FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 16, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2002-80
Petitioner	:	A.C. No. 36-07456-03532
	:	
v.	:	Docket No. PENN 2003-10
	:	A.C. No. 36-07456-03533
D & F DEEP MINE BUCK DRIFT,	:	
Respondent	:	Docket No. PENN 2003-38
	:	A.C. No.36-07456-03534
	:	
	:	Buck Drift Mine

DECISION

Appearances: Andrea J. Appel, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, on behalf of Petitioner;
Randy Rothermel, Sr., Klingerstown, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The petitions allege that D & F Deep Mine Buck Drift ("D&F") is liable for four violations of the Act and mandatory safety and health standards applicable to underground coal mines. A hearing was held in Pottsville, Pennsylvania. The Secretary proposes civil penalties totaling $2,628.00 for the violations. For the reasons set forth below, I find that D&F committed three of the alleged violations and impose civil penalties totaling $1,560.00.

Findings of Fact - Conclusions of Law

Background

Respondent operated an underground anthracite coal mine, the D & F Deep Mine Buck Drift, in Schuylkill County, Pennsylvania. Four miners normally worked at the site. D&F's

mine is a "drift" mine,[1] the entrance to which consists of a nearly horizontal tunnel, 10-12 feet wide, leading into the Big Buck coal vein. At that level, the coal vein is approximately five feet thick and slopes at an angle of 35 degrees from horizontal. The main entry of an anthracite mine is referred to as a "gangway." Entries called "chutes," were developed upward in the coal seam from the gangway at 60-80 foot intervals. Other horizontal entries, approximately eight feet wide, were driven higher in the vein and parallel to the gangway, at 30-60 foot intervals. The first horizontal entry above the gangway is called the "monkey heading" and successive entries above that level are referred to as "miner headings." A locomotive operated on tracks installed in the gangway from the mine entrance to the no. 16 chute, which was referred to as the "loadout point." The locomotive towed haulage cars to transport supplies into and coal out of the mine.[2]

At the time of the inspections, D&F was in the process of removing pillars, those blocks of coal left between the headings and chutes. Specifically, D&F was removing the lower portions of the pillars between the gangway and monkey headings from chute no. 16 to chute no. 20.[3] In the same area, D&F was also robbing, or removing, coal from the low-side rib of the gangway entry. This mining increased the width of the gangway by approximately 20 feet on the high rib side and by 10 feet on the low side. Roof support was provided by timbers placed on five-foot centers and roof bolts that were driven as indicated by conditions.

The Inspections

Section 103(a) of the Act requires that underground coal mines be inspected by the Secretary's Mine Safety and Health Administration ("MSHA") four times each year. Kenneth J. Chamberlain, an MSHA inspector with 12 years of experience and 15 years of experience as a miner, commenced an inspection of the mine on November 16, 2001. On Monday, November 19, 2001, he inspected the pillar removal work in the gangway and issued a citation to Respondent charging a violation of 30 C.F.R. § 75.203(a), i.e., that the gangway entry was being mined to an excessive width. Respondent was given until 8:00 a.m. the following day to abate

---

[1] A "drift" is "[a]n entry, generally on the slope of a hill, usually driven horizontally into a coal seam." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 169 (2nd ed. 1997).

[2] The slope of the Big Buck vein becomes more horizontal as it rises, changing approximately 3-5 degrees for each heading. At the monkey and gangway levels, coal would slide down the chutes by force of gravity alone. At the higher levels, however, coal would not slide and various methods were used to move the coal down the chutes.

[3] Approximately 10-12 feet of coal on the high side of the pillars was left in place to preserve the lower rib of the monkey heading. D&F planned to use the monkey heading for removal of coal mined from the pillars further up the slope. The chutes were boarded-shut at the monkey heading, so that coal could be dragged to an open chute, where it could run down to the loadout point on the gangway.

the violation. On November 20, Chamberlain observed that the violation had not been abated and issued an order pursuant to section 104(b) of the Act, barring entry to the affected area. On November 21, 2001, Jack McGann, another MSHA inspector, accompanied by Dennis D. Herring, an inspector in training, attempted to conduct an inspection to determine whether the violation cited by Chamberlain had been abated.

They arrived at the mine about 9:00 a.m. and spoke to Cindy Rothermel,[4] who was in an office on the surface. She was unable to contact Randy Rothermel, Sr., the superintendent, who was underground, because she could not locate the surface-to-underground intercom, which had been moved. McGann stated that he knew the layout of the mine and where work was being done, and indicated that he and Herring would enter the mine without an escort. Mrs. Rothermel told him that she was not comfortable with them entering the mine without the miners' knowledge. McGann and Herring then prepared to go underground and proceeded to walk down the gangway into the mine. When they reached the loadout point, the area of the no. 16 chute, they encountered Randy Rothermel, Jr., who had come down from the monkey heading to retrieve some tools. He sent another worker to inform his father of the inspectors' presence, stating that "he's not going to be happy." Tr. 158. Randy Rothermel, Sr. immediately came to the loadout point and was very angry that the inspectors had entered the mine without his knowledge. He ordered them to leave the mine immediately. McGann warned Rothermel that the denial of entry would result in a citation and order. Rothermel continued to insist that the inspectors leave mine property. Respondent stipulated that McGann and Herring were told to leave the mine because they entered the mine without Rothermel's knowledge and because there had been inspectors at the mine for the previous three days.

When he returned to the office, McGann issued Citation No. 7003551, charging Respondent with denying the inspectors entry to the mine, a violation of section 103(a) of the Act. The Secretary filed a civil action in the U.S. District Court for the Middle District of Pennsylvania against Randy Rothermel, Jr. and Cindy Rothermel, Respondent's principals, seeking temporary and permanent injunctive relief. On November 23, 2001, a preliminary injunction was issued barring the Rothermels from interfering with, hindering or delaying the Secretary of Labor from carrying out the provisions of the Act. McGann returned to the mine the following day and was allowed to perform the inspection. The denial of entry citation and the excessive width citation were terminated after a sign was hung forbidding passage on the gangway inby the no. 17 chute. McGann determined that mining in the gangway did not conform to the operator's approved roof control plan and issued a citation for that violation.

On January 30, 2002, Chamberlain visited the mine to conduct a respirable dust survey. Randy Rothermel, Sr. refused to allow him to carry dust pumps necessary for the survey into the mine, demanding to be shown, in writing, the Secretary's authority to conduct a dust survey not

[4] Cindy Rothermel is married to Randy Rothermel, Sr., the mine's superintendent. Mrs. Rothermel and Randy Rothermel, Jr., are partners who own the D&F mine.

in conjunction with a regular inspection.[5] When written authority satisfactory to Rothermel was not produced, he continued to refuse to allow Chamberlain to take the dust pumps into the mine. Chamberlain returned to the mine with the MSHA field office supervisor, Kenneth Hare, who again cited the Secretary's authority to conduct inspections under section 103(a) of the Act, and handed him a citation and an order when he continued to refuse to allow the inspection. Citation No. 7003958 charged Respondent with denying entry to an authorized representative of the Secretary in violation of section 103(a) of the Act. The Secretary again sued the Rothermels in federal court, seeking temporary and permanent injunctive relief. The Rothermels defended, challenging the Secretary's legal authority to conduct respirable dust surveys. The Secretary prevailed in that action. A permanent injunction was entered on April 25, 2002, enjoining the Rothermels from denying entry to authorized representatives of the Secretary attempting to conduct inspections. The Rothermels appealed that decision, which was affirmed. *Chao v. Rothermel*, 327 F.3d 223 (3rd Cir. 2003).

The four citations issued in the course of the above events are discussed below.

Citation Nos. 7003952 and 7003553

Citation No. 7003952, which was issued by Chamberlain on November 19, 2001, alleges a violation of 30 C.F.R. § 75.203(a), which requires that "The method of mining shall not expose any person to hazards caused by excessive widths of rooms, crosscuts and entries, or faulty pillar recovery methods." The conditions noted on the citation were:

> The method of mining used by the operator caused excessive width in the old conveyor gangway in the Big Buck Vein. The operator deviated in his pillar recovery sequence, in that the gangway is approximately 40 feet wide from no. 17 chute inby to the no. 20 chute. It should be noted the operator had spot bolted the area and placed appropriate timbers. The above method is not included in the operator's approved Roof Control Plan.

He concluded that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was significant and substantial, that four persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of $281.00 is proposed.

Citation No. 7003553 was issued by McGann on November 24, 2001, and alleges a violation of 30 C.F.R. § 75.220(a)(1), which requires that "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." The conditions noted on

---

[5] Beginning in April 2000, MSHA conducted bi-monthly respirable dust inspections at underground coal mines, four of which were done in conjunction with the regular inspections. Ex. P-11 (exhibits to the Secretary's Motion to Limit Trial Issues).

the citation were:

> The operator deviated from the approved roof control plan in that the gangway pillars of the old conveyor gangway (Big Buck Vein), were being removed. The operator had removed the pillars on the high and low side of the coal ribs between chute nos. 17 through 20. The area mentioned is 40 feet in width. The above robbing method is not mentioned in the roof control plan.

He concluded that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was significant and substantial, that four persons were affected and that the violation was due to the operator's moderate negligence. A civil penalty of $97.00 is proposed.

The Violations

The approved roof control plan in effect in November 2001 for Respondent's mine specified a maximum gangway entry width of 12 feet and did not contain any provisions for pillar removal. Tr. 103-05, 192-93; ex. P-6. Following issuance of these citations, Respondent submitted an addendum to its roof control plan, which included provisions for removal of gangway pillars and robbing of the low rib of the gangway. That proposal, as amended, was eventually approved by MSHA. Ex. P-7. The pillar removal provisions of the amended plan specify a procedure very similar to that employed by Respondent at the time the citations were issued. They allow the partial removal of the lower portions of the pillars between the gangway and monkey headings and robbing of the low-side gangway rib down to the water level, some 200 feet below. Required roof support consists of timbers installed on five-foot centers, and "cribs" or "cogs" installed on 50 foot centers. Foot or liner boards, at a minimum height of 12 inches, must be installed on the second row of timbers above the dragway-working surface. Ex. P-7. The plan also specifies a sequence for removal of blocks of coal from the low-side rib.

As to Citation No. 7003553, there is no question that the roof control plan in effect in November 2001 did not provide for pillar removal, and that Respondent was not following its approved roof control plan at the time the citation was written. Randy Rothermel, Sr. essentially conceded as much, although he maintained that his mining method exceeded the requirements of the plan. Tr. 68-69, 164-65, 189-96. I find that Respondent violated 30 C.F.R. § 75.220(a)(1), as alleged.

The alleged excessive width violation, Citation No. 7003952, presents more difficult issues. Respondent had expanded the width of the gangway entry to 40 feet, well in excess of the maximum width allowed in its approved roof control plan. The critical question is whether the conditions in that area wre such that the 40-foot width presented a hazardous condition. For the reasons that follow, I find that the mining method employed by Respondent to rob the pillars and low-rib in the gangway complied, in all essential respects, with the later-approved amendment to its roof control plan and that no hazard was presented.

Chamberlain and Herring explained their assessments of the danger of conducting pillar removal as Respondent was doing it in November 2001. Increasing the width of the entry exposed more roof, forcing the remaining coal and roof supports to bear more weight. They felt that "sooner or later," a large piece of coal or roof would fall and slide down the slope, possibly hitting a miner working on the gangway or low rib. Tr. 28-29, 106-09.

Chamberlain testified that the timbers and roof bolts Respondent had installed were not sufficient to compensate for the stresses caused by the increased width of the entry. In his judgment, cribs and foot boards should have been installed. The later-approved amendment to the roof control plan required that cribs be placed on 50-foot centers and that foot boards be installed on the second row of timbers above the working surface. Herring also testified that the timbers and bolts were not sufficient to compensate for the increased width. However, his conclusion was based upon an assessment that the timbers were spaced too far apart. Tr. 109, 134. He had not entered the mine past the no. 17 chute and did not take measurements, but estimated that the timbers may have been 6 feet apart. Tr. 134. Randy Rothermel, Sr., testified that the timbers were placed on 5-foot centers and that foot boards had been installed. Tr. 168. Chamberlain recalled that the timbers were spaced "pretty close" to the 5 foot centers required in the amended plan. Tr. 39-40.

I find that timbers had been placed on 5-foot centers and that roof bolts had been installed. Herring, who had not traveled the gangway beyond the no. 17 chute, testified that he did not recall foot boards being present. Tr. 110, 121. Chamberlain testified that foot boards were not present. Tr. 26, 30, 39, 80. However, he also indicated that he was relying on his recollection of observations made during the inspection in 2001. Tr. 45. I find it significant that neither the citation, nor the notes he made during the inspection, mention the absence of foot boards. Ex. P-1, P-9. McGann's citation, likewise, does not note an absence of foot boards. Ex. P-3. I credit Rothermel's unequivocal testimony on this issue, and find that foot boards had been placed on the timbers above the gangway entry.

Roof control plans must address the specific conditions of a particular mine, and may provide for protections in addition to those specified in the mandatory standards. *See, e.g., C.W. Mining Co.*, 18 FMSHRC 1740, 1745 (Oct. 1996); 30 C.F.R. §§ 75.220(a), 222(a) and 207. Approved roof control plans are, therefore, authoritative documents reflecting MSHA's approval of roof control measures designed by the operator to avoid hazardous roof conditions in a particular mine. Anecdotal evidence of conditions or occurrences at other mines is of limited value in evaluating the adequacy of roof control measures in Respondent's mine.

The later-approved amendment to the roof control plan for Respondent's mine allowed a gangway width in excess of 200 feet and called for essentially the same amount of roof support that was provided when the citation was issued.[6] While that plan also required that cribs be

[6] The amended roof control plan also specified a procedure, or "sequence," for removing the coal from the gangway's low-side rib. Respondent had not been following that sequence in November 2001. However, there is no evidence that the procedure followed by Respondent was more hazardous than that specified in the amended plan.

installed on 50-foot centers, the gangway was no more than 40 feet wide at the time, such that cribs would not have been required. The mine roof was in good condition. The coal was very hard, and Chamberlain did not observe any areas where the roof or ribs were in bad condition or timbers were bearing any significant weight. Tr. 76-77. Even if foot boards were missing in some locations, the gangway, itself, constituted the substantial equivalent of a foot board. The higher side of the gangway floor had been "fired," or blasted downward to level off the floor. That depression in the rock floor of the vein created a configuration that, in Herring's opinion, would most likely have caught and stopped any sliding material, greatly minimizing the danger to miners working on the low-side rib. Tr. 124-25.

Based upon the foregoing, I find that the width of the gangway entry and the mining method used by Respondent to rob the gangway/monkey pillars and the low-rib of the gangway did not expose miners to a hazard, and that Respondent did not commit the violation alleged in Citation No. 7003952.[7]

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *See also U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985); *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I have found that the condition of the gangway entry in November 2001 did not present a hazard to miners. Consequently, the violation of 30 C.F.R. § 75.220(a)(1) was not significant and substantial.

Citation No. 7003551

Citation No. 7003551 was issued by McGann on November 21, 2001, and alleges a violation of section 103(a) of the Act, which provides that authorized representatives of the Secretary "shall have a right of entry to, upon, or through any coal or other mine" for the purpose

---

[7] The Secretary argues that Respondent's method of pillar removal, which left the higher side of the pillars in place, resulted in "compromised" pillars, in that the "dimension of the remaining coal at the bottom of the pillar [was] less than at the top," whereas, leaving the lower side of the pillars in place would have provided a "stable" block of coal to support the roof. Sec'y Br. at pp. 3, 17. However, there is no evidence to suggest that the block of coal remaining at the top, or higher side, of the pillar would have had different dimensions or been less stable than a similar sized block of coal left at the bottom, or lower side. Chamberlain's concern was the location of the pillar remnant, not its shape.

of conducting inspections authorized by the Act. He concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that four persons were affected and that the violation was due to the operator's reckless disregard of the Act. A specially assessed civil penalty of $750.00 is proposed.

The Violation

There is no dispute that the inspectors were at the mine for a legitimate purpose, i.e., to determine whether the conditions noted in the citation issued by Chamberlain had been abated. There is also no dispute that Randy Rothermel, Sr. refused to allow them to remain in the mine because he was upset at the inspectors for entering the mine without his knowledge and he was frustrated by being subjected to another inspection when there had been inspections on the preceding three days. As he explained his concerns, anthracite coal is mined entirely through the use of explosives, an extremely hazardous mining method that requires a high degree of caution. As superintendent, he must know the precise location of everyone in the mine while blasting operations are occurring. On the day in question, since the previously issued citation and order prevented robbing of the pillars and rib in the gangway, he was driving a "rock hole," i.e., blasting a tunnel through rock to reach the Little Buck vein, approximately 20 feet above. The entrance to the tunnel was at the loadout point, no. 16 chute on the gangway, and pieces of rock blasted from the face of that tunnel would have been thrown forcefully out of the tunnel in the area of the loadout point. He ordered the inspectors out of the mine "for their own good," so that they wouldn't do it again. Tr. 163-64, 184. Randy Rothermel, Jr. testified that if the inspectors had entered the mine a half-hour later they "could have got fired up." Tr. 158. Herring has not entered a mine under such circumstances "before or since" and testified that he would have been very concerned if, when he and McGann reached the loadout point, he had seen twisted wires leading up the rock hole, indicating that a blast was about to occur. Tr. 115-16. He conceded that it could be very dangerous for an inspector to enter a mine under such circumstances. Tr. 116. Randy Rothermel, Sr. testified, without contradiction, that he has discussed the issue with the current MSHA District Manager and has been advised that MSHA's present policy is not to enter mines under such circumstances. Tr. 170.

Respondent argues that section 103(f) of the Act requires that a representative of the operator be given an opportunity to accompany the Secretary's authorized representative during an inspection, and that the only notification provided was to Cindy Rothermel who was not trained to go underground. However, as the Secretary notes, section 103(a) of the Act specifically provides that, except in certain circumstances, "no advance notice of an inspection shall be given," and in some situations, inspectors are not permitted to notify mine personnel underground before entering a mine. Tr. 96, 141-43. Section 103(f), upon which Respondent relies, also provides that "Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

McGann notified Respondent's principal of his presence and intention to enter the mine and conduct the inspection. He did not prevent Mrs. Rothermel from notifying the underground

miners. She was unable to do so because she could not find the mine intercom. Even if McGann's actions could be construed to be non-compliant with section 103(f), they would not compromise the Secretary's authority to conduct the inspection, and would provide no defense to the alleged violation. However inadvisable it was for the inspectors to have entered the mine without the underground miners' knowledge, once their presence was made known, they were not in danger and there was no justification for preventing them from conducting the inspection. The concerns raised by the manner of their entry could and should have been pursued at another time and place. Rothermel's refusal to allow them to conduct the inspection violated the right of entry provision of the Act. While Rothermel's actions were not legally defensible, I find that his concerns about the inspectors' safety and the safety of his mining activity were *bona fide* and, under the circumstances, understandable. I find the above considerations a mitigating factor on the degree of operator negligence and hold that the violation was the result of Respondent's high negligence.

Citation No. 7003958

Rothermel's refusal to allow Chamberlain to bring dust monitoring equipment into the mine on January 30, 2002, resulted in the issuance of Citation No. 7003958, alleging a denial of entry in violation of section 103(a) of the Act. Chamberlain concluded that it was unlikely that the violation would result in an injury, that the violation was not significant and substantial, that four persons were affected and that the violation was due to the operator's reckless disregard of the Act. A specially assessed civil penalty of $1,500.00 is proposed.

By Order dated September 11, 2003, the Secretary's Motion to Limit Trial Issues was granted, in part. It was held that the preclusive effect of the federal court litigation conclusively established Respondent's violation of the Act, as alleged in this citation. That order provided, in relevant part, that "Respondent is precluded from relitigating the fact that it violated the Act as alleged in Citation No. 7003958. Respondent may, however, litigate the appropriateness of the gravity and negligence determinations, as well as the amount of the civil penalty."

The primary remaining issue, with respect to this citation, is whether Respondent's negligence was at the level of "reckless disregard." Randy Rothermel, Sr., explained that his refusal to allow the dust monitoring was based upon his recollection of a long-ago reading of a portion of the MSHA Program Policy Manual, and a recent change in inspection procedures. Tr. 180-81. He asked to be shown written authority for MSHA to conduct dust sampling when not done in conjunction with a regular inspection. He apparently was shown the Act's provisions regarding the Secretary's authority to enter mines for the purpose of conducting inspections, but was not provided with specific written authorization for the proposed dust inspection. He recognized the Secretary's authority to conduct spot inspections for respirable dust, but was resistant to the Secretary's program of conducting two dust samplings, in addition to those taken during the four regular inspections.

The Secretary characterizes Respondent's explanation for the denial of entry as

"unconvincing" for a number of reasons. Sec'y Br. at p. 32. However, the fact that Rothermel pursued his challenge to the Secretary's authority through a final decision by the United States Court of Appeals for the Third Circuit is convincing evidence that he honestly believed that there was some question as to the Secretary's authority. While the appellate court characterized some of the Rothermels' arguments in less than charitable terms, it did engage in more extended treatment of the argument that MSHA's change in dust sampling procedures required formal rulemaking. Again, I find Respondent's *bona fide* belief in the legal merit of its position to be a mitigating factor. The Secretary's authority to conduct inspections pursuant to section 103(a) of the Act is very broad, but is not unlimited or absolute. *Tracey & Partners, Randy Rothermel*, 11 FMSHRC 1457, 1461-62 (Aug. 1989). Randy Rothermel, Sr. had successfully challenged the Secretary's claim of authority to conduct certain inspections. *Id*. An operator that believes there is a reasonable challenge to the Secretary's authority to conduct inspections in a given manner has limited options with which to secure judicial review of the suspect practice, and must do so at its own "legal peril." *Id*. n. 3 at 1462. I find that the violation was the result of Respondent's high negligence, rather than reckless disregard of the Act.

The Appropriate Civil Penalties

The parties stipulated that, prior to its temporary abandonment of the Buck Drift Mine in March 2003, D&F produced approximately 8,000 tons of coal per year, making it a small mine and very small controlling entity. The computer-generated report of D&F's history of violations for the period January 30, 2000, through January 29, 2002, reflects no violations other than those at issue in this case. Ex. P-5. The violations, gravity and negligence assessments, with respect to each alleged violation, are discussed above.

Respondent submitted copies of income tax returns for the years 2001 and 2002 filed by Cindy and Randy Rothermel, Sr., including returns related to the partnership operating the D&F Mine and RS&W Coal Co., Inc., a corporation. Ex. R-3. Respondent offered no testimony explaining the documents, and does not directly argue that imposition of the proposed penalties would threaten its ability to remain in business.[8] Evidence of an operator's financial condition is

[8] Respondent's economic argument is painted with a considerably broader brush. Pointing to productive time lost due to numerous inspections, the failed mail delivery of a request for expedited hearing, and the time required to secure approval of roof control plan amendments, it contends that maintaining economic viability in compliance with applicable regulations "is becoming an impossibility." Resp't. Br. at p. 9. Time required to attend to inspections can certainly adversely affect production in a small mine like Respondent's. Within two months of opening the mine in September of 2000, some 21 inspectors visited. However, Respondent bears considerable responsibility for the disruption of the gangway pillar mining caused by the roof control citations. The Rothermels are highly experienced anthracite coal miners, and the primary planned mining activity when the D&F Buck Drift Mine was acquired was robbing of pillars. Yet, the roof control plan submitted by Respondent contained no provisions for the removal of pillars. If the later-approved amendments had been included in that plan, the subject citations

relevant to the ability to continue in business criterion. *Georges Colliers, Inc.*, 23 FMSHRC 822, 825 (Aug. 2001). However, in the absence of proof that the imposition of civil penalties would adversely affect an operator's ability to continue in business, it is presumed that no such adverse effect would occur. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). The documents submitted by Respondent show modest, but positive, income for D&F and its principals. There is no evidence of indebtedness leading to tax liens or adverse judgments in favor of creditors. D&F has not been dissolved. It remains a viable business entity and could resume its temporarily abandoned operations. In the absence of evidence showing that imposition of the proposed penalties would affect its ability to resume operations and continue in business, consideration of this penalty criterion does not warrant a reduction in the amount of the proposed penalties. *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994).

Docket No. PENN 2002-80

Citation No. 7003553 was affirmed. However, the violation was not found to have been significant and substantial. Rather, the violation was found to be unlikely to result in a serious injury. Respondent took immediate steps to terminate the violation and submitted an amendment to its roof control plan that was eventually approved. A civil penalty of $97.00 was proposed by the Secretary. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Docket No. PENN 2003-10

Citation No. 7003551 was affirmed. However, it was found to have been the result of the operator's high negligence, rather than reckless disregard. The fact that Respondent did not attempt to abate the alleged violation is reflected in the negligence assessment and the proposed specially assessed penalty of $750.00. Considering the reduction in the level of Respondent's negligence and the factors specified in section 110(i) of the Act, I impose a penalty of $500.00.

Docket No. PENN 2003-38

Citation No. 7003958 was affirmed. However, it was found to have been the result of the operator's high negligence, rather than reckless disregard. The fact that Respondent did not attempt to abate the alleged violation is reflected in the negligence assessment and the proposed specially assessed penalty of $1,500.00. Considering the reduction in the level of Respondent's negligence and the factors specified in section 110(i) of the Act, I impose a penalty of $1,000.00.

---

would not have been issued, and the disruption to mining activities most likely would have been avoided.

ORDER

Citation No. 7003952 is hereby **VACATED** and the petition as to that citation is hereby **DISMISSED**.

Citation Nos. 7003553, 7003958 and 7003551 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $1,560.00 within 45 days.[9]

Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

Andrea J. Appel, Esq., U.S. Dept. of Labor, Office of the Solicitor, Suite 630 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Randy Rothermel, Sr., D & F Deep Mine Buck Drift., RD 1, Box 33A, Klingerstown, PA 17941

/mh

[9] It should be noted that Respondent's principals are now subject to a permanent injunction issued by the U.S. District Court. Any further denial of entry could result in a charge of civil or criminal contempt and substantial penalties. The added deterrent effect of the injunction has not been taken into consideration in determining the amount of the penalties imposed herein.