not energized. I find no such requirement in the standard and respondent has not persuaded me otherwise. The question of whether the unit was energized at the time of the inspection goes to the question of gravity and may not serve as an absolute defense to the violation. The citation is AFFIRMED.

The Federal Mine Safety and Health Review Commission denied the petition for discretionary review.

In the instant case, Eastover cites no legal precedent in suppport of its defense. As noted above, the prior decisions of judges have held that the placement of nonpermissible power connection points in return air is a violation of 30 C.F.R. § 75.507 even if the units are not energized. I conclude that the evidence of record establishes a violation of 30 C.F.R. § 75.507. However, I also find that the pump control box in controversy had not been energized at the time the order issued.

ASSESSMENT OF CIVIL PENALTY

MSHA proposed that a civil penalty in the amount of $2,500 be assessed for this violation. I have found that there was a prior violation of the same standard, 30 C.F.R. § 75.507, cited in this case, in this same mine in May 1979. Eastover was negligent in that it knew or should have known of this violation since the area where the violation occurred had been preshifted. This mine liberates methane and had the control box been energized, an explosion source would have been present. However, I have found that the control box was not energized at the time the order was issued, nor was it ever energized at the point at which it was found in return air. The gravity of the violation was therefore much less than was assumed by MSHA when it proposed a penalty of $2,500.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of $500 should be imposed for the violation found to have occurred.

ORDER

WHEREFORE IT IS ORDERED that Eastover pay the sum of $500 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.507.

James A. Laurenson, Judge

Issued:

Distribution by Certified Mail:

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

Karl S. Forester, Esq., Forester & Forester, P.O. Box 935, Harlan, KY 40831

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 18 1980

PENN ALLEGH COAL COMPANY, INC., Contestant	:	Contest of Citation
v.	:	Docket No. PENN 80-271-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation No. 840677 June 23, 1980
	:	Allegheny No. 3 Mine
and	:	
UNITED MINE WORKERS OF AMERICA, Respondents	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 80-275 A.C. No. 36-05691-03012
v.	:	
PENN ALLEGH COAL COMPANY, INC., Respondent	:	Allegheny No. 3 Mine

DECISION

Appearances: Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania, for Penn Allegh Coal Company, Inc.;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

Hearings were held on these cases in Pittsburgh, Pennsylvania, on November 18, 1980, pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The general issue to be first resolved is whether Penn Allegh Coal Company, Inc. (Penn Allegh), violated the regulation cited in both cases, to wit: 30 C.F.R. § 70.101. At hearing, Penn Allegh filed a motion for summary decision. My bench decision granting that motion appears below with only non-substantive corrections and is affirmed as my final decision at this time.

Under Commission Rule 64(b), 29 C.F.R. § 2700.64(b), a motion for a summary decision shall be granted only if the entire record including the pleadings, depositions, answers to interrogatories, admissions and affidavits shows, (1) that there is no genuine issue as to any material fact and, (2) that the moving party is entitled to summary decision as a matter of law. Based on the agreed stipulation of facts submitted in this case, I conclude that, indeed, there is no genuine issue as to any material fact and that the operator in this case, Penn Allegh Coal Company, Inc., is entitled as a matter of law to a summary decision vacating the citations at issue.

There are two citations before me each charging one violation of the standard at 30 C.F.R. § 70.101. That standard, which I will refer to as "the reduced dust standard," provides in part as follows:

> When the concentration of respirable dust in the mine atmosphere of any working place contains more than five percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere to which each miner in such working place is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air, computed by dividing the percent of quartz into the number ten: [Emphasis added.]

I have emphasized the language "working place" as utilized in the standard because that language is critical to the decision in this case and it is the language upon which this case is to be decided. The term "working place" is defined in the regulations at 30 C.F.R § 70.2(e) as the area of a coal mine inby the last open crosscut. The term "working place" as used in the standard cited in these cases, that is, the reduced dust standard, is clearly governed by this definition. No one disputes this. I conclude, therefore, that the operator is required to maintain the reduced respirable dust levels required by section 70.101 only in that same specific area located "inby the last open crosscut" i.e., the same "working place" where the respirable dust has been found to contain more than 5 percent quartz.

The stipulated and agreed facts of this case show that the samples taken to establish that the concentration of respirable dust contained more than 5 percent quartz were taken between January 2 and January 9, 1980, in the north main section and specifically the area designated on the operator's mine map which is in evidence as Exhibit No. 1 as the working places in the area adjacent to the letter "A."

On the other hand, the samples on which the violations cited in the two cases before me today were based were actually taken in the 2 right section which has been identified on the operator's mine map (Exh. No. 1) as the area designated with an orange color with the date February 1980, adjacent to it, the area designated by a green color with the date March 1980, adjacent to it, the area designated by the color red with the date April 1980, appearing adjacent to it, the color brown with the date May 1980, appearing adjacent to it, and the color yellow with the date June 1980, appearing adjacent to it.

According to the stipulation, the "working places" where the quartz concentration was determined and the "working places" where the alleged violations were found were no closer than 2,000 feet apart. Under the circumstances, it is clear beyond all doubt that the "working places" at which the respirable dust having more than 5 percent quartz content was found and relied upon in these cases were not the same "working places" at which the violations were cited. There has, therefore, been no violation of the cited standard and, accordingly, the citations before me must be vacated.

ORDER

Citation Nos. 9901143 and 840677 are hereby VACATED. The civil penalty proceeding, Docket No. PENN 80-275, is DISMISSED.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 18 1980

CLIMAX MOLYBDENUM COMPANY, Applicant	:	Applications for Review
v.	:	Docket No. DENV 78-553-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 331733 July 27, 1978
	:	Docket No. DENV 78-554-M
	:	Citation No. 331744
CLIMAX MOLYBDENUM WORKERS, LOCAL NO. 2-24410, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, Respondent	:	July 27, 1978
	:	Docket No. DENV 78-555-M
	:	Citation No. 331747 July 28, 1978
	:	Climax Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEST 79-340-M
v.	:	A/O No. 05-00354-05025
CLIMAX MOLYBDENUM COMPANY, Respondent	:	Climax Mine

DECISION

Appearances: Charles W. Newcom, Esq., Sherman and Howard, Denver, Colorado, for Climax Molybdenum Company;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Mine Safety and Health Administration;
David Jones, President, and James Kasic, Law Clerk, Climax Molybdenum Workers, Local No. 2-24410, Oil, Chemical and Atomic Workers International Union, Leadville, Colorado, for the Union.

Before: Judge Cook

I. Procedural Background

On August 28, 1978, Climax Molybdenum Company (Climax) filed applications for review in Docket Nos. DENV 78-553-M, DENV 78-554-M and DENV 78-555-M pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act). Answers were filed by the Mine Safety and Health Administration (MSHA) on September 7, 1978. On October 31, 1978, the Climax Molybdenum Workers, Local No. 2-24410, Oil, Chemical and Atomic Workers International Union (Union) elected party status.

On September 12, 1978, a notice of hearing was issued scheduling the application for review proceedings for hearing on November 28, 1978, in Denver, Colorado. On November 8, 1978, Climax filed motions for continuance and commencement of discovery, and on November 9, 1978, filed a motion for a prehearing conference for the determination of issues. The three motions were granted. The requested prehearing conference was held on December 1, 1978, in Arlington, Virginia. Thereafter, on January 5, 1979, Climax filed amended applications for review.

On May 5, 1979, a notice of hearing was issued scheduling the application for review proceedings for hearing on November 6, 1979, in Denver, Colorado. On September 26, 1979, Climax and MSHA filed a joint motion for continuance. The motion was granted on October 3, 1979, and the cases were continued to January 15, 1980, in Denver, Colorado. On January 2, 1980, Climax filed a motion for continuance. The motion was granted on January 7, 1980, and the hearing was continued to March 11, 1980, in Silverthorn and Breckenridge, Colorado.

Extensive discovery was authorized and various telephone conferences were held at various stages of the proceedings.

The above-captioned civil penalty proceeding was filed by MSHA on September 24, 1979, pursuant to section 110(a) of the 1977 Mine Act alleging 12 violations of various provisions of the Code of Federal Regulations. The three citations at issue in the above-captioned application for review proceedings are also at issue in the civil penalty case. Climax filed its answer on October 15, 1979, and on October 24, 1979, the case was assigned to Administrative Law Judge John J. Morris of the Commission's Office of Administrative Law Judges located in Denver, Colorado. On January 18, 1980, MSHA filed a motion to withdraw the proposal for a penalty as relates to Citation Nos. 333241, 333339 and 333340. MSHA's motion was granted by Judge Morris on February 25, 1980.

Thereafter, Climax moved to transfer the civil penalty case to the undersigned and such transfer occurred on March 4, 1980. On March 7, 1980, a notice of hearing was issued consolidating the case with the above-captioned application for review proceedings and scheduling it for hearing on March 11, 1980, in Silverthorn Colorado.

The hearing was held on March 11, 1980, in Silverthorn, Colorado, and on March 12, 1980, in Breckenridge, Colorado. Representatives of Climax and MSHA appeared and participated on both days. A representative of the Union appeared on March 11, 1980, and limited his participation to the delivery of a brief opening statement.

At the beginning of the hearing, MSHA filed a written motion in Docket No. WEST 79-340-M to withdraw the proposal for a penalty as relates to all remaining citations except the three at issue in the application for review proceedings. An order granting the motion is contained in this decision.

At the conclusion of the hearing, an agreement was reached addressing the posthearing filing of definitions contained in certain treatises. On April 28, 1980, Climax filed copies of definitions contained in treatises entitled, IEEE Standard Dictionary of Electrical and Electronic Terms, A Dictionary of Mining, Mineral, and Related Terms [U.S. Department of Interior], and the National Electrical Code. These exhibits were marked for identification as Exhibits 0-9, 0-10, and 0-11, respectively, and received in evidence on June 13, 1980.

Climax and MSHA filed posthearing briefs on May 16, 1980, and June 13, 1980, respectively. Climax filed a reply brief on July 1, 1980. The Union did not file a posthearing brief.

The transcript of the hearing was received by the undersigned Administrative Law Judge on June 4, 1980. Thereafter, it was discovered that the court reporting company had failed to forward with the transcript a total of 26 exhibits received in evidence during the hearing, i.e., Joint Exhibits 1-A through 1-H, 2-A through 2-I, 3-A through 3-H, and Exhibit 0-4. By a letter dated August 14, 1980, the three parties were apprised of this and were requested to submit substitute copies of the missing exhibits in conjunction with an appropriate stipulation. Additionally, the representatives of Climax and MSHA were directed to obtain the signature of the Union's representative on the stipulation filed at the hearing on March 11, 1980. Climax filed copies of Joint Exhibits 1-A through 1-H, 2-A through 2-I, and 3-A through 3-H, on September 8, 1980. The attached cover letter states that the parties "are in agreement that copies of these exhibits be placed in the record as substitutes for the missing joint exhibits. They bear identical numbers to the original exhibits. We are also in agreement that the cable which you have in your possession be substituted for missing Exhibit 0-4."

On September 9, 1980, MSHA filed a statement agreeing to the substitution. To date, the Union has not filed a written statement agreeing to the substitution. The Union did not introduce any exhibits in evidence during the hearing. However, copies of Climax's September 8, 1980, cover letter and MSHA's September 9, 1980, filing were served on the Union, and the Union has not filed a statement in opposition to the substitution. Accordingly, the substitution will be made and the exhibits will be considered in deciding these cases.

Additionally, on September 15, 1980, an agreement to the March 11, 1980, stipulation bearing the Union representative's signature was filed.

II. Violations Charged in Docket No. WEST 79-340-M

Citation No.	Date	30 C.F.R. Standard
331733	July 27, 1978	57.12-82
331744	July 27, 1978	57.12-82
331747	July 28, 1978	57.12-10
333300	August 7, 1978	57.12-28
333331	November 27, 1978	57.12-1
333241	December 27, 1978	57.12-1
333242	December 27, 1978	57.12-25
333246	December 27, 1978	57.12-13
333335	December 27, 1978	57.12-13
333336	December 27, 1978	57.12-13
333339	December 27, 1978	57.12-1
333340	December 27, 1978	57.12-1

III. Witnesses and Exhibits

A. Witnesses

MSHA called as its witnesses Lawrence P. Filek, an electrical engineer at MSHA's Denver Technical Support Center; William S. Vilcheck, an electrical engineer at MSHA's Pittsburgh Technical Support Center; and James Atwood, a Federal mine inspector.

Climax called as its witnesses Edwin D. Matheson, an electrician in the Storke locomotive shop of the Climax Mine and Chairman of the International Brotherhood of Electrical Workers, Local No. 1823; Harden H. Williams, an electrical foreman at the Climax Mine; George E. Pupera, electrical superintendent at the Climax Mine; and Dr. Fred Leffler, Associate Professor of Electrical Engineering at the Colorado School of Mines.

B. Exhibits

1. The following joint exhibits were introduced in evidence:

Joint Exhibit 1-A is a copy of Citation No. 331733, July 27, 1978, 30 C.F.R. § 57.12-82.

Joint Exhibits 1-B through 1-E are copies of various subsequent action forms pertaining to Joint Exhibit 1-A granting various extensions of the time period for abatement.

Joint Exhibit 1-F is a copy of the inspector's statement pertaining to Joint Exhibit 1-A.

Joint Exhibit 1-G is a copy of the termination of Joint Exhibit 1-A.

Joint Exhibit 1-H is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 1-A.

Joint Exhibit 2-A is a copy of Citation No. 331744, July 27, 1978, 30 C.F.R. § 57.12-82.

Joint Exhibits 2-B, 2-D, 2-E, and 2-F are copies of various subsequent action forms pertaining to Joint Exhibit 2-A granting various extensions of the time period for abatement.

Joint Exhibit 2-C is a copy of a modification of Joint Exhibit 2-B.

Joint Exhibit 2-G is a copy of the inspector's statement pertaining to Joint Exhibit 2-A.

Joint Exhibit 2-H is a copy of the termination of Joint Exhibit 2-A.

Joint Exhibit 2-I is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 2-A.

Joint Exhibit 3-A is a copy of Citation No. 331747, July 28, 1978, 30 C.F.R. § 57.12-10.

Joint Exhibits 3-B through 3-E are copies of various subsequent action forms pertaining to Joint Exhibit 3-A granting various extensions of the time period for abatement.

Joint Exhibit 3-F is a copy of the inspector's statement pertaining to Joint Exhibit 3-A.

Joint Exhibit 3-G is a copy of the termination of Joint Exhibit 3-A.

Joint Exhibit 3-H is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 3-A.

Joint Exhibit 4 is a booklet published by Climax containing general information about the Climax Mine.

Joint Exhibit 5 is a booklet published by Climax entitled "This is Climax Molybdenum."

Joint Exhibit 6 lists the type of electical cables at issue in these proceedings.

Joint Exhibits 7 through 14 are photographs.

Joint Exhibit 15 is a copy of a memorandum dated January 22, 1975, from William W. Carlson, Mining Engineer, Metal and Nonmetal Mine Health and Safety, Duluth Subdistrict, Marquette, Michigan, to A. Z. Dimitroff, Chief, Denver Technical Support Center, Denver, Colorado, addressing the subject of

electrocution hazard potential when powerlines are installed in contact with water and air lines.

Joint Exhibit 16 is a copy of a memorandum dated January 30, 1975, from the Electrical Engineer, Industrial Safety Group, to the Chief of the Denver Technical Support Center addressing powerlines in contact with metal pipelines.

Joint Exhibit 17 is a copy of a memorandum dated January 31, 1975, from the Chief of the Denver Technical Support Center, to William W. Carlson replying to Joint Exhibit 15.

Joint Exhibit 18 is a copy of the Nelson/Shepich Memorandum of February 21, 1975.

Joint Exhibit 19 is a copy of a memorandum dated August 19, 1975, from the Chief of the Mine Electrical Systems Group, to the Assistant Administrator for Metal and Nonmetal Mine Health and Safety containing an opinion on the interpretation of mandatory safety standard 30 C.F.R. § 57.12-82.

Joint Exhibit 20 is a copy of a memorandum dated February 10, 1978, from the Electrical Engineer, Mine Electrical Systems Branch, to Allen D. Stoutenger, Mining Engineer, Rocky Mountain Subdistrict Office, Lakewood, Colorado, addressing mandatory safety standard 30 C.F.R. § 57.12-82.

2. MSHA introduced the following exhibits in evidence:

M-1 through M-6 are photographs.

M-7 is a copy of an extract from the National Electrical Code.

M-8 is a copy of an extract from the American Electrician's Handbook.

3. Climax introduced the following exhibits in evidence:

O-1 is a booklet published by Climax entitled "Technical Information."

O-2 is the affidavit of Otto W. Drager.

O-3 is a copy of an extract from the National Electrical Code.

O-4 is a segment of electrical cable.

O-5 is a copy of an extract from the Anixter Brothers, Inc., supply catalog containing detailed specifications for the cables listed in Joint Exhibit 6.

O-6 is a copy of Dr. Leffler's resume.

0-7 contains copies of pages from the 1978 Annual Book of ASTM Standards.

0-8 is a copy of an extract from the American Electrician's Handbook.

0-9 contains copies of pages from the IEEE Standard Dictionary of Electrical and Electronics Terms.

0-10 contains copies of pages from A Dictionary of Mining, Mineral, and Related Terms.

0-11 is a copy of an extract from the 1978 National Electrical Code.

IV. Issues

A. The following issues are presented in the above-captioned application for review proceedings:

1. Whether the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses not only the conductor, but also the other constituent parts of the cable used as a powerline, such as the insulation, filler and jacket.

2. If the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses the conductor, insulation, filler and jacket, then whether the regulation requires the use of additional insulation where the powerline achieves contact with waterlines, telephone lines, and air lines.

3. If the regulation requires the use of additional insulation where the powerline achieves contact with waterlines, telephone lines, and air lines, then what type of additional insulation is needed to comply with the standard?

4. Whether mandatory safety standard 30 C.F.R. § 57.12-10 is violated when the outer jacket of a telephone line achieves contact with the outer jacket of a cable used as a powerline.

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

V. Opinion and Findings of Fact

A. Stipulations

1. 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, these proceedings.

3. At all times relevant to the above-captioned proceedings, MSHA inspector James L. Atwood was an authorized representative of the Secretary of Labor.

4. Citation No. 331733, Docket No. DENV 78-553-M was issued on July 27, 1978, by inspector James L. Atwood. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form MSHA 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 1.

5. On July 27, 1978, Inspector Atwood issued Citation No. 331744, Docket No. DENV 78-554-M. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 2.

6. Citation Nos. 331733 and 331744 both involve alleged violations of regulatory standard 30 C.F.R. § 57.12-82.

7. Citation No. 331747, Docket No. DENV 78-555-M was issued by Inspector Atwood on July 28, 1978. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form MSHA 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 3.

8. Citation No. 331747 involves an alleged violation of 30 C.F.R. § 57.12-10.

9. The central question in the above-captioned actions is what constitutes suitable insulation or separation of powerlines from telephone lines, waterlines, or air lines.

10. Climax and MSHA agree that Inspector Atwood observed various places on the 600 Level and the Storke Level at the Climax Mine in which the outer jacket of an insulated and jacketed power cable was touching an air line, waterline or telephone line. The power conductors in these cables were carrying voltages ranging from 110 volts to 440 volts. The cables were in satisfactory condition.

11. MSHA and Climax are in agreement that each of the joint exhibits attached hereto should be admitted into evidence.

12. The Climax Mine is located at the peak of Fremont Pass in Lake County, Colorado, approximately 13 miles northeast of Leadville, Colorado, at an altitude of 11,318 feet. It is one of the world's major producers of molybdenum and the second largest underground mine in the world.

13. The Climax Mine operates 24 hours per day employing a total of approximately 3,000 employees, roughly half of whom work underground. The mine has open pit operations which employ approximately 400 workers. The mine also has crushing and milling facilities employing approximately 400 employees. The remaining employees perform various administrative functions on the surface.

14. The mine presently has two underground production levels. One level (referred to as the Storke Level) has been in production since 1952. The second underground level (the 600 Level) has been in production since 1972. Development work has begun on a third underground level which will be known as the 900 Level.

15. Open pit production began in 1974.

16. Total production at the mine is approximately 50,000 tons of ore per day.

17. Molybdenum ore is mined underground by the block caving method. A cave is created above the production areas by drilling and blasting. After the rock is fractured by blasting, creating the cave, the force of gravity causes the rock to continue to break. The rock then falls from the cave into raises (fingers) that run at a 45-degree angle into a slusher drift. Each slusher drift (also called a dash) has six finger raises. The fractured rock falls through the raise into the slusher drift. Each slusher drift has a 150-horsepower electrical motor which powers a dipper that is pulled back and forth in the slusher dash. The dipper pulls the rock towards a draw hole which is 3.9 feet wide and 8 feet long. The rock falls through the draw hole into ore trains that are sitting on tracks in a haulage drift which is located approximately 10 feet below the floor of the slusher drift. The haulage drift is perpendicular to the slusher drift. The block caving method is illustrated in Joint Exhibit 4, especially the drawings on pages 8-10. Joint Exhibit 5, "This is Climax Molybdenum," also describes the mine's operations.

18. This action involves only power cables in the drifts of the mine which have track for haulage of ore, or other materials, by rail. The Climax Mine has approximately 24 miles of haulage drifts. These drifts contain an estimated 367,000 feet of cable of the types in issue here (see paragraph 21). There are approximately 24 miles of air lines and 24 miles of waterlines in these drifts.

19. As a general rule, air lines and waterlines are on one side of the drift and power cables are on the other side of the drift.

20. All of the power cables involved in this action carry voltages having low potential (low potential is defined in 30 C.F.R. § 57.2 as 650 volts or less). In fact, none of these cables carry in excess of 440 volts.

21. The types of cables involved in this action are listed in Exhibit 6.

22. The power cables in issue in this action never carry voltages greater than the manufacturer's insulation rating for that cable.

23. These power cables may from time to time be on the same side of the drift as an air line or a waterline for a variety of reasons. These reasons include the following:

A. It is sometimes necessary to move air or waterlines or power cables from one side of the drift to the other in order to transmit air, water, or electricity to a particular location.

B. At intersections of drifts, air lines, waterlines, or power cables will frequently cross.

C. The distribution of power within production areas leads to numerous crossovers which are unavoidable. Power for slusher operations is distributed via cable referenced in paragraph 21 above. The main distribution cable is the 500 M.C.M. cable. 2/0 feeder cables are spliced into that 500 M.C.M cable to run power into a switch vault. Switch vaults are 70 feet apart in production areas on alternate sides of the haulage drift. (There are approximately 300 switch vaults in the mine. Approximately 150 are in production areas. At any given time, approximately 50 more switch vaults are active in supplying power to fans or other electrical equipment.) From the switch vault power is distributed to the motors in two slusher dashes. Slusher motors are also on alternating sides of the haulage drift, thus requiring at least one additional crossover of power cable and also frequently requiring that the power cable run parallel to the air and waterlines for several feet. These types of crossovers are illustrated in the photographs attached hereto as Joint Exhibits 7 through 14. Exhibit 7 shows a place where two drifts "Y" together. Exhibits 8, 9, and 10 illustrate the normal configuration of drifts with power cable on one side and pipelines on the other side of the drift. These exhibits also show power cable crossovers. Exhibit 11 is a closeup of cable crossing a drift running from a switch vault, across the back and up into a slusher dash. Exhibit 12 shows a switch vault on the same side of a drift as the power cable bundle, with the feeder cable out to the slusher dashes. Exhibit 13 shows another switch vault which provides power for two slusher machines; that switch vault is on the pipeline side of the drift. Exhibit 14 shows a small switch vault which supplies power to a nonproduction area.

24. The dielectric strength of air or a substance refers to the ability of air or that substance to offer a high resistance to the passage of electricity through it.

25. A powerline is a conducting material capable of carrying electrical power. A communication line (because of the low current flow) is not a poweline.

26. The court should be aware of three prior cases involving 30 C.F.R. § 57.12-82.

27. The first case is Docket No. DENV 79-92-PM, Secretary of Labor v. Kerr-McGee Nuclear Corporation. The facts in that case involved a situation in which the outer jacket of a power cable assembly was in contact with a metal pipeline. That power cable assembly consisted of conductors, each of which were surrounded by insulation having a manufacturer's rating equal to or greater than the voltage applied to the power conductors. The insulated power conductors were then surrounded by an outer jacket which was in satisfactory condition. The only thing that came in contact with the metal pipeline was the outer jacket. By motion filed May 21, 1979, MSHA moved to vacate the citation issued on those facts because there was "insufficient evidence available to support the alleged violation."

28. In a case involving similar facts, Docket No. WEST 79-252-M, MSHA v. Sunshine Mining Company, by motion served November 7, 1979, MSHA also moved to vacate a citation issued under 30 C.F.R. § 57.12-82 because "there [was] insufficient evidence to sustain the allegations contained in the citation." The facts in the Sunshine Mining case were essentially the same as those in the Kerr-McGee case.

29. In a decision dated November 29, 1979, Secretary of Labor v. Ozark Mahoning Co., Docket No. VINC 79-138-PM, Judge Stewart found a violation of 30 C.F.R. § 57.12-82. The similarity between the facts of that case and the facts of this case are uncertain since he indicates in discussing one of the citations that the "outer jacket of the cable was comprised of neoprene and rubber insulation" and on the other citation that the powerline "was protected only by factory insulation." Here each of the cables are insulated and covered with a separate heavy-duty outer jacket approved for use in mines by the Bureau of Mines.

30. Attached as Joint Exhibits 15 through 20 are various letters and interpretive memoranda issued by MSHA regarding 30 C.F.R. § 57.12-82. These constitute all of the published and unpublished interpretive letters or memoranda regarding that standard.

31. The primary purpose of this litigation is for Climax and MSHA to resolve a conflict between them regarding interpretation of the regulatory provisions in issue in this action. Climax and MSHA thus agree that in the event the court should determine that a violation(s) occurred, the appropriate civil penalty would be the amount the citation(s) was assessed for by the Office of Assessments. These amounts are as follows: Citation No. 331733--$72; Citation No. 331744--$78; and Citation No. 331747--$66.

32. Climax is a large operator within the meaning of the 1977 Mine Act.

33. Climax demonstrated good faith in attempting rapid abatement of the practices described in Citation Nos. 331733, 331744 and 331747.

B. Opinion and Findings of Fact

1. Occurrence of Violations

The principal question presented in the above-captioned cases is what constitutes suitable insulation where powerlines achieve contact with telephone lines, waterlines, or air lines. The basic facts are relatively uncomplicated. The parties, however, demonstrate considerable disagreement both as to the legal significance of the facts and as to the proper interpretation of the cited mandatory safety standards.

Citation Nos. 331733, 331744 and 331747 were issued at the Climax Mine by Federal mine inspector James L. Atwood during the course of the first inspection of that mine conducted pursuant to the provisions of the 1977 Mine Act (Tr. 203).

Citation Nos. 331733 and 331734 were issued on July 27, 1978, addressing identical practices detected by Inspector Atwood on the 600 Level and Storke Level, respectively. These citations charge Climax with violations of mandatory safety standard 30 C.F.R. § 57.12-82 in that energized powerlines of various voltages were in contact with pipelines in various places. 1/ The term "pipelines," as used in the citations, refers to both air lines and waterlines (Tr. 213), and the term "powerlines" refers to the outer jacket on insulated and jacketed cables (Tr. 223).

Citation No. 331747 was issued on July 28, 1978, addressing a practice detected by Inspector Atwood on the 600 Level. The citation charges Climax with a violation of mandatory safety standard 30 C.F.R. § 57.12-10 in that several telephone lines were observed hanging with and touching energized powerlines. The citation further alleges that the practice existed in all areas of the 600 Level. 2/ The inspector testified that he checked a total of 10 telephones and that in each instance the telephone line "came out of the phone and went right up and into a bundle of powerlines, and went down

1/ Citation No. 331733, July 27, 1978, 30 C.F.R. § 57.12-82 states the following: "Powerlines and pipelines were in contact on the 600 level in various places. These were energized powerlines of various voltages from 110 V up." Citation No. 331744, July 27, 1978, 30 C.F.R. § 57.12-82 states the following: "Powerlines and pipelines were in contact on the Storke level in various places. These were energized powerlines of various voltages from 110V on up."

2/ Citation No. 331747, July 28, 1978, 30 C.F.R. § 57.12-10 states the following: "Several phone lines on the 600 level were observed hanging with and touching energized powerlines. This condition exists in all of the areas of the 600 level. A total of 10 phones were checked and the lines were all in contact with the powerlines."

the drift" (Tr. 218). He further testified that the telephone lines in question had jackets (Tr. 257), and that the citation addresses the outer jackets of telephone lines touching the outer jackets of power cables (Tr. 223).

At various times between August 25, 1978, and February 2, 1979, Federal mine inspectors James D. Enderby and David Park issued subsequent action notices extending the time periods for abatement. The citations were terminated in April of 1979 by Federal mine inspector Elmer E. Nichols.

The parties stipulated that molybdenum ore is mined underground at the Climax Mine by the block caving method. A cave is created above the production areas by drilling and blasting. After the rock is fractured by blasting, creating the cave, the force of gravity causes the rock to continue to break. The rock then falls from the cave into raises (fingers) that run at a 45-degree angle into a slusher drift. Each slusher drift (also called a dash) has six finger raises. The fractured rock falls through the raise into the slusher drift. Each slusher drift has a 150-horsepower electrical motor which powers a dipper that is pulled back and forth in the slusher dash. The dipper pulls the rock towards a draw hole which is 3.9 feet wide and 8 feet long. The rock falls through the draw hole into ore trains that are sitting on tracks in a haulage drift which is located approximately 10 feet below the floor of the slusher drift. The haulage drift is perpendicular to the slusher drift.

The parties further stipulated that the instant cases involve only power cables in drifts of the mine which have track for the haulage of ore, or other materials, by rail. The Climax Mine has appoximately 24 miles of haulage drifts, and these drifts contain an estimated 367,000 feet of cable of the types in issue here. The types of cables involved in these proceedings are listed on Joint Exhibit 6. There are approximately 24 miles of air lines and 24 miles of waterlines in these drifts.

All of the power cables involved in the instant cases carry voltages having low potential, as that term is defined by 30 C.F.R. § 57.2, i.e., 650 volts or less. None of these cables carry in excess of 440 volts. Additionally, the cables never carry voltages greater than the manufacturer's insulation rating.

As a general rule, air lines and waterlines are on one side of the drift and power cables are on the other side of the drift. However, the power cables may, from time to time, be on the same side of the drift as an air line or a waterline for a variety of reasons. These reasons include the following: First, it is sometimes necessary to move air or waterlines or power cables from one side of the drift to the other in order to transmit air, water, or electricity to a particular location. Second, at intersections of drifts, air lines, waterlines, or power cables will frequently cross. Third, the distribution of power within production areas leads to numerous crossovers which are unavoidable. Power for slusher operations is distributed via cable referenced in Joint Exhibit 6. The main distribution cable is the 500 M.C.M.

cable. 2/0 feeder cables are spliced into that 500 M.C.M. cable to run power into a switch vault. Switch vaults are 70 feet apart in production areas on alternate sides of the haulage drift. There are approximately 300 switch vaults in the mine. Approximately 150 are in production areas. At any given time, approximately 50 more switch vaults are active in supplying power to fans or other electrical equipment. Power is distributed from the switch vault to the motors in two slusher dashes. Slusher motors are also on alternating sides of the haulage drift, thus requiring at least one additional crossover of power cable and also frequently requiring that the power cable run parallel to the air and waterlines for several feet.

In addition to the foregoing, the parties stipulated that when the respective citations were issued, Inspector Atwood observed various places on the 600 Level and the Storke Level at the Climax Mine in which the outer jacket of an insulated and jacketed power cable was touching an air line, waterline or telephone line, and that the power conductors in these cables were carrying voltages ranging from 110 volts to 440 volts. Furthermore, the parties stipulated that the cables were in satisfactory condition.

Mandatory safety standard 30 C.F.R. § 57.12-82 provides as follows: "Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines." The regulation applies "only to the underground operations of underground mines." 30 C.F.R. § 57.1. The principal area of disagreement between the parties centers around the appropriate definition of the term "powerlines" and the determination as to what constitutes suitable insulation at the points where powerlines achieve contact with waterlines, air lines, and telephone lines.

Climax argues that the term "powerline" should be defined as a "conducting material capable of carrying electrical power;" i.e., that the definition of powerline should be limited to the copper conductors contained within a power cable, and exclude the insulation, jacket and filler. Climax further argues that when this definition is applied, one can then consult both the American Society for Testing and Materials (ASTM) standards for the manufacture of power cable and accepted principles of electrical engineering to determine whether the insulation is sufficient. In Climax's view, unless such definition is adopted, no objective basis exists for determining what constitutes suitable insulation. Additionally, Climax maintains that its interpretation is consistent with the electrical standards in 30 C.F.R. § 57.12. (Climax's Posthearing Brief, pp. 8-15, 20).

MSHA categorically rejects Climax's contentions and argues that "powerline" includes not only the metal that actually conducts the flow of power from one point to another, but also the component parts that make up the line from one point to another, i.e., the insulation, jacket and filler. (MSHA's Posthearing Brief, p. 3). For the reasons set forth below, I conclude that the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses not only

the conductor, but also all constituent parts of the cable that make up the line from one point to another, e.g., the insulation, jacket and filler. 3/

Neither Climax's nor MSHA's witnesses were able to point to a learned treatise in the field of electrical matters containing a definition of the term "powerline," and none of the exhibits suggest an express definition for the term. Accordingly, on the basis of the record developed in these cases, it must be concluded that the term "powerline," as used in the general electrical field, is not susceptible to a precise definition of the type that would be of meaningful assistance in deciding the issues presented in the instant cases. It is therefore necessary to consider all electrical standards and definitions contained in Part 57 of Title 30 of the Code of Federal Regulations in order to determine the meaning of the term "powerline" as used in the context of standards designed to secure a safe work place for miners working in the underground areas of metal and nonmetallic mines.

A full review of the electrical standards and definitions set forth in Part 57 of Title 30 of the Code of Federal Regulations convinces me that Climax's definition of the term "powerline" is inaccurate when viewed in the context of mine safety as relates to electrical applications located in the underground areas of underground metal and nonmetallic mines. The electrical terms appearing most frequently in 30 C.F.R. § 57.12, insofar as material to the instant cases, are "cables," trailing cables," "power cables," "conductors," "power conductors," "bare power conductors," "electrical conductors," "power wires," "signal wire," "bare signal wires," "trolley feeder wires," "trolley wires," "powerlines" and "bare powerlines." Of these, only the term "conductor" is expressly defined within Part 57 of Title 30. Climax's proffered definition of "powerline" is identical in all material respects to the definition of "conductor" set forth at 30 C.F.R. § 57.2, which provides as follows: "'conductor' means a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." It can therefore be deduced that if the drafters of the subject regulation had intended it to require only "conducting material capable of carrying electrical power" to be "well separated or insulated from waterlines, telephone lines, and air lines," then they would have used the term "conductors" in lieu of the term "powerlines." Substantial guidance is also provided by a comparison of mandatory safety standards 30 C.F.R. § 57.12-66 and 30 C.F.R. § 57.12-82. The former

3/ Climax maintains that MSHA stipulated to this definition of a powerline and that MSHA should not be permitted to depart from the definition as stipulated (Climax's Posthearing Brief, pp 14-15). The stipulation in question states as follows: "A powerline is a conducting material capable of carrying electrical power. A communication line (because of the low current flow) is not a powerline." Having considered both the comments of counsel for MSHA (Tr. 117-118, 122-123) and the precise wording of the stipulation, I conclude that the sole purpose of this stipulation was to set forth a distinction as to the different functions performed by powerlines and communication lines. Accordingly, the conclusion reached in this decision as relates to the definition of "powerline" does not do violence to the stipulation.

regulation, applicable "only to the surface operations of underground mines," 30 C.F.R. § 57.1, makes express reference to "bare powerlines" (emphasis added). The latter regulation, applicable only to the underground operations of underground mines, refers to "powerlines" and does not contain the modifying adjective "bare." In view of the foregoing, it is apparent that the drafters of Part 57 of Title 30 intended that the term "powerline," in the context of 30 C.F.R. § 57.12-82, envisioned a line that already included a conductor or conductors with the insulation and jacket as manufactured, such as exists in Exhibit O-4. Accordingly, I conclude that the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses not only the metal that actually conducts the flow of electricity from one point to another, but also all component parts that make up the line from one point to another. The electrical cables at issue in Citation Nos. 331733 and 331744 were "powerlines" within the meaning of the cited regulation. Furthermore, the terms "trolley wires" and "bare power conductor," as treated in 30 C.F.R. § 57.12-80, bolster the proposition that the term "powerlines" in the context of 30 C.F.R. § 57.12-82 envisioned something more than bare power conductors.

The second area of controversy concerns the determination as to what constitutes insulation in compliance with the regulation. Both MSHA and Climax agree that the purpose of 30 C.F.R. § 57.12-82 is to prevent a waterline, telephone line or air line from becoming energized (Climax's Posthearing Brief, p. 19; MSHA's Posthearing Brief, p. 4). Climax argues that compliance with the standard is achieved if the manufacturer applied insulation on the powerline is sufficient to achieve the standard's objective. Accordingly, Climax argues that the cables at issue (Joint Exh. 6) provide the requisite protection by their design (Climax's Posthearing Brief).

MSHA argues that, in the context of mining, avoidable hazards and risks are required to be eliminated to the greatest extent possible, and that this objective is attained when the powerlines are well separated from the waterlines, telephone lines and air lines, or when insulation, in addition to that which is placed on the powerline by the manufacturer, is used at the points of contact. In MSHA's view, Climax's proffered interpretation is both shortsighted and naive because it incorrectly assumes that powerlines used in the underground areas of metal and nonmetallic mines will never sustain damage. According to MSHA, Climax's approach allows avoidable hazardous conditions to remain in the miner's work environment, and places excessive faith in the initial construction and manufacturer's testing of every inch, foot and mile of powerline used in the Climax Mine. MSHA points to the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18) as a detailed statement of its interpretation of the requirements of the regulation, and argues that the interpretation set forth in the memorandum should be accorded deference, citing Bell v. Brown, 557 F.2d 849, 855 (D.C. Cir. 1977); Perine v. William Norton & Company, Inc., 509 F.2d 114, 120 (2d Cir. 1974); 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 637 (1978) (MSHA's Posthearing Brief, pp. 2-7).

It is unnecessary to rely upon the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18) for the proposition that mandatory safety standard 30 C.F.R. § 57.12-82 requires the use of additional insulation at

the points where powerlines contact waterlines, telephone lines and air lines. The regulation, when interpreted in accordance with the principles of statutory construction, requires the use of additional insulation.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland Statutory Construction, § 31.06, p. 362 (1972). According to 2 Am. Jur.2d, Administrative Law, § 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe work places must be interpreted in light of the express Congressional purpose of providing a safe work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974).

Mandatory safety standard 30 C.F.R. § 57.12-82 uses the terms "powerlines" and "insulated." As noted previously in this decision, it is apparent that the drafters of Part 57 of Title 30 intended that the term "powerline," in the context of 30 C.F.R. § 57.12-82, envisioned a line that already included a conductor or conductors with the insulation and jacket as manufactured, such as exists in Exhibit O-4. Accordingly, the use of the term "insulated" in 30 C.F.R. § 57.12-82 would be a redundancy if it did not require the use of additional insulation. It is a time-honored rule of statutory construction that effect must be given, if possible, to every word, clause and sentence contained in a statute. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." C. D. Sands, 2A Sutherland Statutory Construction, § 46.06, p. 63 (1973). However, it is equally "clear that if the literal import of the text of an act is not consistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature." C. D. Sands, 2A Sutherland Statutory Construction, § 46.07, p. 65 (1973).

The foregoing interpretation of 30 C.F.R. § 57.12-82 as requiring additional insulation where powerlines achieve contact with waterlines, telephone lines and air lines, gives effect to both words contained in the regulation, preserves the intent of the drafters, and harmonizes with Congress' goal of accident prevention. It cannot be said that the drafters were unaware of the significance attached to the use of the term "insulated," because such term is defined by 30 C.F.R. § 57.2 as follows:

> "Insulated" means separated from other conducting surfaces by a dielectric substance permanently offering a high resistance to the passage of current and to disruptive discharge through the substance. When any substance is said to

be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected. Otherwise, it is, within the purpose of this definition, uninsulated. Insulating covering is one means for making the conductor insulated.

It is significant to note that "[w]hen any substance is said to be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected." Climax's position in this case fails to take this requirement into account.

Climax's principal argument asserts that the electrical cables used as powerlines in the underground areas of the Climax Mine accord the requisite protection that the regulation seeks to secure by virtue of their very design. The testimony of Dr. Fred Leffler, Associate Professor of Electrical Engineering at the Colorado School of Mines, supports Climax's contention that the cables, manufactured in accordance with the ASTM standards, are substantially overdesigned in terms of their dielectric properties.

According to Dr. Leffler, the dielectric strength of ethylene-propylene rubber (EPR) is approximately 350 volts per mil, i.e., approximately 350 volts per 1/1000 of an inch (Tr. 363, 396). EPR is the type of insulation used on much of the cable at issue in the instant cases. These 600-volt rated, EPR-insulated cables have an insulation thickness ranging from 30 to 60 mils, depending on the size of the conductors (Exh. 0-7, Table 1D). The size of the conductors in the cables at issue ranges from 16 Awg to 500 mcm (Joint Exh. 6). Accordingly, these cables have insulation around the conductors with a dielectric strength rating, depending on the size of the conductors, of 10,500 volts (Awg sizes 14 to 9), 15,750 volts (Awg sizes 8 to 2), 19,250 volts (Awg sizes 1 to 4/0), and 22,750 volts (225-500 mcm). (See, Exh. 0-7, table 1D, and Tr. 361-364.)

Styrene butadiene rubber (SBR), the other type of insulation used on the power cables at issue in these proceedings, has a dieletric strength rating of approximately 250 volts per mil (Tr. 357-358). Accordingly, the 600-volt rated, SBR-insulated cables have insulation around the conductors with a dielectric strength rating, depending upon the size of the conductors, of 7,500 volts (Awg sizes 18-16), 11,250 volts (Awg sizes 14-9), 15,000 volts (Awg sizes 8-2), 20,000 volts (Awg sizes 1 to 4/0), and 23,750 volts (225 to 500 mcm). (See, Exh. 0-7, table 1A, and Tr. 357-361.)

The neoprene rubber used as a jacket is not taken into account when determining the insulation rating. The jacket serves to protect the insulation from outside forces such as oils, acids, alkalies, water or moisture, flame and abrasion (Tr. 48, 67-68, 365). However, both Dr. Leffler and Lawrence P. Filek, an MSHA electrical engineer, agreed that the jacket has an insulating capability (Tr. 49, 367). According to Dr. Leffler, neoprene and lead-cured neoprene have a dielectric strength of approximately 300 volts per mil (Tr. 367). Cable specifications set forth by Climax's cable supplier, Anixter Brother's Inc., indicate that the jacket on a three-conductor,

16-Awg cable, which appears to be the smallest cable listed on Joint Exhibit 6, is 4/64's of an inch (Exh. 0-5); i.e., 62.5 mils. Accordingly, the jacket on what appears to be the smallest cable would provide an extra 18,750 volts of dielectric substance on that cable.

The fact that the cables possess these qualities is not dispositive. It must be borne in mind that the powerline applications addressed by 30 C.F.R. § 57.12-82 are located in the underground areas of metal and nonmetallic mines, an extremely harsh environment. The cables can sustain physical damage from a variety of sources such as fly rock and concussion from blasting, rubbing by haulage equipment, and dragging over sharp rock or metal edges (Tr. 71, 73-74, 198-200, 215, 295, 329). According to Mr. Filek, if wires or small metal objects, propelled by a blast concussion, penetrated both the jacket and insulation, a waterline or air line could become energized in the absence of added insulation if the cable was within sufficient proximity to the waterline or air line. This could occur even though the cable did not contact the pipe at the point of penetration. Electricity can conduct along the surface of a contaminated cable to the point of contact (Tr. 75-76). Furthermore, it it should be borne in mind that Inspector Atwood worked as a miner at the Climax Mine from 1956 to 1972 (Tr. 195-196). His testimony is deemed particularly probative as relates to both the conditions existing in the mine and the frequency of employee contact with the waterlines and air lines. His testimony reveals that the mine is wet and that individuals walking through underground areas are walking in mud and water most of the time. It is extremely wet when the snow melts in spring. In fact, the mine resembles an underground lake in areas at that time of the year (Tr. 211). The inspector further testified that it is normal for miners to achieve physical contact with the waterlines and air lines during their normal working day. Physical contact can occur while hooking up air and water hoses, while climbing ladders or while stepping into the dashes (Tr. 214).

Additionally, it is significant to note that both Mr. Williams and Mr. Pupera testified that they would prefer added insulation at the point of contact prior to touching the water or air lines, provided the jacket and insulation had been penetrated (Tr. 315-316, 329-330).

It cannot be said that drafters of Part 57 of Title 30, in formulating their definition of "insulated," were unaware of either the harsh environment in the underground areas of metal and nonmetallic mines or the dielectric properties of jackets and insulation used on cables approved for use in mines. A substance is "insulated" when it is "insulated in a manner suitable for the conditions to which it is subjected," a requirement directly related to the mining environment. The fact that "[i]nsulating covering is one means for making the conductor insulated" shows that the drafters did not intend to rely solely upon the cable as manufactured in all cases.

These considerations, when applied to 30 C.F.R. § 57.12-82, point to an interpretation requiring the use of insulation in addition to that which is on the powerline. Given the harsh environment existing in the underground areas of metal and nonmetallic mines, it would be unreasonable to rely solely

upon the manufacturer-applied insulation to achieve the regulation's stated goal. In this environment, a mine operator cannot be 100 percent certain that every inch of powerline will retain its dielectric integrity throughout each hour and minute of the day. The added insulation may not be foolproof, but its use promotes the regulation's objective and thereby contributes to securing a safe work place for miners. "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972). Accordingly, I conclude that 30 C.F.R. § 57.12-82 requires the use of additional insulation where powerlines contact waterlines, telephone lines and air lines.

The final question presented as relates to Citation Nos. 331733 and 331744 concerns the type of additional insulation necessary to comply with the regulation. It is unnecessary to explore this issue in order to determine whether the cited practices constituted violations of 30 C.F.R. § 57.12-82 because the mine operator in this instance had no additional insulation at the points of contact with the air lines and waterlines. The absence of any additional insulation established violations of the regulation. However, the evidence does disclose the type of additional insulation necessary, at a minimum, to comply with the requirement, as set forth in the following paragraphs.

One of MSHA's interpretations is set forth in the last paragraph of the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18), as follows: "Additional insulation means that insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum applied voltage on the conductor." This interpretation is entitled to weight. As noted by the Commission in The Helen Mining Company, 1 FMSHRC 1796, 1801, 1979 OSHD par. 24,045 (1979):

> In accordance with this expression of congressional intent, we will accord special weight to the Secretary's view of the 1977 [Mine] Act and the standards and regulations he adopts under them. His views will not be treated like those of any other party, but will be treated with extra attention and respect * * *. [T]his weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution, or standards-making activities * * *.

The record offers no clear indication as to how the drafter of the memorandum reached the conclusion that the additional insulation "shall have a dielectric strength at least equal to the maximum applied voltage on the conductor." However, the record clearly shows that the wording in that paragraph of the memorandum does not set forth a logical interpretation as to the amount of additional insulation needed, as demonstrated by the testimony of two of MSHA's witnesses, Mr. Lawrence T. Filek and Mr. William S. Vilcheck.

Mr. Filek received a Bachelor of Science degree from the University of Illinois in 1951, and thereafter practiced his profession in both Government and the private sector. At the time of the hearing, he was in his fifth year of employment at MSHA's Denver Technical Support Center in Lakewood, Colorado. During cross-examination, he testified as follows:

> Q. Now, would it be a fair summary of this memorandum to say that what the Shepich-Nelson memorandum requires is that there be some insulation in addition to the jacketing on the power line?
>
> A. Yes.
>
> Q. And that that amount of insulation be, looking to the last sentence, at least equal to the maximum voltage applied on the conductor?
>
> A. What is implied there is that the dielectric strength of the insulation should be at least equal to the insulation -- the dielectric strength of the conductor, and not the applied voltage.
>
> Q. Well, let me rephrase the question. I think what the memorandum requires is that the additional insulation beyond the outer jacketing have a dielectric strength at least equal to the maximum voltage which would be applied to the power conductor; isn't that correct?
>
> A. I don't think so.
>
> Q. Oh? Well, could you restate for me then what you do believe it says?
>
> A. Well, I could restate for you what I believe it should say.
>
> Q. Well, I'm interested in what it says, Mr. Filek, not what you wish it said.
>
> A. Okay. This memorandum equates -- this memorandum equates dielectric strength, which is usually measured in volts per thickness of insulation to voltage, and the units do not -- do not correspond; therefore, it cannot be an equality.

(Tr. 113-114).

Mr. Vilcheck received a Bachelor of Science degree in electrical engineering and a Master of Science degree in electrical engineering in 1973 and 1975, respectively. Both degrees were received from West Virginia

University. He received an emphasis on power systems during his studies for his Master's of Science Degree, and, at the time of the hearing, was in his second year of employment at MSHA's Pittsburgh Technical Support Center. Mr. Vilcheck testified as follows during cross-examination:

> Q. Does Joint Exhibit 18 say you should double it? What does that Joint Exhibit 18 say should be doubled? That is, is it the voltage applied to the conductor, or is it the manufacturer's rating on the insulation?
>
> A. Okay. Exhibit 18 to me says that -- it says, "Insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum voltage on the conductor."
>
> Larry says we are kind of comparing apples to oranges. I think it results from a nontechnical person writing this memorandum. Okay?
>
> You know, we can argue what his intent was or how we interpret it to be, but actually what he has verbatim I don't think makes a whole lot of sense. Okay? We know that he's trying to put additional insulation on the conductor, and I think what he means is at least equal to that of the insulation on the conductor, but I --
>
> Q. But that's not what it says.
>
> A. What it says may be -- I'm not sure what it says is what his intent was either. Okay?

(Tr. 170).

The testimony of Mr. Filek reveals that the additional insulation will meet the requirements of 30 C.F.R. § 57.12-82 if it possesses the following traits: A piece of permanently fastened, nonabsorbent insulator should be placed between the cable and the waterline, telephone line, or air line (Tr. 107). The added insulation should have a dielectric rating at least equal to the dielectric rating of the cable when it was new (Tr. 110).

This is not to say, of course, that other methods of insulation cannot be employed. The only conclusion that can be drawn from the record is that added insulation with the foregoing characteristics is, at a minimum, sufficient to comply with 30 C.F.R. § 57.12-82.

In view of the foregoing, and particularly because in these instances no additional insulation whatsoever was applied, it is found that the practices set forth in Citation Nos. 331733 and 331744 were violations of 30 C.F.R. § 57.12-82. The applications for review will be denied in Docket Nos. DENV 78-553-M and DENV 78-554-M, and a civil penalty will be assessed for these violations in Docket No. WEST 79-340-M.

As noted previously in this decision, Citation No. 331747 alleges a violation of mandatory safety standard 30 C.F.R. § 57.12-10 in that several telephone lines were observed hanging with and touching energized powerlines. The cited mandatory safety standard provides as follows: "Telephone and low-potential signal wire shall be protected, by isolation or suitable insulation, or both, from contacting energized power conductors or any other power source."

The inspector's testimony reveals that the citation charges a violation of that portion of the regulation requiring telephone and low-potential signal wire to be protected, by isolation and/or suitable insulation, from contacting energized power conductors (see, e.g., Tr. 219, 251, 258). The phrase "or any other power source," as used in the regulation, refers to electrical switchboxes and items of a similar nature, but does not refer to a line (Tr. 258).

As noted previously in this decision, the inspector testified that the telephone lines in question had jackets, and that the citation addresses the outer jackets of telephone lines touching the outer jackets of power cables. It is therefore clear that the telephone lines were not in contact with "power conductors" in view of the definition of "conductor" set forth at 30 C.F.R. § 57.2.

Accordingly, the application for review will be granted in Docket No. DENV 78-555-M, and the proposal for a penalty in Docket No. WEST 79-340-M will be dismissed as relates to Citation No. 331747.

2. Evaluation of Civil Penalty Assessment Criteria

The parties stipulated that the primary purpose of this litigation is to permit Climax and MSHA to resolve a conflict between them regarding the interpretation of the regulations at issue. The parties further stipulated that if violations are found to have occurred, then the civil penalties assessed by the Office of Assessments would be appropriate. The relevant proposed assessments are identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment
331733	7/27/78	57.12-82	$ 72
331744	7/27/78	57.12-82	78
		Total:	$150

The record fully supports the assessment of civil penalties in the amounts proposed by the Office of Assessments. The absence of operator negligence is deemed of particular significance to this determination.

The record reveals that Climax is a large operator, producing approximately 50,000 tons of ore per day; that Climax has no history of previous violations for which assessments have been paid during the period of time

prior to July 27, 1978 (Tr. 22-23); and that Climax demonstrated good faith in attempting rapid abatement (Tr. 21-22, 202-203, 213). No evidence was presented establishing that the assessment of civil penalties will affect Climax's ability to remain in business, and, accordingly, it is found that the assessment of civil penalties for Citation Nos. 331733 and 331744 will not affect Climax's ability to remain in business. Hall Coal Company, 1 IBMA 175, 79 I.D. 688, 1971-1973 OSHD par. 15,380 (1972).

The air lines and waterlines in the Climax Mine are grounded to the rails of the haulage tracks at 500-foot intervals (Tr. 320), and are supported at 6- to 10-foot intervals on supports attached to rock bolts driven into the rock (Tr. 339). The rock at the Climax Mine makes a very good grounding medium (Tr. 339). Furthermore, the cables at issue in these proceedings were in satisfactory condition. Based upon these considerations, the design characteristics of the cables at issue in these proceedings and the voltages applied to the cables, Climax could have had some foundation for concluding that additional insulation was not necessary at the points where powerlines contacted waterlines, telephone lines and air lines because it could have concluded in good faith, although erroneously, that the objective of the regulation had been met. Accordingly, it is found that Climax did not demonstrate negligence in connection with the practices described in the citations.

The best available evidence indicates that no injuries have been sustained at the Climax Mine as a result of powerlines energizing waterlines, telephone lines or air lines (Tr. 297-298). In fact, Mr. Pupera, the electrical superintendent, had never heard of the AC system energizing a waterline or an air line at the Climax Mine, although he had heard of it occurring from other causes. He related approximately two or three occurrences over an 8-year period in which the trolley wire was knocked down and achieved contact with a pipe. In view of these considerations, the characteristics of the jacketed and insulated cables at issue in these proceedings, and the specific electrical applications encompassed by the citations, it is found that the occurrence of the event against which the standard is directed was improbable. However, if the event did occurr, then all miners achieving proper conductive contact with the waterlines or air lines would be exposed to serious or fatal injury (see, e.g., Tr. 213). Accordingly, it is found that the violations were moderately serious.

In view of the foregoing, Climax will be assessed civil penalties as set forth above.

VI. Petitioner's Motion in Docket No. WEST 79-340-M to Withdraw the Proposal for a Penalty as Relates to Certain Citations

MSHA filed a written motion during the hearing on March 11, 1980, to withdraw the proposal for a penalty as relates to six citations. The motion states, in part, as follows:

> 1. From August 7, 1978, to December 27, 1978, the following citations were issued to respondent:

(a) No. 333300 for an alleged violation of 30 C.F.R. § 57.12-10;

(b) No. 333331 for an alleged violation of 30 C.F.R §57.12-1;

(c) No. 333242 for an alleged violation of 30 C.F.R. § 57.12-25;

(d) No. 333246 for an alleged violation of 30 C.F.R. § 57.12-13;

(e) No. 333335 for an alleged violation of 30 C.F.R. § 57.12-13;

(f) No. 333336 for an alleged violation of 30 C.F.R. § 57.12-13.

2. On July 25, 1979, the Federal Mine Safety and Health Administration, Office of Assessments, assessed proposed penalties for each of the alleged violations set forth in the aforesaid citations, in the following amounts:

Citation No.	Assessed Proposed Penalty
333300	$255.00
333331	$325.00
333242	$ 56.00
333246	$325.00
333335	$325.00
333336	$325.00

3. There is insufficient evidence to establish a violation of the aforesaid mandatory standards as the only witness who can testify to the conditions of the alleged violations is permanently unavailable to testify at the hearing.

In view of the representations set forth above, an order will be entered granting MSHA's motion.

VII. Conclusions of Law

1. Climax Molybdenum Company and its Climax Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. Federal mine inspector James Atwood was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation Nos. 331733, 331744 and 331747.

4. The practices set forth in Citation Nos. 331733, and 331744 were in violation of mandatory safety standard 30 C.F.R. § 57.12-82.

5. The practice described in Citation No. 331747 was not a violation of mandatory safety standard 30 C.F.R. § 57.12-10.

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

VIII. Proposed Findings of Fact and Conclusions of Law

All briefs filed in these proceedings, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

ORDER

IT IS ORDERED that the February 25, 1980, determination in Docket No. WEST 79-340-M granting MSHA's motion to withdraw the proposal for a penalty as relates to Citation Nos. 333241, 333339 and 333340 be, and hereby is AFFIRMED.

IT IS FURTHER ORDERED that MSHA's March 11, 1980, motion to withdraw the proposal for a penalty in Docket No. WEST 79-340-M as relates to Citation Nos. 333300, 333331, 333242, 333246, 333335 and 333336 be, and hereby is GRANTED.

IT IS FURTHER ORDERED that the applications for review in Docket Nos. DENV 78-553-M and DENV 78-554-M be, and hereby are, DENIED, and that such application for review proceedings be, and hereby are, DISMISSED.

IT IS FURTHER ORDERED that the application for review in Docket No. DENV 78-555-M be, and hereby is, GRANTED, and that Citation No. 331747 be, and hereby is VACATED. The proposal for a penalty in Docket No. WEST 79-340-M is herewith DISMISSED as relates to such Citation.

IT IS FURTHER ORDERED that Climax be, and hereby is, ASSESSED civil penalties in the amount of $150, as set forth in Part V(B)(2), supra, and that Climax pay such civil penalties within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 18 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. LAKE 80-192-M
v.	:	A.C. No. 33-03760-05001
	:	Dorr Street Pit Mine
MAUMEE HAULERS AND EXCAVATORS, Respondent	:	

DECISION

Appearances: Marcella L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Robert H. Parker, Vice President, Maumee Haulers and Excavators, Swanton, Ohio, for Respondent.

Before: Judge Lasher

This proceeding arises under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Toledo, Ohio, on August 19, 1980. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred during closing argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions, and rationale appears below as it appears in the transcript, other than for minor corrections of grammar and punctuation and the excision of obiter dicta:

> This proceeding arises upon the filing of a petition for assessment of penalty by the Secretary of Labor on March 28, 1980, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a).
>
> The Secretary seeks penalties against Respondent for the commission of two violations cited in Citation Nos. 368929 and 368930, which were issued on July 18, 1979. Citation No. 368929 alleges an infraction of 30 C.F.R. § 50.9-1l

1/ Tr. 104-112.

and Citation No. 368930 alleges an infraction of 30 C.F.R. § 56.11-2. These two citations involved the same Insley crane, which was observed on July 18, 1979, in the Respondent's Dorr Street Pit and was seen by the inspector to have the following allegedly violative conditions present: First, that the window in the side door of the crane was cracked and broken; and, second, that a handrail was not provided on the elevated walkway on the crane.

The Respondent, in its response to my prehearing order, indicated two critical issues, one of which I find is ultimately dispositive of this case. The first issue raised by Respondent is that the crane in question was normally operated by a part-owner of the corporation, not an employee. The second issue was that the machine in question (the crane) was out of service and was not in use at the time the inspector cited the allegedly violative conditions. The Respondent admits that the two violations alleged, that is, the window violation and the handrail violations, did exist. Accordingly, I preliminarily conclude that the conditions described in the two subject citations did exist. This, of course, in view of the questions raised by Respondent, does not, in and of itself, constitute a finding that a violation of the Act did in fact occur.

Also preliminarily, I note that the record clearly indicates that the Respondent had no history of previous violations, and in this connection I further note that the two citaions were issued upon the first inspection of the sand pit in question. In addition, I preliminarily find, based upon the stipulation of the parties, that any penalty which I might assess in this case, up to the proposed initial assessment of MSHA, would not affect the Respondent's ability to continue in business. The parties also indicated that the Respondent is a small operator, so there is no (conflict) with respect to that traditional penalty assessment factor. In view of my subsequent finding, I find it unnecessary to evaluate the evidence with respect to negligence and gravity.

The Respondent, in closing argument, reiterated the two questions which had been raised previously in its prehearing submission. The second such issue being that since the cited machine was operated only by the owners of the corporation and not by employees, the jurisdiction of the Secretary, and I would presume the jurisdiction of the Federal Mine Safety and Health Review Commission, would not attach. I find no merit to this contention. The law is relatively clear and settled on the point that a family-owned and family-operated business does come within the (coverage of the) Act. Also, the intent of Congress in enacting this protective legislation extends to

any person, not just miners or employees of these kinds of companies. Accordingly, I find that the Respondent does come within the coverage of the Act, is subject to regulation by MSHA under the Act, and that this entire proceeding is subject to the review function of the Federal Mine Safety and Health Review Commission. See Marshall v. Kraynak, 604 F.2d 231 (3rd Cir. 1979). The fact that the three Parker brothers actually own and engage in some of the work of the mine in question is no bar to their inclusion within the jurisdiction of the Act and I further find that they are miners the same as are their employees. 30 U.S.C. § 820(d)(g) provides that a "miner" means "any individual working in a coal or other mine." See Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980).

In its closing argument the Respondent also contended that the two citations were improperly issued based upon the following (stated) logic: "We feel that a machine that is visually out of service should not be subject to the issuance of a citation," or words to that effect. I do find merit in this last contention. The evidence indicates that on July 18, 1979, the inspector, Michael J. Pappas, observed the Insley crane in the pit. Even though there were no tags on this piece of equipment indicating that it was not to be used, the inspector knew the engine was out of service. The investigation by MSHA, both at the time and subsequently, was not such as to indicate that the crane was being operated in the allegedly violative condition described in the two citations. Nor was there any investigation which would indicate that the crane had ever operated in that condition. There is no evidence from employees of the Respondent which indicate that the machine, either before July 18, 1979, or after July 18, 1979, operated in the condition described in the two citations. The inspector was unable to testify that he had ever seen the crane in operation at all.

The president of Respondent, Mr. Ike Parker, testified that he had purchased the subject crane some 3 or 4 months earlier, that is, prior to July 18, 1979, and that it had been broken down and out of repair most of the time in between, and that on July 18, 1979, a new crane was on the premises and being operated by his brother, Conrad Parker. Ike Parker also indicated that he was negotiating with Columbus Equipment Company regarding the purchase of this new Insley crane and that in order to obtain a better trade-in price for the old crane, which was the subject of the two citations, he was attempting to -- and here I paraphrase -- improve the performance of the engine. Ike Parker indicated that the whole back end of the old crane was out. Inferring from his testimony, I find it was in an obvious state of condition to indicate to anyone that it was not in operating condition.

Section 102(b)(3)(h)(1) of the Act (provides) that a "coal or other mine," can include equipment and machines. It also indicates that for such equipment or machines to be a mine that they, insofar as applicable here, must be "used in, or (are) to be used" in the work of extracting minerals from their natural deposits." The evidence in this record clearly indicates that the machine was out of service at the time the inspector issued the citations. Thus, I find that the equipment in question was not within the definition so as to be subject to the issuance of citations and withdrawal orders. Therefore, I find that the position of Respondent in this case is meritorious and that the two citations in question were improperly issued. 2/ Accordingly, it is ordered as follows: Citation Nos. 368929 and 368930, issued July 18, 1979, are vacated, and this proceeding is dismissed.

Michael A. Lasher, Jr., Judge

Distribution:

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2/ See Plateau Mining Company, 2 IBMA 303 (1973).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 18 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MAUDLIN CONSTRUCTION COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS DOCKET CENT 80-114-M A/O NO. 13-01910-05001 DOCKET CENT 80-121-M A/O NO. 13-01160-05001 DOCKET CENT 80-141-M A/O NO. 13-01848-05001 DOCKET CENT 80-142-M A/O NO. 13-01349-05001 (Consolidated) DOCKET CENT 80-201-M A/O NO. 13-01349-05002 DOCKET CENT 80-30-M A/O NO. 13-01802-05001 Mines: Clay County or Stellish Pit, Solberg Pit, Clark Pit, Mortvedt Pit and Nelson Pit

DECISION

APPEARANCES:

Eliehue C. Brunson, Esq., Office of the Solicitor
United States Department of Labor, 911 Walnut Street, Room 2106
Kansas City, Missouri 64106
for the Petitioner,

Stewart H. M. Lund, Esq.,
P O Box 634, Webster City, Iowa 50595

for the Respondent.

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) [hereinafter referred to as "the Act"]. The proposals for penalties allege sixteen violations of safety standards.

Pursuant to notice, a hearing on the merits was held in Fort Dodge, Iowa on May 20 and 21, 1980. Raymond C. Weston, Sr., Carl L. Smith and Charles E. Peaton, federal mine inspectors, testified on behalf of the petitioner. Edward David Ammala, a supervisor for the Mine Safety and Health Administration, testified for the petitioner. Charles P. Becker and Harlan Von Seggren testified on behalf of the respondent. The parties filed post hearing briefs.

II. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. The mine inspectors who issued the citations were employees of the Mine Safety and Health Administration and authorized representatives of the Secretary of Labor.

2. The Administrative Law Judge has jurisdiction of this case pursuant to section 107 of the Act.

3. The proposed penalties would not adversely affect the respondent's ability to continue in business.

4. The respondent is a medium-sized operator in the State of Iowa.

III. Motions

Counsel for the Petitioner moved that the record be left open after the hearing in order to allow him an opportunity to submit a computer printout sheet from the Office of Assessments showing respondent's record of past violations. The undersigned ordered that the record was to be left opened until such time as respondent's counsel received a copy of the printout. Respondent, in its post hearing brief, renewed its objection to the admission of the computer printout sheet on the grounds that respondent did not have the opportunity to cross-examine witnesses as to the history or relevancy of the proposed exhibit. Respondent's objection is hereby sustained and the exhibit will not be admitted into evidence. Therefore, the penalties assessed herein are based on the assumption that the respondent had no history of any violations prior to the violations alleged in the present cases.

On August 15, 1980, respondent filed a motion to strike petitioner's post hearing briefs. Respondent claims that the petitioner's late filing of the briefs has prejudiced the respondent. I disagree. Respondent has failed to demonstrate any prejudice. Therefore, its motion is denied and petitioner's briefs and the arguments contained therein have been considered.

IV. Settlement Approvals

In the case of Secretary of Labor v. Clay County Highway Department, CENT 80-30-M, Maudlin Construction Company, as the leasee of the Stellish Pit, accepted the defense in this matter. This case involved three alleged violations. Respondent agreed to, and has in fact already paid the proposed penalty of $32.00 for citation no. 176765. Citation Nos. 176766 and 176767 were dismissed by the petitioner on the ground that the accuracy of the test results could not be proven.

In docket number CENT 80-114-M, the respondent agreed to affirm citation no. 176800 and pay the proposed penalty in the amount of $22.00.

The proposed settlement agreements are hereby approved by the undersigned.

V. Discussion

The five remaining cases involve four different mine sites, the Mortvedt, Solberg, Nelson and Clark Pits. The initial inspections at these pits took place between July 9, 1979 and September 18, 1979.

CENT 80-141-M and CENT 80-114-M

Cases CENT 80-141-M and CENT 80-114-M involve six citations all alleging a violation of mandatory safety standard 56.5-50.[1] These citations, involving similar issues of fact and law, will be dealt with together.

1/ 56.5-50. Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

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

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level. Note. When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum $\frac{C_1}{T_1} + \frac{C_2}{T_2} \ldots \frac{C_n}{T_n}$

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

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

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

The following issues pertain to citation nos. 175215, 175217, 175216, 175319, 175320 and 176783:

1. Did the testing procedures employed by the mine inspectors in measuring the noise levels conform to the procedures, as set forth in 56.5-50(a), and

2. Were the instruments properly calibrated in order to assure accurate noise level readings.

Respondent disputes the accuracy of the testing procedures used by the inspectors, attacking them in several ways. Only respondent's first two arguments need to be examined in order to reach a decision.

First, respondent argues that a sound level meter must be used to check or convert the dosimeter readings. (Respondent's brief at p. 4) Contrary to respondent's argument, I have found nothing in the Act that requires that sound level meters be used in conjunction with dosimeters. The applicable standard, found at 30 C.F.R. 56.5-50(a), requires that a sound level meter or a dosimeter with similar accuracy be used in testing noise levels. While respondent's expert, Harlan Von Seggren, testified that he would not use a DuPont 376 dosimeter alone for determining noise levels, nothing in the record supports a conclusion that this type of dosimeter cannot be used to accurately determine noise levels.

Secondly, respondent alleges that the test results are inaccurate due to the length of time between when the dosimeters were calibrated and when the tests were performed. Citations 175215, 175216 and 175217 were all issued on August 17, 1979 by Raymond Weston, Sr.. Mr. Weston testified that he calibrated the instruments on July 20, 1979, a period of 27 days prior to the inspection (Tr. 39). Citations 175319, 175320 and 176783 were issued on July 25, 1979 by Carl L. Smith. The dosimeters used by Smith were calibrated on July 6, 1979, 18 days prior to testing (Tr. 220).

The inspectors testified that they had been instructed that the dosimeters were to be calibrated every 30 days and that the instruments should be calibrated prior to an inspection (Tr. 243). However, neither inspector felt that it was necessary to calibrate the instruments the day before or the day of the inspection.

Edward Ammala, supervisory inspector for the western half of Iowa, stated that one of his duties as a supervisor is to review the citations that have been issued. He stated that he checks for any discrepancy between the sound level meter readings and the results of the dosimeter tests. In doing so he claimed that he can tell by the dBA level approximately what the dosimeter reading will be (Tr. 268). He therefore concluded that the dosimeter readings in the citations in question were accurate.

I find the testimony of respondent's expert to be more credible than that of the Petitioner's witnesses. Harlan Von Seggren stated that, in order to assure an accurate reading, a dosimeter must be calibrated immediately prior to conducting the test (Tr. 153). According to Mr. Von Seggren, a dosimeter is a very sensitive piece of equipment and can easily be affected by temperature changes, movement and other outside influences. In his opinion, the lapse of time between the calibration of the instruments and the actual tests would invalidate the results. Petitioner failed to offer any testimony to refute the statements of Mr. Von Seggren.

Petitioner's explanation for not calibrating the dosimeters closer to the time when the tests were going to be performed was that it takes approximately twenty minutes to calibrate each machine. I find this explanation unacceptable. Section 104 of the Act requires that when a violation is found that a citation must be issued and a penalty assessed. It is grossly unfair to operators to subject them to testing procedures, the accuracy of which cannot be proven, in order for the inspectors to save time. The burden of proving the accuracy of test results is with the Petitioner. The Petitioner having failed in his burden, the citations are hereby vacated.

CENT 80-201-M

This case involves three citations. Citation Nos. 176795 and 176796 both allege a violation of mandatory safety standard 30 C.F.R. 56.14-1.[2] Citation No. 176797 alleges that respondent violated mandatory safety standard 30 C.F.R. 56.11-1.[3]

At the conclusion of Petitioner's evidence, respondent moved to dismiss the citations on the ground that the government had failed to establish a prima facie case. Respondent did not present any evidence nor offer any testimony as to these citations. At the time of the hearing, I reserved my ruling on respondent's motion until I had an opportunity to review the record. Having done so, I conclude that respondent's motion to dismiss should be granted and the citations dismissed.

The only testimony offered by Petitioner was that of the inspector who issued the citations. The inspector could not identify the photographs that he had allegedly taken and his notes were contradictory (Tr. 319 and 326).

The issuance of a citation is insufficient to establish a prima facie case. Petitioner having failed to offer any credible testimony to prove the existence of the alleged violations they are hereby dismissed.

2/ 56.14-1. Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

3/ 56.11-1. Mandatory. Safe means of access shall be provided and maintained to all working places.

Issues:

1. Whether or not the front end loader was equipped with an operative back up alarm and, if so,

2. Did this defect affect the safety of miners.

Discussion

Citation 175313 alleges that respondent violated mandatory safety standard 30 C.F.R. 56.9-2 [4] by failing to have an operative back up alarm on a front end loader.

The uncontradicted testimony of Carl Smith, the inspector who issued the citation, was that the front end loader had been equipped with a back up alarm; however, at the time of his inspection on July 9, 1979 it was inoperative.

Respondent contends that there was no violation, even though the alarm was inoperative, because the alarm was an additional safety feature installed by the respondent, which was not required by the Act. I disagree. The fact that the alarm was inoperative subjects the respondent to liability under 30 C.F.R. 56.9-2, unless there is a showing that even though the alarm was not working it would not affect the safety of respondent's employees.

Witnesses for both parties testified that the operator of the loader would not have a clear view of someone on the ground (Tr. 334 and 355). Although the testimony of the witnesses differed as to how far the view of the operator would be obstructed, it is unrefuted that there was a blind spot. Based on this fact and the testimony of Mr. Smith that he observed other employees working in the immediate vicinity, I find that a violation did occur.

Penalty

The likelihood of an injury resulting from this violation was remote since the loading process was confined to a small area and most of the employees in the loading area would be in trucks. However, if an accident were to occur it could be of a serious nature. The respondent acted in good faith by trying to abate the citation immediately. For these reasons, I find that a penalty of $40.00 is appropriate.

4/ 56.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

Citation 176794 alleges that respondent violated 30 C.F.R. 56.12-8[5] by failing to provide a bushing on the conductor where it entered the distribution box on a light. The uncontradicted facts are that the wires were not equipped with a bushing, but that they were insulated with tape. The power source for the light was a portable generator, that in turn received its power from a diesel engine (Tr. 358). Therefore, there was never any reason for any employees to be in the vicinity of the lightpole (Tr. 359).

I find that a violation did occur. Although respondent argued that the tape eliminated any shock hazard, the standard requires that when wires pass through metal frames the holes must be bushed.

Penalty

I find that respondent's negligence and the gravity of the violation were low based on the evidence presented that the wires had been insulated. It appears there was only a slight chance of anyone being injured since it was not necessary for anyone to be near the light in order to turn it off or on. The respondent promptly abated the citation. For the reasons stated herein, I reduce the proposed penalty and conclude that a penalty of $10.00 is appropriate under the circumstances.

In citation no. 176799, the petitioner alleges a violation of safety standard 30 C.F.R. 56.4-18,[6] based on the inspector's statement that oxygen cylinders were being stored in the parts trailer where oil and grease containers were also kept (Tr. 313). According to Mine Inspector Carl Smith, this condition created a fire hazard and would add to the intensity of a fire if one were to occur.

I find that a violation did occur. Respondent did not deny that the oxygen was being stored in the same trailer containing oil and gas cans. Respondent contends that a citation should not have been issued since the oxygen bottles were immediately removed. The Act provides that when a violation is found to have occurred that a citation is to be issued. Respondent's promptness in abating the citation goes to the company's good faith. Also, the fact that the trailer was parked away from the area where the employees were working and that they would only be in the area to pick up supplies goes to the gravity of the violation and not to whether a violation did in fact occur.

5/ 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 [Section 56.12-8 made mandatory and revised at 42 FR 29420, June 8, 1977, effective July 8, 1977].

6/ 56.4-18 Mandatory. Oxygen cylinders shall not be stored in rooms or areas used or designated for oil or grease storage.

Penalty

Under the circumstances, as set forth above, I find that a penalty of $28.00 is appropriate.

Findings of Fact

1. Seventeen citations were issued to the respondent between July 9, 1979 and September 18, 1979 at five different mine sites. These facts alone do not constitute harassment on the part of MSHA, as alleged by the respondent.

2. Petitioner failed to prove the accuracy of the dosimeter readings.

3. Petitioner failed to establish a prima facie case with regard to the three citations contained in Docket No. CENT 80-201-M. Therefore, respondent's motion to dismiss is granted.

4. The back-up alarm on the front end loader was inoperative. This presented a safety hazard for employees working in the area, since the operator would be unable to see persons walking behind the loader.

5. The hole in the conductor box was not bushed as required by mandatory safety standard 30 C.F.R. 56.12-8.

6. Oxygen cylinders were being stored in the same trailer as containers of oil and grease thus presenting a fire hazard.

ORDER

Case	Citation No.	Assessment
CENT 80-30-M	176765	$ 32.00
CENT 80-114-M	176800	$ 22.00
CENT 80-121-M	175313	$ 40.00
CENT 80-142-M	176794	$ 10.00
	176799	$ 28.00
		$ 132.00

It is hereby ORDERED that Respondent pay the penalties totaling $ 132.00 within thirty (30) days from the date of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 18 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. VA 80-85
Petitioner	:	A.C. No. 44-04048-03014V
v.	:	
	:	No. 1 Mine
LITTLE EGYPT COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Catherine M. Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Harold Jackson, Little Egypt Coal Company, Grundy, Virginia, for Respondent.

Before: Judge Melick

Hearings were conducted in this case in Abingdon, Virginia, on November 5, 1980, following which I rendered a bench decision. That decision, which I affirm at this time, is set forth below with only nonsubstantive corrections.

> This proceeding is, of course, before me under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815, the "Act." The general issues are whether the Little Egypt Coal Company (Little Egypt) has violated the regulatory standards cited in the petition filed by the Department of Labor, Mine Safety and Health Administration (MSHA) in this case, and, if so, what is the appropriate penalty to be paid by Little Egypt.
>
> Section 110(i) of the Act sets forth the criteria that I should consider in arriving at an appropriate penalty for violations under the Act, namely: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's abililty 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 the violation.

Now, I observe that the one citation before me is a section 104(d)(1) citation and the two orders before me are orders of withdrawal under section 104(d)(1). These ordinarily require for their validity certain specific findings regarding "unwarrantable failure" and "significant and substantial." Since this is a civil penalty proceeding, however, only the fact of the violation and the relevant criteria under section 110(i) of the Act will be considered.

Now, going to the one citation before me, Citation No. 696006, I find that the violation did occur as charged. The citation charges that dry, loose coal was permitted to accumulate approximately 35 feet outby Survey Station No. 2506, located in the No. 4 entry intake airway, adjacent to the belt entry. The "accumulation" was approximately 4 feet high, 20 feet wide, and 60 feet long.

The cited standard (that is, 30 C.F.R. § 75.400) reads as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials shall be cleaned up and not be permitted to accumulate in the active workings or on electrical equipment therein."

MSHA inspector Harold Burnett testified here today--and I find his testimony to be completely credible and on essential points uncontradicted--that on July 31, 1979, in the course of a regular inspection with Mr. Ball, another MSHA inspector, that he did in fact observe in the No. 4 intake entry the described stockpile of coal. He measured that pile of coal using a 50-foot rule and found the size as reported in the citation. His testimony is undisputed, so I find that the size of the material to be as it was cited.

Now, with respect to the combustibility of this material, I have some problems with Mr. Burnett's testimony because at one point he says, "My visual observations were not sufficient to determine the combustibility," and at another point he testified that in essence those observations were sufficient from which he could conclude that the material was combustible. Burnett did testify, however, that the material which looked like coal was indeed black, was in fact dry, and was in fact not intermixed with observable noncombustibles such as rock dust or pieces of cement block or sundry other noncombustible materials.

The equivocal testimony is, in any event, obviated by the laboratory tests on the samples taken by Mr. Burnett. The samples, taken at each end of this pile and one in the middle,

showed only 30, 27, and 23 percent incombustible material, respectively. These tests therefore demonstrate the presence of a rather high percentage of combustible material.

Now, even if you do not accept Burnett's testimony regarding the combustibility of this material, Mr. Jackson himself (the owner of Little Egypt) testified that this stockpile was treated the same as any other coal that is shipped out of his mine, that is, it was sold as part of its mine product. Clearly, if this "accumulation" did not consist of combustible materials to a significant degree, it could not have been so disposed.

Now, from the vast size of the stockpile alone, which was 4 feet high, 20 feet wide and 60 feet long, I conclude also that it was indeed an "accumulation" within the ambit of recent decisions by the Mine Safety and Health Review Commission. Secretary v. Old Ben Coal Company, 1 FMSHRC 1954 (December 1979); Secretary v. Old Ben Coal Company, 2 FMSHRC 2806 (October 1980). Now, indeed, even though the Commission has indicated that it is not necessary in proving a violation of this standard that some time have had elapsed while that "accumulation" remains, it is apparent from Jackson's own testimony that the "accumulation" had in fact existed since the previous day.

Now, I also find that Little Egypt was grossly negligent in allowing this coal to accumulate as it did. Jackson admitted that beginning in the middle of July 1979, because his union employees were supposed to be working only parttime on alternate days, he could not ship his coal out of the mine every day of the week as he desired. As a result, he found it economically necessary to stockpile the coal inside the mine for short periods of time. It was therefore a company policy to keep coal accumulated at least for that 1-day period or until such time as the coal could be shipped out. So I find that clearly the operator not only knew that this accumulation was present but in fact actively condoned maintaining such accumulations. As further evidence of the operator's negligence in this case, I note that Jackson admittedly had two "accumulations" in the mine and that although he had two scoops available, he used only one for cleanup while he continued to use the other for production.

Now, the condition did present a hazard and this testimony, again, is essentially uncontradicted that combustible materials such as this could be ignited and could cause fire or an explosion not only in the immediate section but the entire mine and there were potential, if not then existing,

sources of ignition not far away. Burnett testified that there were electrical cables in an adjacent entry some 60 to 70 feet away, that there was a battery-operated scoop operating as close as 20 feet to the accumulation, and that there was a supply station some 40 or 50 feet from the accumulation in which timber, oil, and other combustible materials were stored. Explosives were also stored in the mine. Of course, the seven or eight men who were working in the mine at that time could be killed by any resulting explosion or fire. The degree of hazard is somewhat reduced by the fact that no defects were found in the cables and no permissibility violations were found on the equipment. Moreover, this mine has no history of methane problems and on the date of the inspection no methane was detected. I have taken these factors into consideration.

Now, with respect to the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation, the testimony is that indeed the condition which was cited at 10:15 a.m. was abated by 9 o'clock the next day. The foreman stopped all production in the mine and had two scoops immediately clean up the accumulation. However, as Inspector Burnett points out the operator really had no choice but to clean up the condition because he would not otherwise have been permitted to continue mining.

Order No. 696007 charges that roof-bolt test holes had not been drilled at 15-foot intervals, beginning approximately 80 feet inby Survey Station No. 2506 located in the No. 4 entry on the 001 section, and extending inby to the working faces of the Nos. 4 through 1 entries and connecting crosscuts for a distance of approximately 300 feet.

The cited standard, 30 C.F.R. § 75.200, deals essentially with the requirements for filing and having an approved roof-control plan in effect. However, that standard has been interpreted by the former Interior Board of Mine Operations Appeals and various administrative law judges in the Mine Safety and Health Review Commission, including myself, to require also that the operator comply with his roof-control plan. That is the interpretation I shall follow here.

Now, that part of the roof-control plan cited here appears on Page 7, Item 9 of Exhibit D, and states as follows:

> In each active working place where roof bolts are installed during a production shift at least

one roof bolt hole shall be drilled to the depth of at least twelve inches above the anchorage horizon of the bolts being used to determine the nature of the strata. Such test holes shall be drilled at intervals not to exceed fifteen feet, and the test holes shall either be left open for examination or a bolt length equal to or greater than the required test hole depth may be installed and tightened.

Inspector Burnett, again without contradiction, testified that indeed the condition that was cited did in fact exist. The violation is therefore proven. Burnett conservatively estimated that even assuming the best of mining conditions it would take approximately 4 or 5 days with one shift operating to progress 300 feet in a mine such as the Little Egypt Mine. Since the test holes had not been driven over that distance it is apparent that the cited condition had existed for at least 4 or 5 days. The fact that the condition existed for such a long period of time indicates that the operator was also negligent. This violation should have been detected in the course of the preshift and onshift examinations over this 4- or 5-day period. I also consider in terms of negligence the fact that this mine had indeed been cited before (and this is conceded by Mr. Jackson here today) for violations of the same nature.

Now, I can sympathize to some extent with the operator's problem. I take into consideration that his roof-bolting machine operator was negligent in failing to perform a duty that he had been instructed to perform and in fact had been previously reprimanded for failing to perform in the past. However, that does not exonerate the foreman and the mine operator from liability for this type of violation. Indeed, if this same violation had occurred in the past, the operator had perhaps an increased duty to see that the same violation did not occur again.

The hazard in this situation was serious because the test holes are used to evaluate roof conditions and if indeed the roof-bolting machine operator is not performing these tests, the roof bolts that he is implanting could be of no use at all because defects may very well exist in the strata just beyond the reach of his bolts. Of course, the danger present here is from roof falls causing death or serious injuries to anyone working on that section.

I note that this condition was abated within the time allotted but, again, I observe the operator really had no choice if he wanted to continue mining.

I find also that the violation in Order No. 696003 has been proven as charged. The order states as follows: "The No. 4 entry has been driven from twenty-four to twenty-eight feet wide, beginning ninety feet in-by Survey Station No. 3506, located in the No. 4 entry and extending inby for a distance of approximately thirty-three feet on the 001 section." The inspector commented that this had become a common practice at this mine and indicated that the approved roof-control plan permits a maximum width of 20 feet.

Now, again, the standard cited here is 30 C.F.R. § 75.200 which is the standard relating to the requirement for the filing of and approval of a roof-control plan. The roof-control plan in effect here required, in relevant part, on Page 4 that the entry width and the crosscut width shall be 20 feet.

The testimony is undisputed that the widths in the No. 4 entry were precisely as charged, that is, from 24 to 28 feet. The measurements were precisely made, again, with a 50-foot tape with the assistance of Inspector Ball. The hazard from this overwide entry is, of course, from a weakened roof resulting in possibly fatal roof falls. The condition was abated within the time specified for abatement by adding timbers to bring the width to within the 20 feet specified in the roof-control plan.

Now, certain criteria under section 110(i) are appropriate to consider across the board, and are common to all of the orders and the citation at issue. One of those criteria is the size of the operator. The operator here is small having only 10,704 production tons per year. With respect to a history of previous violations, the printout admitted as Government Exhibit F does not provide sufficient detail for me to really determine the specific nature of the previous violations. I am, of course, considering only those violations in which a penalty has actually been paid since those are the only ones that have become final as of this date. It appears, however, that the operator does not have a significant history of violations.

Now, considering what effect penalties might have on the operator's ability to continue in business, I note that Mr. Jackson has testified that even the penalties proposed by the Department of Labor would have such an effect. However, Mr. Jackson has been given the opportunity to obtain and to present documentary evidence to support his testimony here but has chosen not to. Apparently, that evidence is not in a form in which it could be readily presented to the court, but since nothing has been presented, I cannot give great weight to the unsupported testimony. If, indeed Jackson could reach

the conclusions he reached here today, it must have been based upon some records.

All right, considering all of these factors, I feel that the following penalties are appropriate for the violations that I have found:

With respect to Citation No. 696006, a penalty of $400.

With respect to Order No. 696007, a penalty of $250.

And with respect to Order No. 696008, a penalty of $300.

ORDER

The Little Egypt Coal Company is ORDERED to pay a penalty of $950 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 18 1980

DALE A. EAGLE, Complainant	:	Complaint of Discharge
v.	:	Docket No. WEVA 80-487-D
SOUTHERN OHIO COAL COMPANY, Respondent	:	Martinka No. 1 Mine

DECISION

Appearances: P. Lee Clay, Esq., Fairmont, West Virginia, for Complainant;
D. Michael Miller, Esq., J. Statler Beachler, Esq., Columbus, Ohio, for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Dale A. Eagle under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., the "Act"), alleging an unlawful discharge of him by the Southern Ohio Coal Company (Southern). A hearing was held on October 28 and 29, 1980, in Morgantown, West Virginia, at which both parties, represented by counsel, appeared and presented evidence.

The issue in this case is whether Mr. Eagle was unlawfully discharged by Southern in violation of section 105(c)(1) of the Act because of his alleged safety-related activities at Southern's Martinka No. 1 Mine. Section 105(c)(1) reads in part as follows:

> No person shall discharge or in any other manner discriminate against * * * or otherwise interfere with the exercise of the statutory rights of any miner * * * because such miner * * * has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners * * * of an alleged danger or safety or health violation * * *, or because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such

proceeding, or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded this Act.

Before hearing, Southern moved to dismiss the complaint on the grounds that, inter alia, Eagle as a nonunion management employee was not a "miner" within the scope of section 105(c)(1) of the Act and that he was not therefore entitled to the protections afforded therein. The short answer to this contention is, however, found in the Act itself in which the term "miner" is unambiguously defined as any individual working in a coal or other mine. See section 3(g) of the Act. Nonunion management personnel working in a coal mine are therefore "miners" for purposes of section 105(c)(1) and are accordingly entitled to the protections afforded therein.

Southern also alleged in its motion that Eagle's complaint did not state facts sufficient to bring the claim within the ambit of activities protected by section 105(c)(1). Eagle maintains that his claim of unlawful discharge is grounded upon his exercise of a statutory right afforded under the law of West Virginia. Since the provisions of section 105(c)(1) do in fact limit the protected rights of miners to only those statutory rights recognized by the Federal law it is clear that a right found only in State law and not recognized by the Federal law does not give rise to a valid claim under section 105(c)(1). Whether or not the alleged right is protected by the law of any State is therefore immaterial. The test is whether that right which may or may not also be recognized by State law is one protected by the Federal mine safety law.

The complaint here, as clarified at hearing, appears to be that foreman Dale Eagle was fired because he made the decision to take his men off production-type work to correct what is claimed to have been an imminently dangerous safety defect in the mine ventilation system. I conclude that such activity would indeed be protected under the Act. In the case of Secretary (o.b.o. David Pasula) v. Consolidation Coal Company, 2 FMSHRC ____ (October 14, 1980), the Federal Mine Safety and Health Review Commission found that the refusal of a miner to work in unsafe or unhealthful working conditions was a protected activity within the purview of the Act. I find that a decision to correct a serious safety or health hazard rather than to perform production-type work is the essential equivalent of refusing to work in unsafe conditions. The motion to dismiss filed herein is therefore denied.

For the reasons that follow, however, I conclude that on the facts of this case the allegations in the complaint cannot be supported. Even assuming, arguendo, that the hazard alleged by Eagle was an imminently dangerous one requiring immediate corrective action (which in reality it was not) it is clear that the decision by Clark Morris, general foreman for the Martinka No. 1 Mine, to discharge Eagle was made without knowledge of any such alleged hazard and without knowledge of the alleged protected activity but was based upon grounds completely independent of any protected activity.

The essential facts are as follows. On March 3, 1980, Complainant Eagle was foreman of a six-man work crew on the 8:00 to 4:00 day shift. His crew

and a crew under foreman Harold "Dick" Barr were working together that day setting up the steel framework for a new conveyor belt. The crews would begin about 100 feet apart and work toward each other in completing a particular section. At the beginning of the shift, project supervisor Chuck Sponsler had warned Eagle and Barr to be sure they kept their men busy that day because they were expecting a visit from mine officials.

According to Eagle, at around 2:40 p.m., he saw several of the mine officials including Mine Foreman Morris. Morris wanted to know the identity of some miners who were standing idle at the nearby power center. Eagle agreed to check on the problem but claimed they were not his men. Eagle later learned that he was discharged by Morris at the end of the shift around 4:00 p.m. when he was filling out his time sheets. Eagle concedes that he did not know whether Morris was aware that he had assigned his men to the alleged safety work (repairing the return air doors) before he was discharged.

Morris testified that he entered the mine at around 2:00 p.m. accompanied by Mine Superintendent Tompkins and several other officials. Arriving at the power center, he heard men laughing and talking loudly and saw that the dinner hole was full of men. One of the men told Morris that they had progressed to the water hole (a pool of water through which the belt line would have to pass) and then "knocked off" for the day. 1/ Morris recognized later that several of this group of 10 or 11 men at the dinner hole were from Eagle's work crew. Some of the men were even dressed to leave for the day although it was an hour before quitting time. Morris located Eagle and Barr and told them to find some work for the men. Morris had previously warned Eagle and Barr about stopping work before the end of the shift.

Morris later returned at around 3:15 to see if the men were working. As he passed through the "16-switch" ventilation doors he saw several of the miners without tools sitting in the mantrip and two standing beside it ready to leave for the day. Outraged, Morris at this point decided to fire Eagle and Barr and told Tompkins of this decision. When Eagle and Barr later came outside at the end of the shift, he told them they were fired. Morris testified that he did not know of any plans Eagle may have had to work on the ventilation doors until he was told of this allegation by Sponsler. By that time the decision to release the men had already been made.

Sponsler, the project supervisor, testified that around 3:00 p.m. he too saw a group of what he thought was about eight to 10 men at the dinner hole. Barr and Eagle were then about 200 feet away. When asked about the idle men, Eagle told him "I don't want to hear no shit, I am going to have

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1/ According to one of the miners called by Eagle to testify, no one wanted to work in this water hole so it was decided to leave that work for the night shift. Eagle was quoted as saying "We can't quit now, you might as well go fix some doors * * * it's too early to quit". These do not sound like the words of a man intent on correcting an imminent danger.

some men fix the doors." Sponsler did not have occasion to tell Morris of the purported project until later. Morris by that time had already made up his mind to fire Barr and Eagle for their repeated failure to keep the men working.

James Tompkins, superintendent of the Martinka Mine, accompanied Morris that afternoon. He too heard the laughter and noise around the power center and observed some 10 to 11 idle men in that area. He also recalled that they later found four or five men in the vicinity of the "16-switch" doors just sitting in the "bus" (mantrip) laughing. It was about this time that Morris told Tompkins that Barr and Eagle would have to go. Tompkins agreed with the decision.

Although Barr thought that he had told Morris when confronted by him in the mine that the idle men were preparing to fix ventilation doors, he was not certain of this. I do not believe that this was an accurate recollection inasmuch as Morris specifically denied having this information before making his decision to fire the men, and the testimony of Tompkins, Sponsler and indeed even Dale Eagle himself corroborates Morris on this point. Barr concluded, moreover, that he and Eagle were fired not because of any anticipated safety work but because Morris indeed found their men at a time when they were not actually working.

Under the circumstances, I conclude that Mine Foreman Morris made the decision to discharge Barr and Eagle for reasons unprotected by the Act and that indeed he made the decision without any knowledge of Eagle's alleged protected activity, i.e., his anticipated repair work on ventilation doors. 2/ The discharge was therefore not motivated in any part by the alleged protected activity. Pasula, supra. Eagle's complaint cannot therefore be supported and is accordingly dismissed.

Gary Melick
Administrative Law Judge

2/ The decision of a trial examiner for the West Virginia Department of Employment Security that Eagle was not discharged for misconduct and was thus eligible for unemployment insurance benefits is not necessarily inconsistent with my findings herein but would not in any event have been accorded great weight. That determination has been appealed by Southern and has therefore not become final. Moreover, Southern was not represented by counsel at the hearing, the hearing commenced without the presence of any company representative, and several key witnesses for the company, including Morris, were not present. The record before the examiner was, as a result, woefully inadequate. Since the Complainant has also failed to submit the rules and regulations governing such proceedings as he was directed to do, I am unable to ascertain the standards applicable thereto. The fact that Eagle claimed at that hearing that he was discharged because of a personality conflict with Morris and not for the reasons now advanced does, however, reflect on the credibility of his complaint herein.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 22 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. YORK 79-49-M
	:	A/O No. 19-00019-05001
v.	:	
	:	Wrentham Quarry & Mill
S. M. LORUSSO & SONS, INC., Respondent	:	

DECISION

Appearances: David Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner, MSHA; Kenneth Arthur, S. M. Lorusso & Sons, Inc., Walpole, Massachusetts, for Respondent, S. M. Lorusso & Sons, Inc.

Before: Judge Merlin

The above-captioned case is a petition for the assessment of civil penalties filed by MSHA against S. M. Lorusso & Sons, Inc.

The Solicitor had filed a motion for settlement which I disapproved on August 12, 1980. As I stated at the hearing, the Solicitor's motion set forth some reasons to support a settlement but, in my opinion, they were not adequate. However, at the hearing, the Solicitor furnished additional reasons and detailed explanations which did warrant approval of his recommendations. The approved settlements are as follows:

Citation No. 217543 was issued when the plant manager was observed not wearing protective footwear. The original assessment was $44; the recommended settlement was $10. In support of the reduction, the Solicitor advised that there was no negligence on respondent's part with respect to this violation. The operator purchases protective footwear for its employees and instructs them to wear it. This employee had simply disobeyed company rules. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217545 was issued when the plant manager was observed not wearing protective headwear. The original assessment was $44; the recommended settlement was $10. The Solicitor gave the same reasons in support of the reduction as were given for Citation No. 217543. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217546 was issued when a guard on a conveyor belt drive that had been removed for servicing was not reinstalled prior to restarting the belt drive. The original assessment was $60; the recommended settlement was $50. In support of the reduction, the Solicitor advised that this is a small operator and that this was the first inspection after the plant had started up operations for the season. In light of the small amount of the proposed reduction, I approved the recommended settlement.

Citation No. 217547 was issued when a railing surrounding the primary crusher was found not to have been put in place prior to starting up the crusher. The original assessment was $66; the recommended settlement was $50. In support of the reduction, the Solicitor advised that it was company practice to instruct employees not to remove these railings, and that if they had to be removed, they must be replaced. An employee simply had not replaced the railing. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217548 was issued when two electric drop cords were found being used without ground connectors. The original assessment was $38; the recommended settlement was $20. In support of the reduction, the Solicitor advised that there was a very low probability of occurrence. The small size of the company and the small history of prior violations was also noted. In light of these factors, I approved the recommended settlement.

Citation No. 217551 was issued when a shaker screen guard which had been removed for servicing was not replaced. The original assessment was $60; the recommended settlement was $40. In support of his motion, the Solicitor cited the same factors which supported the settlement for Citation No. 217546 and further advised that there was only an extremely remote likelihood that a person would come in contact with the dangerous parts of the machinery. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217552 was issued when a guard on a conveyor belt head pulley which had been removed for servicing was not reinstalled prior to starting up the machine. The original assessment was $60; the recommended settlement was $50. In support of the reduction, the Solicitor cited the same factors which warranted the reduction for Citation No. 217546. The Solicitor further advised that there was a very low probability of any injury occurring and that the operator's negligence was very low, given the fact that the plant was beginning to start up for the new season. In light of the foregoing factors and the fact that this was not a particularly large reduction, I approved the settlement.

Citation No. 217555 was issued when it was observed that the traffic rules pertaining to speed limits on the haulage road were not posted. The original assessment was $52; the recommended settlement was $20. In support of the reduction, the Solicitor advised that both negligence and gravity were less than were originally thought since the rules had been posted but they were either destroyed or taken down because of the winter weather. The Solicitor further advised that the drivers are aware of the speed limits,

and the rules are posted in the company office. I accepted the Solicitor's representations and approved the settlement.

I recognized that the original assessments for these citations were not large. However, at the hearing the Solicitor did advise that this operator is small in size and had a very small history of prior violations. In light of these factors, the recommended reductions are appropriate.

ORDER

The rulings issued from the bench on November 24, 1980, are hereby AFFIRMED.

The operator is ORDERED to pay $250 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
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DEC 24 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ARIZONA CRUSHING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-195-M A/O NO. 02-01642-05001 MINE: PORTABLE CRUSHER

DECISION

APPEARANCES:

Sandra Rogers, Esq., Office of Daniel Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California for Petitioner

Peter J. Ranke, Comptroller, appearing pro se, Phoenix, Arizona for the Respondent.

Before: Judge John J. Morris

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, ARIZONA CRUSHING, failed to guard its conveyor equipment, thereby exposing its employees to hazardous pinch points. MSHA asserts ARIZONA CRUSHING thereby violated 30 CFR 56.14-1,[1] a regulation promulgated under the authority of the Federal Mine Health and Safety Act (amended 1977), 30 U.S.C. § 801 et seq.

1/ The cited standard provides as follows:

GUARDS

56.14-1 MANDATORY. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

ISSUES

The issues are whether MSHA has jurisdiction and whether the violations occurred.

CONTENTIONS

ARIZONA CRUSHING contends that Congress did not intend to include sand and gravel operations in the scope of the Act. I disagree. The legislative history indicates otherwise. In reviewing the safety record for metal and nonmetal mining, the United States House of Representatives included data on the number of fatalities occurring in open pit, sand and gravel mines, stone quarries, and mills. House Report No. 95-312, 95th Cong. 1st Sess. 6 (1977). Congress also directed that any doubts over the extent of MSHA's jurisdiction are to be resolved in favor of inclusion within the Act. Senate Report No. 95-181 95th Cong. 1st Sess. 14 (1977).

The determination that sand and gravel pits are under the jurisdiction of the Act has been upheld in recent decisions. Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979), Cert. denied, 444 U. S. 1015 (1980); Marshall v. Cedar Lake Sand and Gravel Co. 480 F. Supp. 171 (E. D. Wisc. 1979); Marshall v. Wallach Concrete Products, Inc., et al, Docket No. 79-422 _____F. Supp. _____(D.C. N.M. 1980).

PENDING LEGISLATION

ARIZONA CRUSHING asserts there is legislation pending in the United States Congress that would remove MSHA's jurisdiction over sand and gravel operations.

As of the date of this decision no legislation has been passed that would affect MSHA's jurisdiction. Accordingly, such argument is overruled.

FINDINGS OF FACT

Citation 379481

1. The return roller of the primary feed conveyor was unguarded (Tr. 10 - 12, P-1).

2. The three foot long pinch points were 5 to 5 1/2 feet above the ground (Tr. 12, P-1).

3. When the conveyer was operating the cleanup man or workers observing the plant would be in close proximity to the hazardous pinch point (Tr. 12 - 15).

CITATION 379482

4. The pinch points of the warp drive on the primary feed conveyer were guarded at the front but not at the sides (Tr. 16 - 18, P3, P4, P5).

5. Workers could come between the guard and the motor within six inches of the pinch points during maintenance and cleaning operations (Tr. 23).

CITATION 379484

At the commencement of the trial petitioner moved to vacate this citation for the alleged violation of 30 C.F.R. 56.14-1 (Tr. 5).

The motion to vacate was granted at trial and is formalized in this decision.

CITATION 379485

6. The west side of the V belt on the primary feed conveyer was guarded but there was an exposed pinch point between the guard and the motor (Tr. 23, P6).

7. Workers had access to this area and could come in contact with the V belt drive (Tr. 23).

CITATION 379486

8. The El Jay rock belt tail pulley was unguarded (Tr. 25 - 29, P8).

9. A portion of the tail pulley was guarded but there were unguarded pinch points at the bottom of the frame (Tr. 26 - 27).

10. Workers by using a walkway or path could come within a few inches of the pinch points (Tr. 28, P8).

ALL CITATIONS

11. Before the inspection ARIZONA CRUSHING had removed its conveyer equipment because a large amount of water was being released into the riverbed.

12. The inspection occurred as ARIZONA CRUSHING was reassembling its equipment.

13. The guards had not yet been reinstalled and the equipment was being tested.

ARIZONA CRUSHING asserts it should not be cited because its workers were not crushing rock but were merely reassembling the equipment. I find the facts supporting ARIZONA CRUSHING's view but I do not concur that such facts establish a defense. It is undisputed that the equipment was running and being tested (Tr. 76). In various ways the workers were exposed to the hazards prohibited by the standard. (Findings of Fact, paragraphs 3, 5, 7, 10).

To synthesize this decision: pinch points must be guarded whenever the workers, in the normal course of their duties, are in close proximity to the hazards.

CIVIL PENALTIES

ARIZONA CRUSHING asserts that the negligence assessed for Citation 379485 is unduly high. I disagree, the condition is obvious and the photograph of the condition indicates ready exposure to the pinch point (P6).

However, in connection with the civil penalties, MSHA's proposed assessment does not credit ARIZONA CRUSHING for its immediate abatement of the conditions. Further, it is company policy to immediately comply with all MSHA directives. In view of the above factors and in consideration of the remaining statutory criteria,[2] I conclude that the proposed civil penalties should be reduced as set forth in the order of this decision.

ORDER

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

1. Citation 379481 is affirmed and a penalty of $14.00 is assessed.

2. Citation 379482 is affirmed and a penalty of $14.00 is assessed.

3. Citation 379484 and all penalties therefor are vacated.

4. Citation 379485 is affirmed and a penalty of $17.00 is assessed.

5. Citation 379486 is affirmed and a penalty of $18 is assessed.

John J. Morris
Administrative Law Judge

2/ 30 USC 820(i)

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DEC 30 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 80-277
	:	A/O No. 36-00963-03096V
v.	:	
	:	Mathies Mine
MATHIES COAL COMPANY, Respondent	:	
	:	
MATHIES COAL COMPANY, Contestant	:	Contest of Order
	:	
v.	:	Docket No. PENN 80-121-R
	:	Order No. 836843; 12/13/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mathies Mine
	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner-Respondent; William H. Dickey, Jr., Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent-Contestant.

Before: Judge Charles C. Moore, Jr.

Mathies Coal Company was served with an order alleging a violation of its roof control plan because it seemed obvious to the inspector that the operator of the continuous miner in a particular cut had been operating under unsupported roof. When the inspector first noticed the unusually large unsupported area where Mathies had been constructing a track shoot (for its rail car haulage system) his eyeball measurement indicated to him that the depth of the cut was greater than the distance from the front of the continuous mining machine to the operator's controls on that machine. He then had the area supported and took measurements. One of his measurements showed it was 28 feet from the deepest cut to the nearest roof bolt. Since it was only some 22 feet 7 inches from the front of the continuous miner to the operator's controls, he assumed there had been a violation because the operator of necessity had been under unsupported roof.

After the issuance of the citation the representatives of Mathies were somewhat perplexed by the measurements but rather than accept the fact of violation they brought the continuous miner back into the track shoot area and found that they could not position the miner in the track shoot in such a way that the operator would be under unsupported roof. One of their discoveries was that it was 28 feet from the far left-hand corner of the cutting blade to the miner's controls which were located on the right rear of the machine.

At the hearing Mathies produced scale drawings of the track shoot showing the last line of roof bolts and a scale model of the continuous miner. The miner would not fit in the track shoot in any area in any way which would expose the operator of the machine to unsupported roof. Furthermore, Mathies produced the continuous miner operator who cut the track shoot in question, and he testified as to how he cut this track shoot and that at no time was he under unsupported roof.

While I can sympathize with the inspector's action, it is nevertheless true and I find it as a fact that no violation of the roof control plan or of 30 C.F.R. §75.200 occurred in this track shoot. The order is accordingly vacated and these cases are dismissed.

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
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DEC 30 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. NORT 78-387-P
	:	A.C. No. 44-04251-02008V
v.	:	
	:	Docket No. NORT 78-388-P
CLINCHFIELD COAL COMPANY,	:	A.C. No. 44-04251-02009V
Respondent	:	
	:	McClure No. 1 Mine

DECISION

Appearances: Michael Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gary W. Callahan, Esq., for Respondent.

Before: Judge William Fauver

These proceedings were brought by the Secretary of Labor under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards in October and November, 1977. The case was heard at Falls Church, Virginia. Both parties were represented by counsel. The Secretary of Labor has submitted his proposed findings, conclusions, and brief for Docket No. NORT 78-387-P, following receipt of the transcript.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent, Clinchfield Coal Company, operated a coal mine, known as the McClure No. 1 Mine, in Dickenson County, Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. Thyssen Mining Construction, Inc. (Thyssen), was an independent contractor engaged by Respondent to sink a return shaft at the McClure No. 1 Mine. In forming the shaft, Thyssen used a three-stage, circular work deck, which was suspended from the surface by four wire ropes in two parts. The

work deck had a diameter of 18 feet, 4-1/2 inches and weighed about 17,500 pounds empty and about 20,000 pounds fully loaded with men and materials. Through the center of the work deck was a bucket well about 5 feet in diameter that permitted a bucket (man hoist) to pass through all three stages and descend to the bottom of the shaft. The shaft was 237 feet deep and had a diameter of 20 feet. The concrete formwork for the shaft was 5 inches thick. Attached to the outside of the work deck and extending about 7 feet above the top stage and about 7 feet below the bottom stage were several anti-tilt riggers, which were designed to wedge against the shaft wall to limit tilting of the deck. The height of the work deck with the tilt-control riggers was 22 feet, 3 inches.

3. Around the outside perimeters of the work deck and the bucket well were separate post-and-chain barricades to prevent persons from falling over the edge of the deck or through the bucket well. The two barricades were circular and each consisted of two chains attached to posts. The top chain was about waist-high and the other one was about knee-high. The outermost barricade was about 6 inches inside the edge of the platform. Also, around the outside and inside edges of the deck were 6-inch kickplates to prevent people from slipping over the edge. The men wore cleated rubber boots and the deck had an anti-skid surface.

4. The workers were not required to and generally did not wear safety belts while working on the deck; however, some of the men did wear safety belts while the deck was moving. If the deck tilted, there was nothing to prevent a man from falling to the deck floor and, besides the two chain barricades, there was nothing to prevent an employee from falling against the shaft wall, from becoming caught between the shaft wall and the deck, or from falling through the bucket well.

5. There has never been an accident involving an employee falling against the shaft wall or lodging an arm or hand between the platform and the wall or falling through the bucket well.

6. The work deck was powered by four Hoyle winches, which served as spools for the wire ropes. Each winch, which was controlled by the hoist operator from the hoist room, was a drum about 16 inches in diameter with two flanges and was powered by a 15-horsepower motor with a capacity of 10,000 pounds. The No. 1 and No. 4 winches were mounted over the shaft opening on the collar coverings and the No. 2 and No. 3 winches were mounted on a concrete pad directly in front of the hoist room.

7. The motors that drove the winches produced a maximum line speed of about 45 feet per minute; however, with the wire rope in two parts, the speed was halved to about 22-1/2 feet per minute.

8. Each wire rope was five-eighths inch and had a breaking strength of 34,000 pounds. With the ropes in two parts, the load supported by each part was 2,500 pounds. Each rope contained seven strands of wire, each of which consisted of 19 smaller wires. The ropes were anchored underneath the

collar of the shaft to one of the collar beams and extended down to the work deck under a sheave wheel and back to the winch drum. The sheave wheels were welded and bolted to the work deck.

9. Title 30 of the Code of Federal Regulations, Part 77, incorporates the minimum safety factors for hoisting ropes established by the American National Standards Institute (ANSI). The ANSI safety factor of a hoisting rope was the factor by which the breaking strength of the rope exceeded the suspended load, related to the depth of the shaft. The recommended safety factor of a shaft 500 feet or less was 8. Under the ANSI system of determining the safety factor of hoisting ropes, any three of the four ropes on the subject work deck would combine to produce a safety factor of 10.44. The four ropes had a safety factor of 13.92.

10. Each of the four winches was equipped with an electric shoe-type brake made from an asbestos fiber. Each brake was spring-activated. Before a brake would release, the motor would have to assume 40 percent of its normal load and the brake would not begin to apply until power decreased to 10 percent of the normal load. Thus, at all times, either the motor would be applying power or the brakes would be activated.

11. When power was applied to the winch motors, the brakes automatically released so that the platform could move; when power was turned off, the brakes applied automatically. If the power source to the winch motors failed, the brakes were designed to activate automatically by spring action.

12. Each winch drum had a slot to receive a safety pin, also known as a safety "dog." The purpose of this pin was to prevent the drum from freewheeling if the brake failed while the deck was in a stationary position. The safety pin was a strip of metal, about 12 inches long, 2 inches wide, that inserted into the frame of the winch drum. The pin would stop the drum when the pin came into contact with a metal lug attached to the outer part of the drum. The metal lugs were 1-inch square and spaced 90 degrees apart so that, when a safety pin was inserted, the winch would rotate a maximum of 90 degrees before stopping at the next lug.

13. An employee on the surface, known as the topman, manually inserted the four safety pins upon instruction from the hoist operator. The operator maintained telephone contact with the workers on the deck because he was unable to see the winches from the hoist room. A bell signal notified the topman that the pins were ready to be inserted. It took 3 to 4 minutes to insert all four pins. There has been no case of failure of a safety pin.

14. The hoist operator tried to operate the four winches simultaneously so that the deck would be level; however, the deck often tilted because the winch motors operated at slightly different speeds and the stretching characteristics of the ropes were not uniform. Before the work deck reached a new resting position, the operator would make several adjustments to level the deck. When the deck was finally stopped the safety pins

would be inserted and power would be released so that the winches would roll back against the pins. One or two of the ropes might become slack when the winches rolled back. Before the deck was moved again, the pins would be removed and the hoist operator would try to level the deck by adjusting the winches one at a time. Three winches were capable of leveling the work deck.

15. If the air was damp, the shoes would absorb moisture and swell. During the 2 or 3 days prior to October 27, 1977, there were heavy rains that caused the brakes to drag and made lowering and raising the deck difficult. On October 27, the weather was drier and the brake shoes had shrunk back to their normal size.

The October Inspection

16. On October 27, 1977, federal mine inspector William H. Hulvey inspected the No. 2 shaft at Respondent's McClure No. 1 Mine. He arrived at the hoist room about 8:15 a.m. to inspect the three-stage work deck. He spoke briefly with the hoist operator and inspected the books.

17. The hoist operator was in the process of moving the work deck to a new resting place in the shaft. The safety pins had been removed and the fiveman crew, including the foreman, were on the work deck. A whole crew was needed to move the work deck safely because there were three stages and there were utility lines and other objects that might interfere with the wire ropes. One of the workers below was communicating with the hoist operator by telephone, instructing him to move the winches one at a time. The operator told the inspector that he was moving the winches one at a time because they were having difficulty leveling the deck. A work deck might be difficult to keep level for a number of reasons, e.g., the brake was not holding properly, the ropes were not spooling on the drums properly, or the winches were not hoisting synchronously.

18. At about 9 a.m., the operator lowered the inspector to the work deck. When he arrived the foreman said that they were trying to move the deck but were unable to keep it level. While the inspector was on the deck, the operator applied power to all four winches and the deck rose about 1 foot. After the power was turned off, the brakes applied and the inspector noticed a slight displacement on one side of the deck and slackness in one of the ropes. The inspector determined that the No. 3 winch rope was not holding its designated load. He believed that if one of the brakes was not supporting any weight, an added strain was placed on the other brakes. The inspector told the foreman to withdraw the men until the problem was diagnosed.

19. The operator raised the work deck and then released power. The No. 3 brake should have applied; however, the brake did not immediately hold the winch and about 1 foot of rope spooled from the drum before holding. They returned to the surface to inspect the No. 3 winch.

20. A mechanic then inspected the brake and found that it was out of adjustment, that it was slipping, and that the shoes were not holding the brake wheel.

21. Inspector Hulvey issued Order of Withdrawal No. 1-WWH (7-62) to Respondent, reading in part:

> The electrically operated magnetic brake (shoe type) installed on the No. 3 electric work deck winch was not maintained in safe operating condition. The brake would not hold the winch drum when power was disconnected to the winch drive motor. This allowed the cable to become slack and not hold its designated load. The No. 4 electric winch brake was the only brake holding the side of the circular-3 level work deck. Workmen were attempting to have the work deck hoisted up the shaft.

The cited condition was abated by adjusting the brake. Three days earlier, there had been a similar problem with this brake.

22. The inspector considered the problem serious because he believed that, if the work deck tilted and wedged against the shaft, one of the men could fall to the floor and injure himself or fall through the bucket well. He also believed that if the No. 4 winch brake also malfunctioned, one side of the deck would tilt and the wires could become damaged by contact with the upper stage of the platform of the deck.

23. The inspector found that the condition should have been discovered before his arrival. The shaft was required to be preshifted before the start of each shift and the hoisting equipment was required to be checked daily. However, the brakes would not be inspected unless the platform was going to be moved. If the platform remained stationary for several days, the brakes would not be examined before men descended to the work deck because the safet pins would prevent the winches from freewheeling. On October 27, there had been a preshift examination and the hoisting equipment was checked.

24. At about 7:30 a.m. on the date of the inspection, Ray Hobson, the fire boss, had preshifted the shaft area, including the man hoist, the winches and the hoist room. His inspection of the winch brakes did not include removing the guards that surrounded the brakes. He descended the shaft in the bucket and found only that a line needed extending at the bottom of the shaft.

25. The hoisting equipment was also inspected that morning, at about 8 a.m., by the hoistman. The hoistman inspected the ropes to see that they were in good operating condition, that there were no broken strands, and that they were aligned in the sheaves and not overlayed on the drums.

26. Thyssen recorded inspections made on the man hoist in the hoist inspection book. The man hoist was used to hoist men in and out of the shaft. Examinations of the deck winches, concrete form winches and emergency hoist winches were also recorded. There was no record in the book of an inspection of the Hoyle winches and the brakes.

27. Respondent's approved shaft-sinking plan provided in part:

> The braking systems employed on the Hoyle Winches which are used to suspend the work deck, concrete forms, and the emergency escape conveyance shall be visually examined and tested on each shift by a qualified hoistman prior to allowing men to travel on the platforms or conveyances suspended; or prior to hoisting loads where men may be endangered by the hoisting operation. If such tests reveal that any part of a braking system is not functioning properly, repairs shall be made immediately. The results of such tests shall be recorded in a book maintained for this purpose and shall be signed each shift by the hoistman making such inspections.

28. An electrical foreman periodically inspected the brake mechanisms by pulling off the covers and disconnecting the solenoid to see that they held with power on. Brake linings were also changed about every 2 to 3 weeks. There was no standard requiring the coverings to be removed when the hoist was inspected. On September 21, 1977, a brake was installed on the No. 3 winch.

29. There were two methods of checking the brakes. One involved the hoist operator applying power and moving the winches slightly and then shutting the power off to activate the brakes. If the brakes were out of alignment, a person on the deck would observe a slack cable when the brakes were applied. A slack cable on the No. 2 or No. 3 winch could be observed at the surface because they were mounted on the pad directly in front of the hoist room; however, a slack cable on the No. 1 or No. 4 winch could be observed only from the deck. Under normal circumstances, when the deck was being moved there would be various tensions in each of the four ropes due to differences in the spooling characteristics and the winding of the ropes on the four drums; however, each of the ropes would be taut.

30. The other method of checking the brakes, which was more complicated but more accurate, involved manipulating the solenoid system on each brake. The electrical engineer would isolate the power from the circuit, remove the covers to disconnect the wires serving the solenoid, insulate those wires safely, replace the covers on the solenoid box and on the brake box, and then reapply power to the circuit. The procedure then had to be reversed to put the system back in working order.

The November Inspection

31. On November 21, 1977, Inspector Hulvey, accompanied by another inspector and the mine foreman, inspected the shaft and the three-stage circular work deck at the McClure No. 1 Mine. The deck was in a stationary position. The workmen were on their lunch hour. Inspector Hulvey observed that the No. 1 winch cable was completely slack at the work deck level. He held the cable with his hand and was able to shake it. In the inspector's opinion, the cable was not suspending its designated load. The only brake

holding that side of the deck was the No. 4 brake and the slippage of that brake would allow the drum to turn until the safety pin engaged or until the slack in the rope was taken up. The safety dogs were in the winches.

32. Inspector Hulvey also observed that an air hose was intertwined with the cable. The air hose was hooked to an air pump, which was located at the bottom of the shaft. The hose was lying on the work deck and was intertwined with the two parts of the cable. He believed that whoever placed the hose there should have observed the slack cable.

33. The hose was not interfering with the function of the wire ropes and there was no danger of the hose snapping unless the work deck was moved. If the hose broke, there would be a sudden whipping action of the live end of the hose. If it were only punctured, there would be a sudden air stream which might strike somebody but pose no real danger unless it generated airborn dust or particles.

34. The inspector believed, initially, that the brake was not holding the load. When they reached the outside and put tension on the rope, they found that the brake was working properly but that the rope had not been properly tensioned.

35. On November 21, 1977, Inspector Hulvey issued an order of withdrawal to Respondent, reading in part:

> One of two hoyle winches used to suspend the east side of the three stage work deck in the shaft was not suspending the designated load in that the winch cable of the No. 1 winch was completely slack at the work deck. Pump hoses to a diaphragm pump were intertwined with the cable.

36. He believed that the condition was serious because an unexpected displacement of the work deck would be hazardous to workers on the deck. At the very least, they might lose their balance and fall to the surface of the deck. He observed a tool box and a fire extinguisher on the top level. At times, miscellaneous hand tools, drills and hoses would be lying on the deck surface.

37. The cited condition was abated in about 30 minutes by applying tension to the cable.

38. At 6:30 a.m. on November 21, a preshift examination had been conducted. No defects or infractions were found. At 11:15 a.m., an onshift inspection disclosed that a whip check was missing from the airline shaft bottom and that the pump needed a safety cable.

DISCUSSION WITH FURTHER FINDINGS

At the hearing, counsel for the Respondent orally moved to dismiss the Secretary's petition for assessment of civil penalty in Docket No. NORT 78-387, on the ground that the Secretary failed to introduce in

evidence the underlying notice of violation. Respondent argues that the existence of the underlying notice of violation must be established before the validity of the subject section 104(c)(1) order of withdrawal can be established. Respondent argues that without a "chain" established between the notice and order, the Commission lacks jusisdiction to consider the validity of the order.

The Secretary introduced in evidence the order of withdrawal that was issued on October 27, 1977. The order of withdrawal reads in part: "The violation was found during a subsequent inspection made within 90 days after Notice No. 1 J.A.B. was issued on September 7, 1977, and is also caused by an unwarrantable failure to comply with such standard." The Secretary did not introduce in evidence Notice No. 1 J.A.B. However, I conclude that this omission was not fatal to the Secretary's case. I find that the existence of the underlying notice of violation was established when the subject order of withdrawal was received in evidence without objection from Respondent. The existence of the underlying notice of violation is indicated on the face of the order of withdrawal. I find that in the absence of evidence that the underlying notice of violation was contested by Respondent in a review proceeding, the validity of the notice is established for purposes of this proceeding.

Based on the order of withdrawal issued on October 27, 1977, the Secretary has charged Respondent with a violation of 30 C.F.R. § 77.404, which provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The basic issue as to this charge is whether the brake on the No. 3 Hoyle winch malfunctioned and whether the malfunction of the brake rendered the three-stage circular work deck unsafe.

The Secretary argues that a preponderance of the evidence establishes that the brake on the No. 3 Hoyle winch malfunctioned, causing an added strain on the other brakes and rendering the work deck operation unsafe.

The Secretary proposes a penalty of $4,000.

Respondent contends that the malfunction of one brake would not render the work deck unsafe because the remaining brakes could handle the load. Geoffrey Weston, Thyssen's Director of Mining Services, testified that the tilt resulting from the failure of one of the brakes would be so slight that no one on the deck would be in danger of falling to the deck or falling through the bucket well.

Using a scale model of the work deck and the shaft and his mathematical calculations based on the weight and size of the deck, Weston testified that the maximum tilt of the deck would be 2.07 degrees and the maximum vertical deflection would be 8 inches or a 4-percent gradient. Weston testified that if the work deck descended below the concrete formwork while the shaft bottom was being excavated, which was unusual, the degree of tilt would be greater.

Weston testified that a four-winch-operated work deck was designed to operate safely with three ropes and that slackness in one of the ropes after the deck was stopped and the winches were rolled back against the safety pins was common. When the winches were backed off, slackness would be produced in one of the ropes depending on the relative positions of the safety pins when the winches were halted.

At the time of the inspection, the shift had already begun and the crew was on the work deck. The safety pins had been removed and the hoist operator was trying to level the work deck before moving it up or down. It was normal for the deck to become slightly unlevel with a four-winch hoisting system and the operator's action in applying power to the four winches one at a time was an acceptable method of leveling the deck. However, a preponderance of the evidence establishes that the crew was having an unusually difficult time leveling the deck. The inspector testified that the hoist operator told him that they were having trouble keeping the deck level and when the inspector arrived at the deck, the foreman also told him that they were unable to keep the deck level.

I find that, with the safety pins removed, the inability to level the deck created a potential hazard to the crew and imposed a duty upon Respondent to inspect the brakes. A preshift examination and hoisting inspection were conducted before the shift began and no brake defects were found. However, the most common method of testing the brakes, which involved activating the hoist motor and then applying the brakes to see if the brakes held, was done only after the five-man crew had descended to the deck. A proper inspection before the men arrived at the work deck would have revealed a problem with the brakes, requiring a more thorough inspection of the braking system.

I find that the tilt observed by the inspector indicated a defect in the braking system and that this defect presented a safety hazard. A sudden displacement of the deck when the brakes were applied could cause an employee to fall and injure himself either on an object lying on the deck's surface or by wedging a leg or arm between the deck and the shaft wall. I find that the tilt was not caused by the winches winding non-synchronously or by the ropes spooling unevenly on the drums. A tilt while the deck was in motion might result from one of these factors; however, I find that the displacement of the deck <u>when the brakes were applied</u> was caused by a defect in the brakes, as Inspector Hulvey believed. It was a violation to keep men on the deck and to try to operate it without first checking the brakes and correcting any brake defect found.

However, the gravity of the violation was minimal because the antitilt riggers attached to the outside of the work deck would limit the tilting of the deck by wedging against the shaft wall. I find significant the inspector's own experience on the deck when the No. 3 brake's failure to hold properly did not cause anyone on the deck to lose his balance.

The negligence of the operator was also slight because a preshift inspection and hoisting inspection were conducted before the shift began; the crew had been trying to level the deck for only a few minutes before the inspector

arrived at the operator's compartment; and the safety features of the three-stage work deck were more than adequate to prevent serious injury if one of the brakes malfunctioned.

Based on the order of withdrawal issued on November 21, 1977, the Secretary has charged Respondent with a violation of 30 C.FR. § 77.404, which provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The basic issue as to this charge is whether the three-stage work deck was in safe operating condition. The Secretary and the Respondent have not filed briefs as to this charge.

I find that the Secretary failed to prove a violation as to this order. As noted above, a slack cable while the deck was stationary was a common occurrence and three cables were capable of supporting the deck in a safe condition. Inspector Hulvey testified that all of the brakes were working properly. The evidence supports a reasonable inference that the slackness in the No. 1 rope was caused by the winch being backed off against the safety pin and that this did not pose a safety hazard. The Secretary did not prove by a preponderance of the evidence that the slack cable constituted an unsafe condition.

Nor did the Secretary show by a preponderance of the evidence that the presence of an air hose intertwined with one of the wire ropes posed a safety hazard under the cited standard. Inspector Hulvey testified that the air hose was not interfering with the function of the wire ropes because the deck was stationary. He said that the only danger was that if the deck was moved, the hose might snap. However, as noted above, the deck often remained stationary for several days and there was no evidence that the deck was about to be moved or that Respondent's crew would not have untangled the hose from the air pump at the bottom of the shaft before moving the deck. The inspector testified that the crew was taking a lunch break at the time of the inspection. I find that the Secretary failed to prove by a preponderance of the evidence that the air hose interfered with the safe operation of the work deck or that the air hose was in danger of snapping or being punctured at the time of the inspection, or that Respondent planned to operate the deck later without disentangling the air hose and wire rope. In addition, the inspector testified that the hazard to the safe operation of the deck posed by the air hose was minimal compared to the hazard of slackness in one of the cables. The gravamen of the Secretary's charge having failed of proof (the slack cable), the air hose condition does not warrant sustaining the November 27 charge of an unsafe condition.

CONCLUSIONS OF LAW

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

2. Respondent violated 30 C.F.R. § 77.404 by allowing men to travel on an unsafe work deck as alleged in Order of Withdrawal No. 1 W.W.H. (7-62).

Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $100 for this violation.

3. Petitioner did not meet his burden of proving a violation as alleged in Order of Withdrawal No. 1 W.W.H. (7-67).

ORDER

WHEREFORE IT IS ORDERED that (1) the charge based on Order of Withdrawal No. 1 W.W.H. (7-62) is DISMISSED, and (2) Clinchfield Coal Company shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $100, with 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

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Gary W. Callahan, Counsel for Clinchfield Coal Company, Lebanon, VA 24266

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 30 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-220
	:	Assessment Control No. 15-07077-03017 V
v.	:	
ROYAL DARBY COAL COMPANY, INC., Respondent	:	No. 1 Mine

DEFAULT DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Barbourville, Kentucky, on November 19, 1980, pursuant to written notice of hearing dated September 24, 1980, and received by respondent on September 26, 1980, counsel for the Secretary of Labor entered his appearance, but no one appeared at the hearing to represent respondent.

Section 2700.63(a) of the Commission's Rules of Procedure provides that when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on November 21, 1980, pursuant to 29 C.F.R. § 2700.63(a). A reply to the show-cause order was timely filed by the operator on December 1, 1980. The operator states that he was unable to attend because his father passed away on the evening of November 18, 1980, and was buried November 21, 1980. In such circumstances, the operator asks that he not be held in default and that another hearing be scheduled.

It seems harsh to find an operator in default in circumstances which show that the operator's father died on the evening of the day preceding the day on which the hearing was scheduled to be held. I would be willing to find that respondent had satisified the show-cause order and I would be willing to reschedule the hearing if the operator had stated that he made any effort whatsoever to notify me before the hearing of the fact that his father's death would prevent him from being able to be present at the hearing. The operator knew that the hearing was scheduled to be held in the

conference room at the Office of the Mine Safety and Health Administration in Barbourville, Kentucky. That office opens for business at 7:00 a.m. each day and MSHA's employees do not leave until 5:30 p.m. Even after 5:30 p.m., a member of the custodial force will answer the phone if a call is made to the office.

Respondent's failure to call the MSHA office on November 18, 1980, or on the morning of November 19, 1980, caused us to have to pay a reporter for being present at a hearing which lasted about 2 or 3 minutes. Additionally, the Secretary's counsel drove all the way from Nashville, Tennessee, to Barbourville, Kentucky, for the sole purpose of representing MSHA at the hearing because all other cases scheduled on or after November 19, 1980, were either settled or continued long in advance of the time set for the convening of the hearing in this proceeding.

The operator's answer to the show-cause order does not state specifically what time his father died. Even assuming that his father died at 11:59 p.m., which is as late as the death could have happened and still be said to have occurred on November 18, 1980, a call to the MSHA office at 7:00 a.m. on November 19, 1980, would have enabled the reporter, MSHA's attorney, the inspector, and me to start our return trips to our various offices instead of waiting around, as we did, for well over an hour after 9:00 a.m. to provide the operator with the hearing he had requested in the event he should make a tardy appearance.

I previously held a hearing in Barbourville on August 8, 1978, with respect to the operator's cases in Docket Nos. BARB 78-387-P and BARB 78-419-P. At that hearing, the operator presented his section foreman as a witness and introduced documentary evidence. The citation involved in this proceeding was served by the inspector on respondent's section foreman. Therefore, the operator was forced to rely upon the first-hand knowledge of his section foreman to present a defense to the alleged violation. In this proceeding, the hearing was scheduled to be held on the morning of November 19, 1980. Consequently, respondent would have had to have prepared for the hearing on November 18, 1980, prior to the death of his father who is said to have died on the evening of November 18. Preparation for the hearing would at least have involved his alerting his section foreman to be ready to travel to Barbourville early in the morning because the operator had to drive to Barbourville, Kentucky, from Louellen, Kentucky, a distance of about 45 miles. If the emotional stress associated with the death of the operator's father caused him temporarily to forget about the hearing, his section foreman would have reminded him very early the next morning that he had failed to meet the section foreman for the trip to Barbourville.

Additionally, as I noted in my decision issued February 7, 1979, in Docket Nos. BARB 78-387-P and BARB 78-419-P, the operator has a history of ignoring his obligations with respect to our hearings. On pages 1 and 2 of my decision in Docket Nos. BARB 78-387-P, et al., I noted that respondent had requested an opportunity to file a posthearing brief. He was given a period of 30 days after receipt of the transcript within which to file the

brief. The operator never did file that posthearing brief and never did notify me that he no longer wished to file a brief even though I waited for 5 months after the transcript was received before writing my decision in order to give him plenty of time within which to file the brief. My decision also noted on page 1 that the operator had made similar requests in other hearings and had never filed a brief in any instance after he had requested an opportunity to do so.

The foregoing facts show that the operator has consistently ignored his reponsibilities as a participant in our proceeding and has shown indifference to the expenses to the Government and time wasted by Government personnel in providing him with procedural due process. I find that the operator has shown no reason in his answer to the show-cause order why he could not have notified me or the MSHA office of his father's death so that at least some of the time, effort, and expense associated with providing him with an opportunity for a hearing on November 19, 1980, could have been avoided.

For the foregoing reasons, I find respondent to be in default. Section 2700.63(b) of the Commission's Rules of Procedure provides that when a judge finds a respondent to be in default in a civil penalty proceeding, he shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Royal Darby Coal Company, Inc., shall pay a civil penalty of $500.00 which was proposed by the Assessment Office with respect to the violation of section 75.200 alleged in Citation No. 746688 dated September 24, 1979.

Richard C. Steffey

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

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