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LESLIE COAL MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

LESLIE COAL MINING COMPANY,
CONTESTANT

v.

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

UNITED MINE WORKERS OF AMERICA,
RESPONDENT

Contest of Citation

Docket No. PIKE 78-400

Citation No. 069563

May 30, 1978

Preparation Plant

Civil Penalty Proceeding

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

v.

LESLIE COAL MINING COMPANY,
RESPONDENT

Docket Nos.	Assessment Control Nos.
PIKE 79-90-P	15-09724-03001
PIKE 79-91-P	15-09724-03002

Preparation Plant

DECISION

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

Before: Administrative Law Judge Steffey

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

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

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

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

> Mr. Stephens explained in the off-the-record discussion the reason Exhibit 42 shows eighteen hundred tons coming out of the plant as opposed to sixteen hundred out of the Leslie Mine is that the preparation plant is processing some stockpiled coal.
>
> The result is, it is actually appearing to process more than it takes in; but as a matter of fact, the figures are right.
>
> Well, based on all that, it has been my practice not to find that a company is a large company unless it is producing around four or five thousand tons a day, or I have a chain of factual record information showing that some holding company owns it; and I just do not think I have the information that I would like to have to find that Leslie Coal Mining Company is a large operator, and I am going to find it is a moderate-size company, which is what I was planning to do before I got confused or worried about perhaps not having considered all the evidence. I just do not see there is enough evidence here to permit me to find a large company.
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> When I find a large company, I am thinking in terms of Consolidation and Itmann and Pittston and companies like that, and I do not think this is that size of an operation. I do not think Ms. Jordan's absence(FOOTNOTE 1) would keep me from making other findings about the civil penalty aspects of the case in her absence, so while I am discussing the size of the company, I will go on and discuss the other criteria.
>
> The evidence shows that there is nothing to contradict or show, other than the fact that payment of penalties would have no effect on this company's ability to continue in business--Mr. Stephens has put no evidence to that effect--so I

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

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

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

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

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

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

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

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

an appropriate step to take.

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

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

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

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

And I think, as Mr. O'Donnell correctly pointed out in his summation, the question of whether the company attempted to achieve rapid compliance is a criterion which is hardly applicable in this instance. Therefore, if I assess a penalty, no amount will be attributable under the penalty--under the criterion of good faith effort to achieve rapid compliance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

hazards that they themselves would not have seen in any event.

> But there does seem to be one aspect of having the inspectors--or rather having a specific person or persons designated to accomp[a]ny the inspectors; because it appears to me that the inspectors feel that if they get the same person each time--or a limited number of persons--to accompany them, that a process of training can be instilled in these people who go around with the inspectors, and the result is there is gradu[a]lly built up a certain amount of expertise in these representatives who accompany them.
>
> The result is they can better field complaints from the miners in general and can coordinate the various inspections by adding knowledge to what has happened in the past. And this, I think, is helpful for both the company and the inspectors.
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> Consequently, from that standpoint, I think that there may be some moderate gravity in preventing the usua[l]ly authorized representative to go around and allowing someone to go who is chosen in a rather rapid way and without the full opportunity for the miners to consider the merits of his appointment or election as their representative.
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> But despite all that, I still do not think there is enough gravity to the kind of thing that happened on this day to justify a large penalty.
>
> Consequently, I shall assess a penalty of fifty dollars. Now, it is my understanding, of course, that I will put this [decision] in the form of a writing, and it will be issued along with the other matters we are going to take up tomorrow when we go forward on the other civil penalty issues.

Settlement

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

Docket No. PIKE 79-90-P

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

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

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

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

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

Citation No. 67897 dated May 24, 1978, alleged that respondent had violated Section 77.1109(b) because sufficient fire hose to project water to any point in the plant had not been

provided at each floor. The Assessment Office proposed a penalty of $90 and respondent has agreed to pay a penalty of $50. MSHA's counsel stated that the reduced penalty was justified because respondent's prospective witness would testify that there was a hose available which would extend to any point in the plant, but that the hose

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

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

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

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

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

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

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

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

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

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

Docket No. PIKE 79-91-P

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

Citation No. 69572 dated May 30, 1978, alleged that respondent had violated Section 77.1102 because signs warning against smoking and open flames had not been posted at the oil storage area located adjacent to the hoist house. The Assessment Office proposed a penalty of $30 and respondent has agreed to pay

$30. Counsel for respondent stated that the inspector incorrectly described the area involved as a storage area for fuel because the only material present was lubricating oil which could not be used, as alleged by the inspector's citation, to refuel equipment. The inspector conceded

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

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

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

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

agreed to accept a penalty of $35 in view of the question of whether anyone would ever come into a hazardous position below the belt (Tr. 384-385).

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

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

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

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

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

according to the citation, because loose coal had been

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

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

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

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

Summary of Assessments and Conclusions

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

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

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

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

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

Docket No. PIKE 79-90-P

Citation No. 67891	5/24/78	77.502	$ 61.00
Citation No. 67893	5/24/78	77.400(a)	56.00
Citation No. 67896	5/24/78	77.204	40.00
Citation No. 67897	5/24/78	77.1109(b)	50.00
Citation No. 67898	5/24/78	77.1605(a)	106.00
Citation No. 67900	5/24/78	77.205	66.00
Citation No. 69563	5/30/78	103(f)	50.00
Citation No. 69565	5/30/78	77.1710(i)	70.00
Citation No. 69566	5/30/78	77.410	70.00
Citation No. 69567	5/30/78	77.1109(c)(1)	70.00
Citation No. 69569	5/30/78	77.1109(d)	52.00
Citation No. 69570	5/30/78	77.1109(c)(1)	40.00

Total Settlement and Contested Penalties in Docket No. PIKE 79-90-P $ 731.00

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

Docket No. PIKE 79-91-P

Citation No. 69571	5/30/78	77.200	$ 45.00
Citation No. 69572	5/30/78	77.1102	30.00
Citation No. 69573	5/30/78	77.1109(e)(1)	30.00
Citation No. 69574	5/30/78	77.1109(c)(1)	25.00
Citation No. 69578	5/30/78	77.400(b)	35.00
Citation No. 69581	5/30/78	77.400(b)	52.00
Citation No. 69582	5/30/78	77.205(b)	36.00
Citation No. 69592	5/31/78	77.1104	48.00

Total Settlement Penalties in Docket No. PIKE 79-91-P $ 301.00

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

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

WHEREFORE, it is ordered:

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

May 30, 1978, is affirmed.

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

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

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

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

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

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