

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
SOUTHERN DIVISION AT PIKEVILLE**

**HILDA L. SOLIS, Secretary of Labor,  
United States Department of Labor,**

**Plaintiff,**

**v.**

Civil Action No. \_\_\_\_\_

**FREEDOM ENERGY MINING COMPANY  
and  
SIDNEY COAL COMPANY, INC. d/b/a  
FREEDOM ENERGY MINING COMPANY,**

**Defendants.**

**DECLARATION OF JAMES POYNTER**

1. My name is James Poynter. I am the Assistant District Manager for the Federal Mine Safety and Health Administration (MSHA) District 6 in Pikeville, Kentucky. Since April 2010, I have served as the Acting District Manager from time to time. I have also worked as a Conference and Litigation Representative, Accident Investigator, Coal Mine Inspector (CMI), Field Office Supervisor, Roof Control Supervisor, and Mine Emergency Unit Member for MSHA since 1987. I am a Certified Mine Foreman in Kentucky and Virginia and a qualified shot firer in Kentucky.

2. I worked in coal mining in Eastern Kentucky from April 1978 through 1986. My underground mining experience includes work as an underground miner and section foreman, examiner, and belt foreman. My industry employment was at Benham Coal Company and Scotia Coal Company (later named Blue Diamond Coal Company). As an underground coal miner, I ran all kinds of equipment including a roof bolter, scoop, shuttle car, and track motor.

**FREEDOM ENERGY MINING COMPANY MINE NO. 1**

3. The Freedom Mine Number One (Freedom) is owned and operated by Sidney Coal Company doing business as Freedom Energy Mining Company. Charles Bearse is the President of Sidney Coal Company. Sidney is a wholly owned subsidiary of Massey Energy Corporation. Freedom Mine #1 is an underground coal mine in Pike County, Kentucky. When coal is removed from the mine, it is transferred to a coal preparation plant. Freedom Energy Mining Company operates the mine and the preparation plant. Freedom Energy Mining Company is a subsidiary of, or trade name of, Sidney Coal Company, Inc.
4. Freedom reported a total of about 132 employees working nine hour shifts, with two production shifts and one maintenance shift daily. Thirty-five to fifty miners work underground at any one time. The mine operates six days a week. The mine has four shaft openings, two portals, two elevators, and two slope openings. The mine is located in the Pond Creek Coal Seam. The average mine height is 60 inches. Steve Endicott is the safety director at the mine. The mine superintendent is J. J. Pinson and Kevin Varney is the mine manager.
5. This mine follows a room and pillar mining method using a continuous miner. The continuous miner cuts the coal by use of a drum covered with carbide tip pointed miner bits. This allows for the continuous extraction of coal without drills or explosives. The cuts are taken by a predetermined pattern. The operator removes coal through a series of openings commonly referred to as entries. After the entry is cut forward, then a side cut is taken to connect the entries. This cross entry is commonly called a crosscut. The operator leaves a block of coal referred to as a pillar in the center between the entries and crosscuts to support the weight above the mine. The top of the coal seam is referred to as the mine roof. The sides of the pillar are called ribs.

6. The crew travels underground to the working section by means of an elevator to a track. Miners also travel by means of rubber tired equipment, some of which is diesel powered. Coal is removed from the mine by means of a belt haulage system. The coal is loaded onto shuttle cars by means of a conveyor located on the continuous miner at the working face and then taken to the feeder. The coal is then removed from the mine by a series of belts. The final belt exits the mine and dumps the coal at the preparation facility. This belt is on an incline or slope. There is a hoist to haul men and supplies at the slope.

7. Freedom currently has three working sections, called mechanized mining units ("MMUs") where coal is mined. These units are separated in distance by eight miles of mined out areas, ventilation air courses and haulage belts. Some older areas of the mine are separated from the active workings by sets of barriers called seals. Freedom reported coal production of 1,333,740 tons in 2008 and 596,275 tons in 2009. As of September, 2010, Freedom reported 641,000 tons of coal produced. This information is publicly available on MSHA's data retrieval system ( ).

8. Between July 1, 2008 and September 30, 2010, MSHA conducted 9 regular, quarterly inspections of Freedom Energy, which included an "impact" inspection in September 2010, a Section 103(g) hazard complaint inspection in April 2010, section 103(i) spot inspections of mine ventilation systems, two part 50 audits for suspected non-reporting of accident and injury data (the first audit was conducted from January 19, 2010, through February 17, 2010, and the second audit began on June 10, 2010, and is ongoing), non-injury accident/incident investigations, ventilation, roof, health, and electrical technical investigations, and special investigations of agent liability that resulted in at least 1,952 citations and orders for violations of mandatory safety or health standards. The detailed history of prior violations for this mine is

located on MSHA's data retrieval system under Legal Identity number 15-07082. During the inspection period between July 1, 2008 and September 30, 2010, at least 643 (33%) of the citations and withdrawal orders were issued for violation of six critical health and safety standards involving improper ventilation (30 C.F.R. Part 75.370(a)(1)), roof support (30 C.F.R. Parts 75.202(a) and 75.220(a)(1)), combustible materials (30 C.F.R. Part 75.400), and electrical equipment examination and maintenance (30 C.F.R. Parts 75.503 and 75.512).

9. For context, an MSHA District 6 Program Analyst compiled data on two mines comparable to Freedom in terms of production and number of employees. The two comparable mines were determined to be a) Sapphire Coal Company's Advantage No. 1 Mine, which employs 127 persons and produced 713,898 tons of bituminous coal in 2008, 811,632 in 2009, and 586,776 through September 2010; and b) McCoy Elkhorn Coal Corp.'s Mine #15, which employs 130 persons and produced 578,743 tons of bituminous coal in 2008, 505,535 in 2009, and 407,374 through September 2010.

10. During the period between July 1, 2008 and September 30, 2010, MSHA issued at least 141 citations for violations of 30 C.F.R. § 75.202(a) for the failure to support the roof and ribs. Ninety percent of the roof violations were designated significant and substantial (S&S). The finding of "S&S" means these are serious violations and subjects the operator to increased civil penalties and the potential for increased enforcement under the Mine Act. During the period between July 1, 2008 and September 30, 2010, MSHA issued at least 49 citations for violations of 30 C.F.R. § 75.220(a)(1) for the failure to comply with the roof control plan. During this same period, MSHA issued at least 289 citations for violations of 30 C.F.R. § 75.400 for accumulations of combustible materials including coal dust and float coal dust, at least 49 citations for violations of 30 C.F.R. § 75.512 for failure to examine and maintain electrical

equipment, at least 72 citations for violations of 30 C.F.R. § 370(a)(1) for failure to follow a ventilation plan, and at least 43 citations for violations of 30 C.F.R. §75.503 because the equipment used inside the last open crosscut was not maintained in permissible condition. The last open crosscut serves as the path for clean air to enter the working entries where coal is mined. Permissible equipment is designed to contain any heat source or spark in an enclosed compartment which eliminates the possibility of the equipment causing an ignition of any dust or methane present at the place where coal is cut.

11. In comparison, The Advantage No. 1 and the Mine #15 were issued 19 and 35 citations for section 75.202(a) roof control violations, 26 and 20 citations for section 75.220(a)(1) roof control plans violations, 10 and 15 citations for section 75.512 equipment examination and maintenance violations, 55 and 50 citations for section 75.503 permissibility violations, 24 and 40 citations for section 75.370(a)(1) ventilation plan violations, and 149 and 29 citations for section 75.400 accumulation of combustible material violations, respectively.

12. Freedom liberates a great deal of methane in comparison with other mines in the nation. Because it liberates between one million and 1.8 million cubic feet of methane per 24 hour period, MSHA is required to conduct spot inspections of the ventilation system at least every five days in addition to the regular quarterly inspection. MSHA has conducted an additional series of impact inspections that focus on mines that present clear dangers. One such inspection occurred at Freedom in September 2010. Prior to May 2010, Freedom was the subject of saturation or enhanced inspections which involve a large group of inspections who visit the mine at the same time.

**COMPLIANCE EFFORTS ON THE PART OF MSHA**

13. As Acting District Manager for District 6, I oversee enforcement of mine safety and health under the Federal Mine Safety and Health Act (the Act) at Freedom. This mine has a number of problems that recur on a regular basis. These include problems involving roof support, ventilation, dust control, accumulations of combustible materials, electrical equipment and installations, and examination/emergency preparedness.
14. In my official position as Acting District Manager, I hold discussions with Freedom mine management including Charles Bearse, JJ Pinson, Kevin Varney, Steve Endicott and Randy Tackett, a mine engineer. I and other MSHA managers have expressed our concerns about safety and health issues at the mine with these individuals for over three years. MSHA District 6 enforcement personnel regularly find that Freedom management fails to conduct adequate workplace examination and fails to maintain the roof, ventilation, methane control, electrical installations and equipment, and emergency information and services. Basic mine maintenance is critical to hazard prevention.
15. MSHA has used all of the tools available to it in the regulatory scheme in an attempt to bring this operator into compliance. The tools used include those provided in the Act including closure orders under sections 104(d), 107(a), 103 (j) and (k) as applicable; audits for unreported and underreported accidents and roof falls; and impact inspections. Freedom managers come to the District office frequently to discuss mine conditions. As recently as July 2010, Mr. Bearse and other mine officials promised the District that they were implementing safety controls that would bring the mine into compliance. These promises have not yet been fulfilled.

16. Because these various promises have not been followed by concrete actions on the part of Freedom, stricter enforcement action is necessary to achieve a safe working environment at Freedom that complies with the Mine Act.

17. Based on my work in the coal industry, training, experience with MSHA, and current knowledge of coal mining in the District, I believe that the risk of harm to miners is much worse at Freedom than it is at other comparable mines. Methane is life threatening in mining if it reaches explosive levels and if there is an available ignition source. At Freedom, the mine naturally liberates more methane than most mines. It is critical to keep watch over methane levels by means of multi-gas detectors located on equipment and carried by mine personnel. Freedom management fails to check for methane levels on a regular basis. The second danger present at Freedom concerns ventilation controls. Air velocity is not maintained at the working section. Line curtains are not installed correctly, and methane builds up at the working face. Electrical equipment is not maintained in working order, and circuit breaker settings are altered allowing equipment and cables to overheat or arch creating an ignition source. Coal dust and float coal dust accumulates on the working sections and along the belts. The dust gives power to any potential explosive force thus expanding the distance an explosion would travel. The dust also creates a danger of a belt fire. Fire detection devices installed on belts are not maintained, and the air velocity on the belts is reduced allowing excessive time for belt fires to grow. Even the number and location of miners working underground is not well documented which puts mine rescue teams at risk in the event of an explosion or fire. Additionally, the roof condition in some active areas of the mine is very poor. Miners are at risk of entrapment from large roof falls or permanent disability from falling draw rock. The sum total of the risks involved, based on the conditions cited by inspectors, establish that the mine has a high risk level for a fatal accident

involving a roof fall, mine fire, or explosion on any given day. Based on the mining experience of those working in Coal Mine Safety and Health District 6, we believe that the working conditions are much worse when MSHA is not present. The conditions found by inspectors take time to develop and reflect an obvious lack of concern for mine upkeep and maintenance.

**WHAT IS NEEDED TO MAKE THIS MINE SAFE**

18. MSHA continues to find serious life threatening conditions at the mine. As recently as February 2010, MSHA inspectors and ventilation specialists found 13 per cent of methane in the atmosphere of an entry at a working face. If MSHA had not been present, it is likely that the methane would cause a fire or explosion. The mine continually experiences roof control problems. Six major roof falls occurred since August 11, 2010. Two of these falls were not reported to MSHA. The other four falls were excessive in size, and one would have caused two deaths but for the power outage that shut the mine fan off.

19. MSHA cannot depend on the operator to report honestly the conditions at this mine either in the required examination records or on required accident reports. A recent audit dealing with Freedom's reporting practices discovered that at least four lost time injury roof falls were not reported to MSHA. Freedom understated the seriousness of the injuries sustained by miners on additional accident reports filed with MSHA. In these cases, Freedom reported to MSHA that the miner involved did not suffer any injury. Medical records obtained during the audit reveal that these miners gave notes from treating physicians to mine management that allowed these miners to return to work only on a limited basis. The miners returned to work and were placed on desk duty or other restricted duty positions for long periods of time. Examples of the injuries sustained that were not reported include a hand fracture, a knee injury that resulted in knee surgery, lacerations and puncture wounds in a leg, a crushed finger and a serious injury to a



right arm. In addition, Freedom failed to report two major roof falls, one which caused an injury. Despite the requirement to report all restricted duty injuries, the operator failed to report the related accidents to MSHA. These omissions were only found when MSHA requested medical records and conducted an extensive audit. The failure to report these accidents prevented MSHA from making timely investigation into the incidents as well as creating a false lower accident rate for purposes of prior history and civil money penalty assessments. .

20. Serious violations of the Mine Act are present at the mine at most times when inspectors are not present at the mine. A number of these conditions develop over extended periods of time. Dust accumulations, rock dust application, roof maintenance, and methane control require constant attention. Based on my mining experience and training, I know that these conditions are created over a number of shifts. Some of the dust accumulations on beltlines required the labor of six to eight miners working entire shifts to eliminate the hazard. Such extensive areas of accumulations do not occur in a short period of time.

21. As Acting District Manager, I believe Freedom management can operate this mine safely but will only do so if forced to by the district court. Freedom has complied with decisions of the Federal Mine Safety and Health Review Commission but regularly fails to comply with MSHA approved mine plans or enhanced administrative enforcement by MSHA.

22. The ventilation plan at this mine was modified in July 2010 to require additional frequent examinations of working areas and certification of conditions on the beltlines by the mine superintendent or his designee. Despite these additional requirements, Freedom has had six major roof falls including two occurring over the belts. In addition, MSHA continues to find accumulations of coal dust and deteriorating roof conditions in areas that should have been examined frequently. Recently, mine examiners recorded the lack of rock dust on a belt on both

the day shift and the evening shift. When MSHA examined the belt, the condition remained uncorrected and no one was scheduled to rock dust the belt. As stated in the recent Emergency Temporary Standard, proper rock dust application is critical in the prevention of major mine explosions and disasters. The approved ventilation plan requires that all reported conditions be called out by an examiner and corrected immediately. Despite the plan requirements, Freedom allowed this hazard to remain until it was cited by MSHA.

23. MSHA requests that the court close down Freedom's Mine #1 and stop mining operations (except for persons listed in Section 104(c) of the Mine Act) until all hazards and violations at the mine are corrected, and until Freedom establishes and maintains a health and safety program, and implements other practices that will ensure the health and safety of the miners.

24. Freedom needs to establish a training and communication program. The training aspect of the program needs to address how to recognize hazardous conditions and violations of mandatory health or safety standards (including the requirements of the examination standards), to whom such conditions can and should be reported, and the company's responsibility to correct the conditions. The communication aspect of the program should include daily meetings between miners and management officials, and establish an action plan for correcting any hazards found at the mine. Freedom needs to establish in their action plan procedures setting forth how they will proactively look for hazards in the mine and how they will abate those hazardous conditions found, including the consideration of administrative and/or engineering controls.

25. Upper mine management should perform additional examinations to look for hazardous conditions and violations of mandatory health or safety standards, and countersign

documents because this will force those in charge of the mine to take responsibility for the mine operations. These upper mine managers control the labor allocations, resources and production requirements at the mine. If the persons who control the mine budget are held responsible for the daily activities at the mine, those miners performing the work will be given adequate time and resources to maintain these critical elements of mining that do not directly contribute to coal production. Based on the problems and violations that MSHA has observed at Freedom, these additional inspections should include:

a. **Additional Examination of Working Sections -** The Mine Superintendent should examine the working section once per shift for hazardous conditions and violations of mandatory health or safety standards, and record the examination in the on-shift book or other book designated for that purpose. If no hazards or violations are observed, he should record a negative finding as "NHO" (no hazards observed). Four examinations should be done during each shift on active production sections of the faces in-by the last open crosscut. These examinations should be scheduled at even time intervals throughout the shift. The last on-shift examination of a production shift can be in conjunction with the pre-shift examination. If the Mine Superintendent is absent from the mine property, or if he cannot do each shift, then he should designate another certified mine management official to do the exams. Even if the Mine Superintendent cannot do the exam, he should countersign all books and records.

b. **Additional Examinations of Belts -** The Mine Superintendent should travel at least fifty percent of all active belts each week, so that one hundred per cent of the belts are examined for hazardous conditions and violations of mandatory health or safety standards every two weeks and record the exam in the on-shift book or other book. The date and time of each belt examination under this section should be noted as well as the items listed on the checklist.

Negative findings should be recorded. If the Mine Superintendent is absent from the mine property, or if he cannot do each shift, then he should designate another certified mine management official to do the exams. Even if the Mine Superintendent cannot do the exam, he should countersign all books and records.

c. **Additional Electrical Examinations** - The Chief Electrician, or his equivalent, should countersign all books and records relating to inspection of electrical installations and equipment including daily pre-operational electrical examinations of all equipment available for operation during any working shift. The record relating to the repair of any conditions found on the equipment should also be countersigned and maintained with the initial examination record for any electrical installation or equipment. The repair information should also be countersigned and dated. If the Chief Electrician is absent from the mine property, he should designate another certified mine management official to countersign all books and records related to these electrical exams.

26. Based on the problems and violations at Freedom, the company should also conduct more equipment exams and exams of certain areas, and look for hazardous conditions and violations of mandatory health or safety standards. Specifically,

a. In every working section, Freedom should make two examinations of the immediate section belt from the section tail piece to the section head drive. The results of the examinations should be recorded even if they are negative findings.

b. Freedom should ensure that all required electrical examinations that refer to "weekly" exams should be conducted every seven days.

c. Freedom should ensure that a pre-operational examination is performed on all equipment that is available for operation during any working shift on any working section.

These pre-operational examinations should be recorded and countersigned, and negative findings recorded. Equipment defects affecting safety should be corrected before the equipment is put into service. The time, date and person performing the examination should be recorded as well as the condition of the equipment and any conditions which need repair.

27. Based on the problems and violations at Freedom, the company needs to take additional air readings. Prior to advance mining of each cut, an air reading (quality and quantity) should be taken. When a miner sets over and prior to any sump, another air reading (quality and quantity) check should be taken. The time and place for the start of each sump, as well as the air reading, shall be recorded in the on-shift book at the end of the shift. The name of the person making the cut, and the name of the person taking the air reading, should be recorded in the book. The results of all examinations should be recorded, including any examinations of equipment and installations and all air readings, gas checks or other data collected, and negative findings should be recorded for each item. The date and time of the examination(s) conducted as well as the name of the person conducting the examination shall be stated in this record.

28. Freedom also needs to do more documentation of potential hazards. Specifically

a. Freedom needs to certify the accuracy of the 30 C.F.R. §75.1200 surface map and underground escapeway maps every day. The Mine Superintendant should do this to make sure that the maps are up-to-date as of the date and time recorded, and record this. If the Mine Superintendant is absent from the mine property, he should designate another certified mine management official to do this.

b. Freedom needs to maintain a record of any methane detected in excess of 1% on any working section and 2% in any other active workings using a methane or multi-gas detector carried by any person underground. This record should show the methane reading, the

identification information for the methane detector, the date, time and location of the reading, and any action taken as a result of the reading. This record should be countersigned by the Mine Superintendent.

29. Under the Act, MSHA can only close a mine or part of a mine under limited circumstances including delay in correcting any cited condition, unwarrantable failure on the part of management to comply with mandatory standards, and the presence of an imminent danger. The court should order that the area(s) of the mine affected by any citation be closed and that production cease until the hazardous condition or violation cited is corrected. This requirement that the danger be corrected immediately will cause the operator to be more proactive in maintaining the mine instead of reacting to poor mining conditions after a mine accident or citation issued by MSHA. This requirement should apply to places in the mine as well as to equipment.

a. When MSHA finds any hazardous condition, or any violation of safety or health standards involving roof control, ventilation, coal accumulations, or electrical equipment, found in a working section, Freedom needs to immediately withdraw all miners from that working section (except for those persons listed in section 104(c) of the Mine Act) until the condition or violation is abated and a pre-shift examination has been conducted on that working section. This requirement should apply to the following standards in 30 C.F.R. Part 75: Subpart B (Qualified and Certified Persons), Subpart C (Roof Support), Subpart D (Ventilation), Subpart E (Combustible Materials and Rock Dusting), Subpart F (Electrical Equipment), Subpart G (Trailing Cables), Subpart H (Grounding), Subpart I (Underground High Voltage Distribution), Subpart J (Underground Low- and Medium-Voltage Current Circuits), Subpart M (Maps), and for violations of standards involving examination and recordkeeping requirements found in 30

C.F.R. §§ 75.1103-11, 75.1106-1, 75.1107-16, 75.1400-3, 75.1400-4, 75.1402-2, 75.1433, 75.1508, 75.1708, 75.1713-1, 75.1713-3, 75.1714-3, 75.2714-7, 75.1714-8, 75.1715, 75.1716-1, 75.1721, 75.1911, 75.1912, and 75.1915).

b. When MSHA finds any hazardous condition, or any violation of safety or health standards found on any equipment, Freedom needs to immediately withdraw that piece of equipment from service (except for those persons listed in section 104(c) of the Mine Act) until the condition or violation is abated.

30. All miners who miss work due to a shut down of a section or the mine as a whole should be paid for those periods. Currently, Freedom is only required to pay for portions of working shifts up to one week when MSHA issues certain types of orders. If the operator appeals these orders, the miners are not paid and must wait for final adjudication of the violation before receiving back pay. Miners are reluctant to report hazards and even more reluctant to speak to MSHA about dangers at the mine because they fear losing their pay during a closure order. Removing the threat of loss of pay under a closure order would allow miners to freely report conditions that may cause the mine or a section of the mine to be shut down while the conditions are repaired.

31. Freedom should be ordered to give MSHA notice of violations, citations or warnings issued by any federal or state agency. Freedom's operations are inspected by a number of agencies including the Kentucky Department of Mine Safety and Licensing, the Department of the Interior's Surface Mining Office, and the Bureau of Alcohol Tobacco, Firearms and Explosives. On some occasions, one or more of these other agencies find conditions that are violations of the Mine Act or other laws. Because of the operator's history of behavior in the

past and its pattern of continued conduct, every piece of information available to MSHA is necessary to assure compliance with the Act and the order of this court.

32. Likewise Freedom should be ordered to turn over books and records including production records and foreman notes upon request. These records honestly reflect the daily activities at the mine. Freedom records every minute when coal is or is not produced during the shift. These records include details concerning roof falls, high concentrations of methane, or accidents. Every delay in the production cycle is recorded and these records will allow MSHA to determine what actions Freedom did or did not take to keep the mine safe and healthy for the miners. MSHA also seeks access to gas detectors upon demand. The monitors contain clues to high concentrations of methane, times when detectors are in use and other details about the mine atmosphere at all times including when MSHA is not present. Freedom's past practices and concealment of hazardous conditions support the order that MSHA be given access to these monitors upon request and without prior notice.


33. This order and all other orders issued in this case should be served on various persons with ties to Freedom including all mine employees (including clerical, guards, contractors, etc.) and all miners' representatives, and that the order be posted at the mine bathhouse, guard shack, website, and on the mine bulletin board. This will assure the court and MSHA that Freedom abides by the order as issued. Dissemination of the order to those who have contact with Freedom adds to the assurance that MSHA or the Court will receive notice of a violation of the order. Given the number of times that MSHA discovered that Freedom failed to report roof falls, accidents resulting in injuries, and hazardous conditions in the mine, anything ordered by the Court only has meaning if all who have contact with Freedom are made aware of the order.



34. Freedom needs to do all of these things for long enough to establish good safety and health habits. This will probably take a year, but if Freedom has a regular, quarterly inspection without any significant and substantial violations that might be long enough.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 2, 2010.

  
James Poynter  
Acting District Manager  
Mine Safety and Health Administration  
United States Department of Labor  
Pikeville, Kentucky