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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v.	Civil Penalty Proceeding Docket No. KENT 80-273 Assessment Control No. 15-07295-03013
MARTIKI COAL CORPORATION, RESPONDENT	Martiki Surface Mine

DECISION

Appearances: George Drumming, Jr., Esq., and Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
William G. Francis, Esq., Francis, Kazee and Francis, Prestonsburg, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 12, 1981, as amended April 30, 1981, July 15, 1981, and August 5, 1981, a hearing in the above-entitled proceeding was held on May 6, 1981, and October 7, 1981, in Prestonsburg, Kentucky, 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 decisions which are reproduced below. Two of the bench decisions are contained in the first volume of transcript and the third decision is contained in the second volume of transcript.

Citation No. 707702 1/8/80 71.603(c)(Tr. 48-52)

In order to rule on Mr. Francis' motion that Citation No. 707702 be dismissed for failure of the Government to prove that a violation of section 71.603(c) existed, I should make some findings of fact.

1. Inspector Dingess, on January 8th 1980, which was a Tuesday, examined the shop area belonging to Martiki Coal Corporation. At that time, he issued Citation No. 707702 stating that the drinking water fountain was not being maintained in a sanitary condition. He subsequently modified the citation by issuance of a subsequent action sheet on February 14, 1980, in which he changed the original section alleged to have been violated from section 71.602(c) to section 71.603(c).

2. There was introduced in evidence as Exhibits A and B two pictures which show that the water fountain was adjacent to a refrigerator. The inspector stated that

the citation was primarily issued

on the ground that an excessive amount of dust, in his opinion, had been allowed to accumulate on the drinking cups which were hanging at the drinking fountain. The cups had been inverted and the dust was on the outside of the cups. The inspector also said that an excessive amount of dust was on the valve which is pressed to obtain water from the inverted container of water on top of the fountain. The inspector did not know how long it had been since the drinking fountain had been cleaned, but he pressed the valve and water did come out of the fountain. Therefore, the fountain was capable of being used. The inspector admitted that the refrigerator contained a supply of sanitary water containers in individual cups.

3. Respondent's witness, Justice, testified that he is the welding supervisor in the area adjacent to the location of the water fountain and refrigerator and he stated that the man who normally did the cleaning of the fountain had been off for a period of time and had been unable to clean the fountain, but that he had assigned other people to clean the bathrooms and the fountain from time to time. He was uncertain as to how long it had been since the cleaning person had become sick, but he testified that he believed that the fountain had been cleaned within a week prior to the inspector's writing of the citation and that in his opinion more dust would have been on the fountain than was there on the day the citation was written if the fountain had not been cleaned for 7 days.

I think those are the basic facts on which a decision will have to be based. The section at issue, namely, 71.603(c), reads as follows: "Drinking fountains from which water is dispensed shall be thoroughly cleaned once each week." The inspector definitely satisfied the first part of that provision in that he tested the drinking fountain and found that water could be dispensed through it, and while the respondent's evidence shows that some of the employees had been told to use the water in the refrigerator until the cleaning employee was able to resume his duties or until someone had been designated permanently to do his work in his absence, the fact remains that the water fountain could have been used by other employees who had not been advised to get their water from the refrigerator.

The difficulty I have with finding a violation, of course, is that the last part of section 71.603(c) provides that the fountain shall be thoroughly cleaned once each week. The inspector did not find out for certain that the fountain had not been cleaned within a week's time. The gap in his proof, therefore, as to whether the fountain had been cleaned for a week is filled in by Justice's testimony which indicated that in his opinion the fountain had been cleaned within a period of 1 week prior to the time the citation was written.

I am aware that the Commission has been very liberal in the interpretation of the standards. For example, in Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (1981), the Commission dealt with a citation which had alleged a violation of section 56.9-2, which provides that equipment defects affecting safety shall be corrected before the equipment is used. In that decision the Commission interpreted that

section to mean that use of a piece of equipment containing a defective component that could be used, and which if used, could affect safety, constitutes a violation of section 56.9-2. The Commission said that its interpretation of that section would come closer to requiring corrective action before an accident occurred than the broader interpretation which had been used by an administrative law judge. The Commission then made a very broad interpretation of that section by saying that if equipment with defects affecting safety is located in a normal work area fully capable of being operated, that constitutes use within the meaning of that section. So I am sure, based on what the Commission said in that case, by analogy the Commission would take a very broad interpretation of the section that's before me in this instance, but I don't see how I can ignore language stating that fountains "shall be thoroughly cleaned once each week."

Since I have the testimony of an inspector who is not certain that the fountain had been cleaned within a week's period and I have the opinion of the welding supervisor, who worked in the area, who says that it was cleaned in less time than a week prior to the citation, I believe that I am required to rely upon his testimony for the latter part of that section and find that no violation of section 71.603(c) was proven. That does not mean that I am critical of the inspector for having issued the citation because the Commission has constantly pointed out that the purpose of the regulations is to achieve healthful and safe conditions in coal mines and surface facilities and the inspector's testimony shows that this particular drinking fountain needed attention and probably the inspector did the company a service in issuing the citation by showing them that they were not cleaning this fountain as often as was desirable, even though it may have been cleaned 7 days before January 8, 1930. Since I have found that no violation was proven the Proposal for Assessment of Civil Penalty is dismissed to the extent that it alleges a violation of section 71.603(c) in Citation No. 707702.

Citation No. 708229 1/8/80 77.1605(d) (Tr. 105-113)

I shall make some findings of fact upon which my decision will be based:

1. On January 8, 1980, Inspector Barry Lawson inspected Martiki Coal Corporation's surface mine. While the inspector was checking equipment, a Caterpillar 992 end loader was driven into the area where the inspector was located. The inspector checked the end loader and then discussed with the operator of the end loader whether the operator had any problems that the inspector had not noted and the operator of the end loader stated that there was a light on the top of the cab which was not working and that the operator

would appreciate it if the inspector would have the company replace that light because it helped him when he was operating the end loader. The inspector had noted that the light had been damaged and was not functioning but he wanted to determine whether the lack of light was a problem for the operator. When the operator indicated to the inspector that he would appreciate having the light replaced, the inspector wrote Citation No. 708229 at 9:45 p.m., alleging a violation of section 77.1605(d).

2. There was introduced in evidence as Exhibit C a picture of the end loader here involved after the right topmost light had been replaced. The end loader not only has two topmost lights on each corner of the uppermost part of the cab but also has dual headlights on each side of the cab located at the bottom of the windshield. The evidence shows that all of the lights were functional on the end loader except for the topmost corner light at the top of the cab.

3. Respondent's testimony shows that the Caterpillar Company produces the end loader of the type here involved with what is known as standard lighting and also offers optional lighting. If the Caterpillar 992 end loader is ordered with standard equipment only the dual lights at the bottom of the windshield on each side of the cab are provided. The testimony of one of respondent's witnesses was to the effect that respondent always ordered its 992 end loaders with the two optional headlights at the top of the cab because in respondent's opinion the additional lighting is helpful to the operator of the 992 end loader when they're being used.

4. The foreman of the night operations testified that any light, including those at the top of the cab of the 992 loader, would be replaced immediately if he were aware of the fact that such a light is missing or damaged and he said that in his opinion the lights at the top of the cab do provide illumination which is helpful and that he approves of the fact that his company ordered the equipment with the additional optional lighting at the top of the cab.

5. The inspector believes that the two lights at the top of the cab are very helpful because he says that when the end loader is being operated and the bucket is raised that the lower lights have a tendency to reflect off the bucket into the operator's eyes and that the two additional lights at the top of the cab definitely provide illumination for the operator which is very helpful and would not otherwise be available to the operator to assist him in operating the equipment.

6. The end loader in question had been used during the shift for the purpose of widening a roadway. The work for which it was intended to be used on that shift had been completed and the operator of the end loader was returning it to the storage area, but on the way to the storage area he stopped to ask the foreman, who was in the company of the inspector, if any further work needed to be done with that end loader before it was returned to the parking lot. It was at that point that the inspector examined the lights and other equipment on the end loader and wrote the citation which I have previously described. The inspector stated that the end loader had no other defects and that the only

violation that he observed was the lack of a headlight at the top of the cab on the right side.
I think that those are the basic facts which have been adduced by both parties in support or in opposition to the violation alleged in Citation No. 708229.

The section here involved is 77.1605(d), which states in pertinent part that, "Lights shall be provided on both ends when required." The first part of that section refers to mobile equipment. The argument advanced by respondent in this case is that since respondent had provided lights on both ends of the mobile equipment here involved, that respondent was not in violation of that provision because it had purchased this Caterpillar end loader with both standard and optional lighting, that is, with lights at the bottom of the windshield, and those lights were burning, plus one of the optional lights at the top of the windshield, and there were lights on the rear of the end loader. Therefore, it is respondent's position that both ends had been provided with lights as required.

Counsel for the Secretary of Labor, on the other hand, states that he would agree that if the two words, "when required", simply refer to the condition of a piece of equipment as it is delivered with standard equipment, that respondent had complied with section 77.1605(d) because there were in fact lights on both ends. The Secretary's counsel contends, however, that the words, "when required", in that section mean lights required to give the type of illumination that is desirable when a person is operating the end loader. He believes that since the testimony shows that the optional lighting, or both lights, at the top of the cab do provide the light that is required for the best possible vision and illumination when the end loader is being used, that respondent violated section 77.1605(d) when it allowed the end loader to be used without having the optional topmost right lamp in operation.

I cited, in dealing with the previous alleged violation, the Commission's decision in the Ideal Basic Industries case, 3 FMSHRC 843 (1981), and I think that that decision is very pertinent to the interpretation that's required in this instance. In that case, as I indicated, the Commission had said that if a piece of equipment is in a work area and it's fully capable of being operated, that that constitutes use of the equipment. So in this case we're sure that this equipment had been used and the question then is whether the words, "when required", mean lights required for the best possible illumination or lights required simply because the manufacturer happens to put them on both ends of the equipment as standard equipment.

The Commission stated in the Ideal Industries case that it believed that interpretations to be given to the statute are those which are likely to prevent accidents, which is the primary goal of the Act. I believe that the interpretation argued for here by the Secretary's counsel is the one which I am required to follow because even respondent's own witness agreed that that one light could make a difference if it were

missing. The operation of this equipment is facilitated and the likelihood of accidents is prevented when the operator has the maximum illumination that the equipment was purchased to have on it. Since the operator of the equipment himself is the one who noted to the inspector that he found the extra light to be an advantage, I believe that the words, "when required", in this case must be that interpretation which would require both lights at the top of the cab to be functional. Therefore, I find that a violation of section 77.1605(d) was proven.

Having found a violation, section 110(i) of the Act requires that a civil penalty be assessed. The parties have entered into stipulations which cover some of the six criteria which must be considered pursuant to section 110(i). It has been stipulated that respondent is subject to the Act and that I have jurisdiction to hear the case and that respondent operates the Martiki surface mine here involved.

With respect to the size of the operator's business, it has been stipulated that respondent is a large operator with an annual tonnage of six million, and approximately three million tons for the Martiki surface mine on an annual basis.

Exhibit 1 in this proceeding, and also an additional statement submitted by respondent, show that there has been no previous history of a violation of section 77.1605(d). It has been my practice to increase a penalty under the criterion of history of previous violation only if the evidence before me shows that the violation being considered has been previously violated. Since there has been no previous violation in this instance, the penalty should not be increased under the criterion of history of previous violations.

It has been stipulated that the operator's ability to continue in business would not be adversely affected by the assessment of a civil penalty. It has also been stipulated that all of the violations alleged in this case were abated after the operator had demonstrated a good-faith effort to achieve compliance. In this instance, abatement of the violation alleged in Citation No. 708229 is indicated in a Subsequent Action sheet written by a different inspector from the one who wrote the citation, but it is obvious that respondent demonstrated a good-faith effort to achieve compliance.

As to respondent's negligence, the evidence shows that the end loader here involved was a spare end loader and was only used when one of the other end loaders was not available or that a special job needed to be done that wouldn't take but a short period of time. In this instance, an operator who normally operated a Caterpillar tractor had been asked to use the end loader to widen a place in the road. Consequently, he would not have had any reason to know how long this light had been off the piece of equipment. The supervisor who testified stated that he was not aware of the missing light prior to the time that the end loader was driven to his vicinity. Consequently, the evidence does not support a finding of a high degree of negligence but I assume, since anyone who operates a piece of equipment is required to check it and make sure that it is without defects before it is operated, that we must attribute some negligence in this instance to the fact that this particular piece of equipment was

used without having this one light replaced. So I find that ordinary negligence existed.

As to gravity, the final criterion to be considered, there is not any real testimony to show that people were exposed to any great hazard in this instance by the lack of the one light on the right side of the cab because the operator of the end loader did not tell the

inspector where he had used the end loader. The purpose for which it had been used had already been completed. At the time that the end loader was pulled up in the vicinity of the inspector, there was another truck and another end loader in that area, but there was no one on foot, so no one was apparently exposed to any hazard in the circumstances that we have in this case. Consequently, since there's a lack of evidence as to just exactly what was done with the end loader in this instance, I find that there was a low degree of gravity based on the evidence that we have in this proceeding. Considering all those six criteria, as outlined above, I find that a penalty of $50 is adequate.

Citation No. 726078 3/21/80 77.1001 (Tr. 326-335)

I shall make some findings of fact on which my decision will be based.

1. Inspector William Creech went to the surface mine of Martiki Coal Corporation on March 21, 1980, to make an inspection based on a complaint which had been submitted to MSHA through another inspector. The complaint was an oral one and apparently alleged that the highwall at the dragline area was unsafe. The inspector was accompanied to the area of the highwall by respondent's assistant safety director. At the highwall the inspector noted some coal production was in progress but the coal was being scraped up about 300 feet from the highwall at the far end of the pit and no actual production was going on close to the highwall. The inspector noticed a rock near the top of the highwall about 2 to 3 feet in size and which was located about 10 to 12 feet from the top of the highwall. He could not tell whether the rock was loose, but as a matter of judgment, he concluded that it was a hazard because it might be loose. Additionally, he felt there were loose materials at the top of the highwall about 2 to 3 feet in depth, and consequently he wrote Citation No. 726078 stating that loose and unconsolidated material had not been stripped from the top of the highwall in an active dragline pit.

2. The inspector introduced as Exhibit 9 the ground control plan which was then in effect, and he stated that page 4 of the ground control plan showed a sketch of the type of mining activity which was in progress. That particular sketch does not show any bench on the highwall. The inspector stated that the highwall was about 90 to 100 feet in height, and the inspector said that he examined the highwall from a distance of 100 to 125 feet and that he saw no bench on the highwall. He also testified that trucks and other vehicles coming into the pit area would have to travel fairly close to the highwall in going in and out.

Based on those conditions, the inspector believed that

a violation existed and that it was fairly serious. The dragline had already been moved from the area and there apparently was no equipment around which could be used to remove either the rock or any other loose material at the top of the wall; consequently, the citation was abated within 1 hour after its issuance by the construction of a berm about 20 feet out from

the highwall which forced all traffic to go on the outby side of the berm and therefore insured no people would be closer to the highwall than 20 feet.

3. Respondent presented five witnesses in support of its contention that no violation existed. The composite testimony of all five witnesses is to the effect that, first, the highwall was not unsafe because the rock which the inspector had said was along the face of the highwall was imbedded so far into the basic rock strata that it could not have fallen; and second, respondent's witnesses claim that even if the rock had fallen, it would have been contained by a bench which had been constructed about 25 feet from the bottom of the pit with a width of 15 to 25 feet and therefore anything falling from the highwall would not have endangered anyone working in the pit.

Respondent's witnesses additionally explain that under the ground control plan which they were following but which was technically not in effect at that moment because they had never started using the one which was actually in effect on March 21, 1980, and that under the plan they were actually following, respondent had been cutting a bench along the highwall at all times. Respondent further contends that the ground control plan introduced by the inspector -- that is, Exhibit 9 -- which reflected no bench along the highwall was erroneous because that plan had been submitted in anticipation of respondent's encountering solid sandstone as a highwall, when, in fact, solid sandstone did not materialize for a sufficient length of time to merit going to a vertical highwall without a bench along the highwall.

4. The rock at the top of the highwall which was discussed by the inspector was also the subject of considerable testimony by respondent's witness, James Lewis, who said that he had inspected the rock on March 21, 1980, and that he did not see any cracks in the rock; but he apparently agreed with the inspector that the rock was on the face of the highwall a little distance down from the top.

The other witness was respondent's superintendent, Jerry Lewis, and it was his testimony that the rock was imbedded in the actual top of the highwall but extended down over the face of the highwall so that, if examined from the ground, the rock would appear to be a hazard, but if inspected from the top, it could be seen the rock was thoroughly anchored in the basic strata of the ground and therefore served as no hazard to the people working in the pit area. Jerry Lewis also said that there is some loose material at times on the highwall but that most of the time the dragline succeeds in cleaning it up so as to present no loose material to

speak of.

5. Respondent presented as Exhibit D an aerial photograph which shows areas, primarily in the form of shadows, indicating where flat places exist and where elevated places exist. According to James Lewis, a bench was constructed along the highwall at the area which is shown on Exhibit D as of March 21, 1980, and that is quite obvious if one looks at the pit area which is still visible on the aerial photograph at about one inch from the arrow shown on Exhibit D below the words "Pit Area 3-21-80."

> I believe those are sufficient findings of fact for rendering a decision in this proceeding. Section 77.1001 provides, "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens or other devices be provided that afford equivalent protection."

If one examines the actual language of the inspector in Citation No. 726078, it can be seen that he stated "loose and unconsolidated material had not been stripped from top of highwall in active dragline pit." It's been my experience over the years that inspectors tend to use the exact language from any of the sections that they are alleging have been violated, and that would be true in this case because the inspector uses the exact language of the first few words of the section by saying that loose and unconsolidated material had not been stripped from the top of the highwall.

Now, if the inspector's testimony had been that the only thing he saw was a rock which he was afraid might fall, then one could say that the only loose material that he was citing was the rock. But he referred to other material sufficiently to have discussed the fact that he thought it was 2 or 3 feet in depth, so I cannot agree with respondent that the only thing that is cited in the citation is a single rock.

Assuming, nevertheless, that the only thing the inspector was concerned about was a rock, we have the other unreassuring testimony of respondent's witness Jerry Lewis, who had examined the rock most carefully, and said that he would want to have examined the rock from both the bottom and the top to be sure that it would not fall or that it was anchored thoroughly in the ground. Since Lewis had looked at the rock from the bottom and the top and felt you could not be sure about it without inspecting both the top and the bottom, it seems to me that he was saying that he couldn't be sure it was thoroughly grounded in the earth from the bottom, and he couldn't be sure of it from the top and it was a judgment matter as to whether this rock could have fallen or not have fallen.

To his credit, we must say he at least looked at it from both the top and the bottom, whereas the inspector did not look at it from both the top and the bottom. If the inspector had looked at it from the top and the bottom, perhaps he would have come to a different conclusion. There is also a difference of opinion between Jerry Lewis and the inspector, and apparently as to James Lewis as well, because James Lewis seemed to think that this rock was somewhere down the side of the highwall, whereas Jerry Lewis thought the rock was

solely at the top, with an extension over the side of the highwall.

So, based on the testimony of those who examined this rock, there must be some doubt about whether the rock was safe or not, because according to the inspector, it was doubtful that the rock was safe because he said it was 10 feet or so from the top; and, if it had come loose, it would have come on down the highwall. Jerry Lewis felt you couldn't be

sure about its safety without checking it from both the top and bottom. In evaluating the conflicting testimony, it should be borne in mind that the inspector is required to cite anything which looks to him as if it is a hazard. All of the people who testified in this proceeding agree that this rock could have been a hazard if it had come loose.

Consequently, I don't think I can say the inspector was entirely out of line for being concerned about this rock. Based on the testimony I have received from the two Lewises, I think I would have to find that the rock was not loose and therefore it did not constitute hazardous material.

On the other hand, the problem that bothers me about this rock is that it either was hanging out over the highwall or it was on the highwall in such a position that it might have been hazardous material, and it seems to me the operator should have been able to knock off a piece of rock that big with this huge dragline they use, because they apparently didn't have any trouble doing it anywhere else. So, I don't think this rock should have been left there in the first place, regardless of whether it was loose or not.

In addition to the foregoing observations, there is no testimony by respondent's witnesses which really addresses the inspector's allegation that there were other loose materials at the top of the highwall. Therefore, I shall take the inspector's word that he wrote the citation on the basis of loose materials at the top of the highwall as well as this rock that has been extensively discussed.

The next question that must be decided is whether the section here involved is violated if there is a shelf on this highwall to catch any material that might fall off of it; because the section says, "The loose unconsolidated material shall be sloped to the angle of repose or barriers, baffle boards, screens or other devices be provided that afford equivalent protection." The inspector agreed in his testimony that if there had been a bench 15 to 20 feet wide in this highwall, he would have to say that that would eliminate the violation of section 77.1001. The part of the testimony that is troubling in this area is that it is hard to conceive how the inspector could have been 125 feet from the highwall and not have seen the bench if, in fact, the bench was there.

On the other hand, it's just as hard to conclude that five witnesses presented by respondent would have come into this proceeding and testified in what I felt was a very convincing and straightforward manner that the bench existed if, in fact, it did not. The aerial photograph shows that the bench was there, because it

is shown in the picture.

The only explanation I can conjecture which would possibly reconcile the inspector's failure to see this bench with the testimony of respondent's witnesses, who say it was there, is that there may have been some sort of dragline work at one end of this highwall which might have obliterated the bench at the point of entrance into the pit area; but I have no testimony to show that that actually happened. I do believe,

> since the inspector had gone here on a complaint, that it would have been possible for him to have been concerned so much about what was at the top of the highwall that he might not have noticed that there was a bench toward the bottom of it. The bench was high enough above the bottom of the pit to have protected anyone in the pit from a fall of this rock or other loose material, because all witnesses stated that the bench was anywhere from 15 to 25 feet wide, and the inspector said that that would be wide enough to provide safety.
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> I think the preponderance of the evidence, therefore, supports a conclusion that the bench did exist and that it did afford sufficient protection to eliminate a violation of section 77.1001; therefore, I find no violation of section 77.1001 occurred and the Government's proposal for assessment of civil penalty will be dismissed as to the alleged violation of section 77.1001 in Citation No. 726078.

After I had rendered the third bench decision set forth above, counsel for the Secretary of Labor orally moved for reconsideration of the third bench decision on the ground that section 77.1001 is intended not only to protect employees in the pit below the highwall from injury, but also to protect employees from stumbling in loose material on top of the highwall and falling from the highwall into the pit below. The Secretary's counsel stated that although a bench would keep material from falling on men working below a highwall, he did not believe that a bench could be interpreted as being in accord with the rule of ejusdem generis in that a bench was not the same as the other items enumerated in section 77.1001 because the bench would be situated well below the other enumerated devices of "barriers", "baffle boards", and "screens". It was the position of the Secretary's counsel that barriers, etc., would be placed at the top of the highwall to protect men and equipment from going over the edge of the highwall and he believed that a violation had been proven because respondent had not placed any barriers, baffle boards, or screens at the top of the highwall.

Counsel for respondent argued that the Secretary's counsel was belatedly raising an issue and argument on which no testimony whatsoever had been presented and that the Secretary's motion for reconsideration should be denied for raising novel issues as to which the inspector had not testified.

I denied the motion for reconsideration at transcript pages 339 and 340. My reasons for denying the motion should be set out in more detail than they were at the hearing.

As for the argument that benches located a considerable distance from the top of the highwall cannot be considered to be in accord with the principle of ejusdem generis because a bench is not in the same category as the enumerated devices of "barriers", "baffle boards", and "screens" which would be at the top of the highwall, I disagree with the Secretary's argument for at least two reasons. First, I do not believe that the barriers,

baffle boards, and screens necessarily have to be placed at the top of the highwall, as was contended by the Secretary's counsel. Section 77.1001 states that "[l]oose hazardous material shall be stripped for a safe distance from the top of pit or highwalls %y(3)5C". The section then states that if such materials can't be

sloped to the angle of repose, barriers, baffle boards, screens, or other devices shall be used to afford "equivalent" protection. The words "for a safe distance", in my opinion, mean that no person is required to strip loose materials from the top if doing so would endanger that person's life. Therefore, if the loose materials are too far from the top to be stripped from the top, it may well be that the only way persons in the pit below the highwall can be protected from falling materials is for the operator to construct barriers, baffle boards, screens, and other devices near the bottom of the highwall so that any loose materials will not fall on employees working in the pit.

Second, it must be recalled that the highwall in this instance was about 100 feet in height. Respondent had cut a bench about 25 feet from the bottom of the highwall to protect employees from materials which might fall off the highwall. The construction of barriers, baffle boards, or screens near the top of a highwall which is 100 feet high would be a hazardous undertaking. Yet the inspector wanted employees in the pit to be protected from the possibility that a rock, which was located from 10 to 12 feet from the top of the highwall, might fall from the highwall into the pit below. In such circumstances, I believe that the bench cut along the highwall was the safest way that employees could have been protected and that the bench may properly be considered as the use of a satisfactory "other device" within the meaning of section 77.1001 and application of the principle of ejusdem generis.

As to the argument by the Secretary's counsel that the barriers, etc., required by section 77.1001 must be adequate to protect both equipment and persons from falling from the top of the highwall, it is obviously impractical, if not impossible, to construct a barrier of sufficient strength and size to prevent a dragline 300 feet high (Tr. 338) from slipping or rolling off the top of the highwall if its operator should happen to position it close enough to the edge of the highwall for it to fall off the highwall.

Finally, as I stated at the hearing, there is no language in section 77.1001 which even implies that that section is designed to protect employees from falling off the top of the highwall. Perhaps the most damaging evidence showing that the inspector did not interpret section 77.1001 in the same fashion as the Secretary's counsel argued in support of his motion for reconsideration, is that the inspector allowed respondent to abate the violation in this instance by having respondent construct a berm in the bottom of the pit which would prevent vehicles from getting closer than 20 feet to the highwall. If section 77.1001 is really intended to require barriers at the top of the highwall to prevent employees from falling off the highwall, nothing was done by the inspector in this case to carry out that intent of section 77.1001 because the only protection provided was constructed in the bottom of the pit solely to prevent loose material from falling on employees working in the pit.

For the reasons given above, I find that the motion for reconsideration should be denied.

WHEREFORE, it is ordered:

(A) Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $50.00 for the violation of section 77.1605(d) alleged in Citation No. 708229 issued January 8, 1980.

(B) The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-273 is dismissed insofar as it seeks assessment of civil penalties for the violation of section 71.603(c) alleged in Citation No. 707702 issued January 8, 1980, and for the violation of section 77.1001 alleged in Citation No. 726078 issued March 21, 1980.

(C) The oral motion of the Secretary's counsel for reconsideration of the bench decision appearing at transcript pages 326 to 335 is denied for the reasons hereinbefore given.

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