

SEPTEMBER 1995

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ADMINISTRATIVE LAW JUDGE ORDERS

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SEPTEMBER 1995

Review was granted in the following cases during the month of September:

RNS Services v. Secretary of Labor, MSHA, Docket No. PENN 95-382-R, etc.
(Judge Weisberger, July 28, 1995)

Secretary of Labor, MSHA v. Kellys Creek Resources, Docket No. SE 94-639.
(Judge Weisberger, August 1, 1995)

Secretary of Labor, MSHA v. Fort Scott Fertilizer and James Cullor, Docket Nos.
CENT 92-334-M, CENT 93-117-M. (Judge Feldman, August 3, 1995)

Secretary of Labor, MSHA v. Opportunity Trucking, Inc., Docket Nos.
WEVA 95-114, WEVA 95-122. (Chief Judge Merlin, unpublished Default order
dated August 2, 1995)

Secretary of Labor, MSHA v. Coal Preparation Services, Docket No. WEVA 95-53.
(Judge Weisberger, August 4, 1995)

Secretary of Labor, MSHA v. Wallace Brothers, Inc., Docket No. WEST 94-710-M.
(Judge Amchan, August 9, 1995)

Review was not granted in the following cases during the month of September:

Secretary of Labor, MSHA v. Mechanicsville Concrete, Inc., Docket No.
VA 95-3-M, etc. (Judge Weisberger, August 15, 1995 - unpublished)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 93- 15
v.	:	
	:	
L & J ENERGY COMPANY, INC.,	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves citations and orders issued by the Department of Labor's Mine Safety and Health Administration to L & J Energy Company, Inc. ("L & J"). Following an evidentiary hearing, Administrative Law Judge Avram Weisberger issued a decision sustaining six of the seven violations charged. *L & J Energy Company Inc.*, 16 FMSHRC 424 (February 1994).

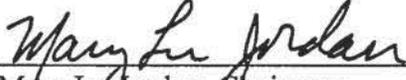
L & J timely filed a petition for discretionary review and/or motion for remand for correction of the record, arguing, inter alia, that a stipulation recounted in the judge's decision did not reflect the parties' agreement. In response, the Secretary also moved for remand. The Commission denied the motions but granted the petition for review. *L & J Energy Company, Inc.*, 16 FMSHRC 667 (April 1994). Upon consideration, the Commission remanded the matter to the judge to "determine whether the stipulation in question is complete and correctly represents the agreement of the parties." The Commission also directed the judge to reconsider his decision if necessary. 16 FMSHRC at 667-668.

On remand, the judge determined that L & J was correct in its assertion that the stipulation did not reflect the parties' agreement, which provided that the judge "would utilize the fact testimony from witnesses, other than [expert witnesses] Wu and Scovazzo, who observed

the condition of the highwall.” *L & J Energy Company, Inc.*, 16 FMSHRC 796 (April 1994). The judge declined to reconsider his decision because “the decision takes cognizance of, and discusses, the testimony of witness (sic) other than Scovazzo and Wu, who had observed the highwall.” *Id.* The Commission denied L & J’s petition for review of the judge’s decision on remand.

Subsequently, L & J filed its appeal in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1995, the court issued its decision remanding the case to the Commission “for a new determination based on the full record.” *L & J Energy Co., v. Secretary of Labor*, No. 94-1454, slip op. at 4. The court determined that the judge’s legal conclusion “disclaim[ing] reliance on anything but expert testimony,” rendered “irrelevant” his statement that he reviewed the testimony of other witnesses. Slip op. at 3., *citing* 16 FMSHRC at 441. The court further stated that if, on remand, the Commission reaches the same conclusion, “it must simply explain why the eyewitness [i.e., non-expert] testimony is discredited or discounted in whole or in part.” *Id.* at 3-4. Finally, the court held that the Commission should address each of the six statutory criteria for determining civil penalties “before assessing a fine.” *Id.*, *citing* *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (March 1983); 30 U.S.C. § 820(i). On August 8, 1995, the court issued its Mandate and Judgment in this matter, returning the case to the Commission’s jurisdiction.

Pursuant to the court's order, we remand this matter to the judge for a new determination based on the entire record.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Henry Chajet, Esq.
Mark Savitt, Esq.
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

Administrative Law Judge Avram Weisberger
Federal Mine Safety and Health Review Commission
Office of the Administrative Law Judges
5203 Leesburg Pike
2 Skyline, 10th Floor
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 11, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 95-122
	:	
OPPORTUNITY TRUCKING, INC.	:	
	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). On August 2, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Opportunity Trucking, Inc. ("Opportunity") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on March 17, 1995, or the judge's Order to Respondent to Show Cause issued on May 15, 1995. The judge assessed the civil penalties of \$800 proposed by the Secretary.

On September 1, 1995, the Commission received from Opportunity a Motion to Set Aside Default. Opportunity's counsel states that Opportunity's owner and president believed he had filed his answer with counsel for the Secretary. The official file does not contain a copy of such answer. On September 7, the Commission received the Secretary's opposition to the motion, in which he asserts that Opportunity failed to set forth grounds justifying relief under Fed. R. Civ. P. 60(b).

The judge's jurisdiction in this matter terminated when his decision was issued on August 2, 1995. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not receive a petition or direct review on its own motion within the 30-day

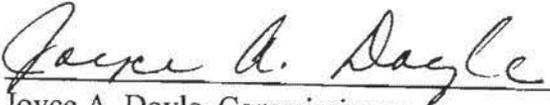
period, the judge's decision becomes a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823 (d)(1).

The Commission has looked to Fed. R. Civ. P. 60(b) in evaluating whether relief from a final Commission order is appropriate. *See, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991); 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). Here, Opportunity's motion was received within the 30-day time period. We deem Opportunity's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988). Accordingly, the judge's order has not become a final Commission decision, and we do not consider whether Opportunity's request justifies relief under Fed. R. Civ. P. 60(b).

On the basis of the present record, we are unable to evaluate the merits of Opportunity's position. In the interest of justice, we vacate the judge's default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (February 1989).



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

Distribution:

W. Christian Schumann, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Charles Stanford West, Esq.
155 E. 2nd Avenue
Williamson, West Virginia 25661

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety and Health Review Commission
1730 K Street, N.W., 6th Floor
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

September 11, 1995

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

v.

OPPORTUNITY TRUCKING, INC.

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:

Docket No. WEVA 95-114

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). On August 2, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Opportunity Trucking, Inc. ("Opportunity") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on March 17, 1995, or the judge's Order to Respondent to Show Cause issued on May 15, 1995. The judge assessed the civil penalties of \$256 proposed by the Secretary.

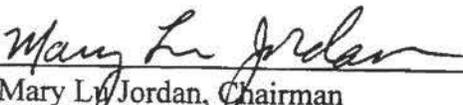
On September 1, 1995, the Commission received from Opportunity a Motion to Set Aside Default. Opportunity's counsel states that Opportunity's owner and president believed he had filed his answer with counsel for the Secretary. The official file does not contain a copy of such answer. On September 7, the Commission received the Secretary's opposition to the motion, in which he asserts that Opportunity failed to set forth grounds justifying relief under Fed. R. Civ. P. 60(b).

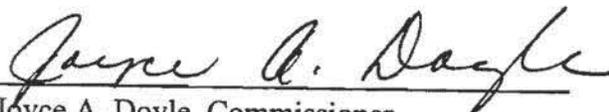
The judge's jurisdiction in this matter terminated when his decision was issued on August 2, 1995. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not receive a petition or direct review on its own motion within the 30-day

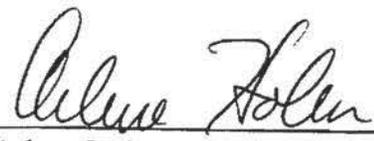
period, the judge's decision becomes a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

The Commission has looked to Fed. R. Civ. P. 60(b) in evaluating whether relief from a final Commission order is appropriate. *See, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991); 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). Here, Opportunity's motion was received within the 30-day time period. We deem Opportunity's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988). Accordingly, the judge's order has not become a final Commission decision, and we do not consider whether Opportunity's request justifies relief under Fed. R. Civ. P. 60(b).

On the basis of the present record, we are unable to evaluate the merits of Opportunity's position. In the interest of justice, we vacate the judge's default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (February 1989).


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

Distribution:

W. Christian Schumann, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Charles Stanford West, Esq.
155 E. 2nd Avenue
Williamson, West Virginia 25661

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety and Health Review Commission
1730 K Street, N.W., 6th Floor
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

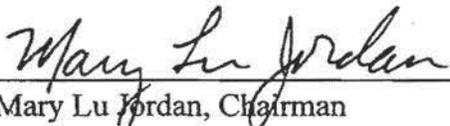
September 11, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 95-509-M
	:	A.C. No. 02-00024-05558
v.	:	
	:	
PHELPS DODGE MORENCI INC.	:	
	:	

ORDER

Counsel for Phelps Dodge Morenci Inc. ("Phelps") has filed a motion to withdraw the Motion for Relief from Final Order it filed on August 21, 1995. Phelps explains that on August 30, it received a letter from the Department of Labor's Mine Safety and Health Administration ("MSHA") rescinding the proposed penalty assessment from which Phelps sought relief. Phelps attached a copy of the letter to its motion to withdraw. Upon consideration of the motion, it is granted and Phelps' Motion for Relief from Final Order is withdrawn pursuant to Commission Procedural Rule 11, 29 C.F.R. § 2700.11.

For the Commission:



 Mary Lu Jordan, Chairman

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 18, 1995

W-P COAL COMPANY :
 :
 v. : Docket No. WEVA 92-746
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSIHA) :

BEFORE: Doyle, Holen and Marks, Commissioners¹

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), W-P Coal Company ("W-P") has filed with the Commission a Motion to Withdraw Appeal. The Secretary of Labor ("Secretary") has not filed a response.

On January 9, 1995, the Commission granted W-P's petition for discretionary review of a decision of Administrative Law Judge Gary Melick in Docket No. WEVA 92-746. In the present motion, filed June 5, 1995, W-P states that the Secretary and W-P entered into a settlement agreement as to other related proceedings pending before Judge Melick, which had been stayed pending final disposition of Docket No. WEVA 92-746, and that, as a part of the settlement agreement, W-P agreed to withdraw its appeal in the instant proceeding. Mot. at 1-2. W-P requests that, upon Judge Melick's approval of the settlement of the related proceedings, this proceeding be dismissed. *Id.* at 2.

¹ Chairman Jordan has recused herself in this matter. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

Judge Melick has approved the settlement and dismissed the proceedings before him. Upon consideration of the motion, we grant it. Accordingly, the Commission's direction for review in this matter is vacated and this proceeding is dismissed.



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

Distribution

Kurt A. Miller, Esq.
Thorp, Reed & Thompson
One Riverfront Center
Pittsburgh, PA 15222

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Suite 400
Arlington, VA 22203

Michael Heenan, Esq.
Smith, Heenan & Althen
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

letter to be a timely filed petition for discretionary review and granted it. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988). The Commission also stayed briefing.

We note that the Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (February 1989), *citing Kelley Trucking Co.*, 8 FMSHRC 1867, 1869 (December 1986); *M. M. Sundt Construction Co.*, 8 FMSHRC 1269, 1271 (September 1986). It appears from the present record that CPS was confused as to the date of the hearing. CPS is appearing pro se and has been diligent in the pursuit of its right to a hearing. Accordingly, in the interest of justice, we vacate the judge's Order and remand this matter to the judge, who shall set the case for hearing.


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

Chairman Jordan, dissenting:

The record in this case shows that the respondent participated in a telephone conference call on June 26, 1995, during which he agreed to the rescheduling of the hearing on his contest from July 13 to July 12. On June 27, the judge issued a notice of hearing setting forth the date and location of the hearing. No location for the hearing had previously been communicated to the respondent. A return receipt indicates that the respondent received the notice on July 5, well in advance of the scheduled hearing. The judge and an attorney from the Solicitor's office traveled from the Washington, D.C. area to Huntington, West Virginia to attend the hearing. But the respondent failed to show up.

Commission Procedural Rule 66 states:

(b) *Failure to attend hearing.* If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

29 C.F.R. § 2700.66(b). Notwithstanding Rule 66's contemplation of entry of default without the necessity of issuing an order to show cause, the judge issued such an order, in effect giving the respondent an opportunity to explain why he failed to appear at the hearing. The respondent claimed that he appeared on July 13 and "nobody was there." The judge concluded that the respondent had not established good cause for failing to attend the hearing, and entered a default decision. In its request to the Commission for relief from default, the respondent states:

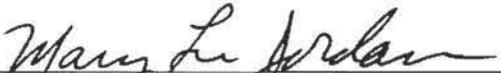
I was given incorrect information and showed up for the hearing at the right time, but it was wrong I guess because they met another day. I wasn't able to tell our side. I think their lawyer intentionally confused me, they'll do that you know.

I agree with my colleagues that defaults are not favored. However, unlike the cases cited by the majority, which all involve respondents who, following entry of default, offered their explanations for the first time when they petitioned the Commission for relief, in the present case the judge issued his default decision only after reviewing the reason proffered by the respondent for his failure to appear. In reviewing the judge's determination that the respondent's excuse did not pass muster, we may not substitute our judgment for that of the trial judge. "An application . . . to set aside a default . . . is addressed to the sound discretion of the [trial] court. The judge's determination normally will not be disturbed on appeal unless he has abused his discretion or the appellate court concludes that he was clearly wrong." Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d § 2693 (footnotes and internal quotation marks omitted).

On this record, I see no basis for concluding that the judge abused his discretion. Accepting at face value the respondent's claim that he appeared at the appointed place a day late,

he must have consulted the notice of hearing, the only document containing the location of the hearing. That notice plainly indicated that the hearing was on July 12, confirming the telephone conversation in which the respondent agreed to appear on that date. Under these circumstances, I cannot conclude that the judge abused his discretion in determining that the respondent's justification did not amount to good cause. On the contrary, in my view the judge's decision is faithful to the provisions of Rule 66. I fear that, by granting the relief sought here, the Commission is rewarding behavior which has already caused unwarranted expense to the Commission and the Secretary.

For the foregoing reasons, I respectfully dissent.


Mary Lu Jordan, Chairman

Distribution

Sam Hood
Coal Preparation Services
P.O. Box 1237
Huntington, WV 25714

Javier I. Romanach, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 516
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 1995

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

v.

BUCK CREEK COAL INC.

Docket Nos. LAKE 94-72, etc.

ORDER

On November 23, 1994, Buck Creek Coal Inc. ("Buck Creek") filed with the Commission a petition for interlocutory review of Administrative Law Judge T. Todd Hodgdon's September 8, 1994, Stay Order (the "Stay Order"). By order dated November 3, 1994, the judge had denied Buck Creek's Motion for Reconsideration of Stay Order and/or Motion for Certification for Review of Interlocutory Ruling.

At the time the petition was filed, 384 contests of citations and orders and 37 penalty proceedings involving Buck Creek were pending; the stay also applied to subsequent Buck Creek cases. The judge stayed all proceedings for ninety days or until the United States Attorney made a determination regarding the criminal prosecution of Buck Creek. Stay Order at 4-5. The judge stated that he would consider lifting the stay on a case-by-case basis and he instructed the parties to advise him monthly of the status of the criminal proceedings. *Id.* at 4 & n. 4, 5.

By its terms, the stay expired on December 7, 1994, and the Secretary moved for an extension. On January 10, 1995, the judge issued an Order Continuing Stay and Notice of Prehearing Conference, which provides in relevant part:

When the stay was granted in September, I did not anticipate the unbroken wave of cases which have continued to be filed in this matter. The cases involve citations issued at least as early as July 1993 and proceed, as of the date of this order, through November 1994. It seems conceivable, as argued by counsel for Buck Creek, that not all of these cases are connected or related to the U.S. Attorney's criminal investigation. If that is the case, it may be possible to dispose of some cases

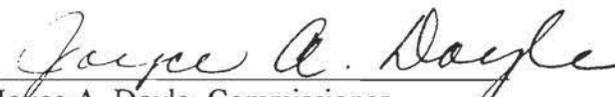
The judge ordered that a prehearing conference take place on February 9, 1995. Order Continuing Stay at 4. The Notice of Prehearing Conference incorporated in the Order Continuing Stay states:

The purpose of the conference will be to determine whether the stay should be continued beyond the conference; if so, under what conditions; whether it will include all cases currently docketed and future cases that may be docketed; and whether some cases can be separated from the rest and proceed to disposition without prejudice to either the government or Buck Creek. . . .

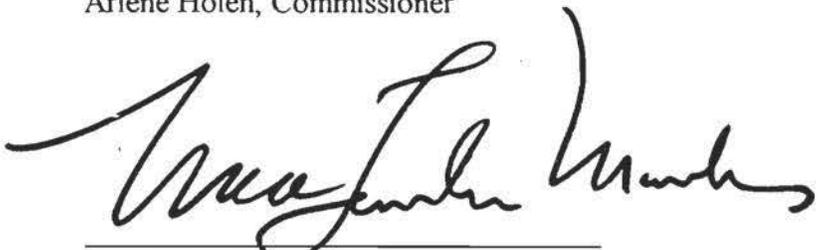
Id.

The expiration of the Stay Order and the judge's Order Continuing Stay, which provides for evaluation of whether the stay should be continued or modified, render Buck Creek's instant petition for interlocutory review moot. Accordingly, we deny the petition, without prejudice to future requests for interlocutory relief.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 15, 1995

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

vs.

BUCK CREEK COAL INC.

Docket Nos. LAKE 94-72, etc.

ORDER

On February 17, 1994, Buck Creek Coal Inc. ("Buck Creek") filed with the Commission a petition for interlocutory review of Administrative Law Judge T. Todd Hodgdon's February 15, 1995, Order Continuing Stay (the "Stay Order"). The judge had previously stayed proceedings for ninety days or until the United States Attorney made a determination regarding the criminal prosecution of Buck Creek. *See Buck Creek Coal Inc.*, 17 FMSHRC ___ (February 1995) (Operator's petition for interlocutory review of the previous stay dismissed as moot). The Stay Order continues the stay until May 16, 1995, and directs the parties to attend a status conference on that date for the purpose of deciding whether and under what conditions the stay should be continued. Stay Order at 5.

Buck Creek urges the Commission to grant interlocutory review and relief from the Stay Order so that it can begin to defend itself against the 554 citations and orders in these consolidated dockets. Pet. at 4. The Secretary responds that Commission Procedural Rule 76(a)(1),

29 C.F.R. § 2700.76(a)(1),¹ precludes our granting interlocutory review because the judge has not certified his ruling, nor has he denied Buck Creek's motion for certification. Opp'n at 3-4. In reply, Buck Creek urges the Commission to construe the Stay Order as an ongoing denial of Buck Creek's previously-filed petition for interlocutory review. Reply at 2. Buck Creek asserts in the alternative that application to the judge for certification would be futile and therefore should not be required. Buck Creek notes that it has now filed a motion for certification with the judge. *Id.* at 2-3 & n.2.

Rule 76 provides that interlocutory review cannot be granted unless the judge has certified his interlocutory ruling to the Commission or has denied a party's motion for certification. We conclude that it would be inappropriate to rule on the Secretary's procedural argument in advance of the judge's determination of Buck Creek's pending motion.

¹ Rule 76 states in part:

(a) Procedure. Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

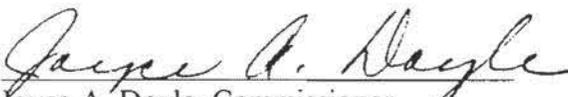
(1) Review cannot be granted unless:

(i) The Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding; or

(ii) The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification.

Accordingly, we hold in abeyance our ruling on Buck Creek's petition pending the judge's determination of the motion for certification. *Cf. Emery Mining Corp.*, 11 FMSHRC 1, 3 (January 1989).


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 1 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-972
Petitioner : A. C. No. 15-14959-03560
v. :
 : Mine No. 3
BROKEN HILL MINING COMPANY, :
INCORPORATED, :
Respondent :

DECISION

Appearances: Mary Sue Taylor, Esquire, Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee for
Petitioner;
Hobart W. Anderson, President, Broken Hill Mining
Co., Inc., Pikeville, Kentucky, *Pro Se*, for
Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Broken Hill Mining Co. pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$8,000.00. For the reasons set forth below, I affirm the citation and the two orders, as modified, and assess a penalty of \$3,700.00.

The case was heard on May 2, 1995, in Pikeville, Kentucky.¹ MSHA Inspector John P. Church and MSHA Ventilation Specialist Jerry Bellamy testified for the Secretary. No. 3 Mine Superintendent Freddie G. Carroll and Broken Hill President Hobart W. Anderson testified for the company. The parties also submitted briefs which I have considered in my disposition of this case.

¹The transcript for this case erroneously states on its cover sheet that it is for "Docket No. KENT 94-920."

SETTLED ORDERS

At the beginning of the hearing, the parties advised that they had agreed to settle Order Nos. 4004020 and 4015281, issued under Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). Both involve failure to submit valid respirable dust samples in violation of Section 70.208(a) of the Regulations, 30 C.F.R. § 70.208(a), for which the Secretary had proposed civil penalties of \$2,400.00 and \$2,600.00, respectively. The agreement provides for the orders to be modified to Section 104(a) citations, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designations, and for the penalties to be reduced to \$325.00 each.

Having considered the representations and documentation presented, (Tr. 6-9), I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, approval of the settlement agreement is granted and its provisions will be carried out in the order at the end of this decision.

CONTESTED CITATION

On September 10, 1993, Inspector Church issued Citation No. 4015959, under Section 104(d)(1) of the Act.² The citation alleges a violation of Section 75.333(b)(1) of the Regulations, 30 C.F.R. § 75.333(b)(1), because "[t]he basic ventilation plan was not being complied with in 001-0 section, in that permanent stoppings were not being maintained up to and including the 3rd

²Section 104(d)1) provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

connecting crosscut outby the working faces. There were five open crosscuts on both intake and return sides of the working section." (Govt. Ex. 1.)

Section 75.333(b) (1) requires that:

(b) Permanent stoppings or other permanent ventilation control devices constructed after November 15, 1992, shall be built and maintained--

(1) Between intake and return air courses, except temporary controls may be used in rooms that are 600 feet or less from the centerline of the entry from which the room was developed. Unless otherwise approved in the ventilation plan, these stoppings or controls shall be maintained to and including the third connecting crosscut outby the working face.

The Respondent contends that the area being mined was a "room" rather than an "entry" and that since it was less than 600 feet, it comes within the exception to the section. Therefore, the company argues that it did not violate Section 75.333(b) (1). I conclude otherwise.

The issue in this case is whether a room must be to the left or right of an entry or whether it can be at the head of an entry. Relying on the Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 941 (1968) definition of "room" as "[a] place abutting an entry or air way where coal has been mined and extending from the entry or airway to a face," Broken Hill argues that it can be at the head of an entry. This argument, however, is a misreading of both the definition and the regulation.

"Abutting" means "to touch along a border, to border on." *New Miriam Webster Dictionary* 22 (1989). (Tr. 169.) A room at the head of an entry would border on a crosscut,³ not an entry. Therefore, a room, by definition, cannot be at the head of an entry.

³ A "crosscut" is "[a] small passageway driven at right angles to the main entry to connect it with a parallel entry or air course." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 280 (1968).

Furthermore, the regulation is even clearer than the definition. It provides an exception for "rooms that are 600 feet or less from the centerline of the entry from which the room was developed" (emphasis added). Since the centerline goes in the same direction that the entry goes, a room could only be to the left or the right of the centerline and, thus, to the left or right of an entry.

I conclude that the regulation is clear and unambiguous and that the company violated it. However, even if it were not unambiguous, whether Broken Hill violated the regulation must be evaluated "in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990) (citations omitted).

Superintendent Carroll stated that "in my opinion rooms are when you are finishing up and you drop down to like a small center, like forty by forty in this case; you whether it be left, right or straight ahead, the last six hundred feet is a room." (Tr. 235.) On the other hand, both Inspector Church and Mr. Bellamy testified that a room has to make "a turn" to "the left or right." (Tr. 78, 155-58.) Mr. Bellamy further testified that the reason rooms only require temporary stoppings is that "in rooms you wouldn't want to put all your ventilating current into it. You wouldn't have to. So you would regulate some off your main current to ventilate the room." (Tr. 158.)

I conclude that the inspector and the ventilation specialist presented what a "reasonably prudent person, familiar with the mining industry" would have provided in this mine to comply with Section 75.333(b)(1). This testimony is supported by the regulation and definitions discussed above. Carroll's opinion is not supported by either, and is also not supported by anything he could provide from his prior experience.

Based on either the plain meaning of the regulation or the "reasonably prudent person" standard, it is apparent that in this instance, Broken Hill violated Section 75.333(b)(1) of the Regulations. Accordingly, I so conclude.

Significant and Substantial

The citation alleges that the violation was "significant and substantial." A "significant and substantial" (S&S) violation is

described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."⁴ A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria for determining whether a violation is S&S. See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As in most S&S cases, whether the violation was "significant and substantial" depends on whether the Secretary has shown that the third *Mathies* element, that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury, was present. In this connection, the Secretary presented evidence that there were several cables lying on the wet mine floor, that the cables were frequently rubbed on the corners of ribs, that as a result shorts in the cable could develop causing a small cable fire with resulting smoke and that the line curtains that had been hung as temporary stoppings in the area were poorly hung and could easily be dislodged either by miners or equipment going through them. In addition, there was evidence that methane is always a danger in mines.

Against this, the company contends that the air circulation at the face was within requirements, that methane had never been detected in the mine and that no mishaps of the nature suggested by the Secretary had occurred when the citation was issued. However, considering this violation, not just at the time it was cited, but assuming continued mining operations, I find that the flimsy nature of the ventilation controls present and the

⁴ See fn. 2, *supra*.

constant movement of the cables makes it reasonably likely that a serious injury would result. Accordingly, I find that the violation was "significant and substantial."

Unwarrantable Failure

The citation also alleges that Broken Hill was highly negligent in permitting this violation to occur and that the violation resulted from the company's "unwarrantable failure" to comply with the regulation. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [Emery] at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The evidence indicates that on August 17 and September 2, 1993, Inspector Church issued citations for the same violation in the same entries as the instant citation. After each citation, and particularly after the second one, Inspector Church stressed to company officials the importance of complying with Section 75.333(b)(1). The evidence also shows that when this citation was issued, the foreman to whom it was issued admitted to the inspector that he knew permanent stoppings were required.

Although not specifically argued in the Respondent's brief, implicit in its presentation in this case is the assertion that the violation was not an "unwarrantable failure" because the company believed it came within the "room" exception to the regulation. This contention is rejected for two reasons.

First, to be a defense to "unwarrantable failure" the company would have had to have had the belief at the time the violation was committed. Instead, the evidence is to the contrary since no mention was made of the exception at the time the citation was issued or at the time a conference with the company was held concerning the citation. In fact, as late as the filing of its answer to the petition for civil penalty on August 18, 1994, the company admitted that a violation existed

and made no claim of a "room" exception.⁵ Thus, it appears that the company's defense to the citation was not arrived at until sometime later.

Secondly, to be a defense to "unwarrantable failure," Broken Hill's belief that it was mining a room would have to be in good faith and reasonable. *Wyoming Fuel* at 1628; *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). As the evidence in this case amply demonstrates, it was neither.

I find that Broken Hill's failure to establish permanent stoppings up to and including the third connecting crosscut outby the working face, after twice being cited for the same violation, and after admissions by its agents that they were aware of the requirement constitutes at best indifference or a lack of serious care. Accordingly, I conclude that by such aggravated conduct, the Respondent unwarrantably failed to comply with Section 75.333(b)(1) of the Regulations.

CIVIL PENALTY ASSESSMENT

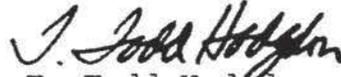
The Secretary has proposed a civil penalty of \$3,000.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984). Considering the six criteria, with particular emphasis on the degree of negligence, I conclude that a \$3,000.00 penalty is appropriate for this violation.

ORDER

Order Nos. 4004020 and 4015281 are **MODIFIED** to Section 104(a) citations by deleting the "unwarrantable failure" designations and are **AFFIRMED** as modified. Citation No. 4015959

⁵ Broken Hill stated "[a]s to Citation No. 4015959, the Respondent claims that even though a Citation existed, we cannot agree that it should be a 104-D-1 type, because temporary brattices were installed in the crosscuts, up to and including the second crosscut outby the faces on the intake and return side of the section."

is **AFFIRMED**. Broken Hill Mining Company is **ORDERED TO PAY** a civil penalty of \$3,700.00 within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Hobart Anderson, President, Broken Hill Mining Co., Inc., P.O. Box 356, Sidney, KY 41564 (Certified Mail)

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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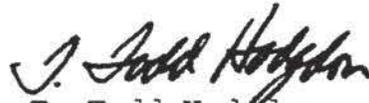
SEP 6 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-972
Petitioner : A. C. No. 15-14959-03560
v. :
 : Mine No. 3
BROKEN HILL MINING COMPANY, :
INCORPORATED, :
Respondent :

ORDER CORRECTING DECISION

In the last sentence of the first paragraph and the second to last sentence in the concluding paragraph of the September 1, 1995, Decision in the captioned case, the amount of penalty assessed is incorrectly stated as "\$3,700.00." The amount of penalty should be "\$3,650.00."

Accordingly, it is **ORDERED**, pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c), that the last sentence in the first paragraph of the decision is **CORRECTED** to read: "For the reasons set forth below, I affirm the citation and the two orders, as modified, and assess a penalty of \$3,650.00." Similarly, it is **ORDERED** that the second to last sentence in the final paragraph of the decision is **CORRECTED** to read: "Broken Hill Mining Company is **ORDERED TO PAY** a civil penalty of \$3,650.00 within 30 days of the date of this decision."



T. Todd Hodgdon
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 5 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-946
Petitioner : A. C. No. 15-15637-03557
v. :
: Mine No. 1
BROKEN HILL MINING COMPANY, :
INCORPORATED, : Docket No. KENT 94-947
Respondent : A. C. No. 15-14959-03559
:
: Mine No. 3

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Hobart W. Anderson, President, Broken Hill Mining
Company, Inc., Pikeville, Kentucky, *Pro Se*, for
Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Broken Hill Mining Company pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege several violations of the Secretary's mandatory health and safety standards and seek penalties of \$1,747.00. For the reasons set forth below, I approve the settlement agreement of the parties and assess civil penalties of \$1,254.00.

The cases were heard on May 2, 1995, in Pikeville, Kentucky. At the beginning of the hearing, the parties advised that they had agreed to settle all of the citations in these cases as follows:

<u>Citation No.</u>	<u>Violation of 30 C.F.R.</u>	<u>Proposed Penalty</u>	<u>Agreement</u>
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Docket No. KENT 94-946

4217421	§ 75.503	\$ 50.00	\$ 50.00
4217422	§ 75.400	\$ 128.00	\$ 50.00 ¹

Docket No. KENT 94-947

4015294	§ 75.1103-1	\$ 128.00	\$ 106.00
4015295	§ 75.809	\$ 119.00	\$ 50.00 ¹
4015296	§ 75.333 (b) (1)	\$ 50.00	\$ 50.00
4015297	§ 202 (a)	\$ 119.00	\$ 119.00
4015298	§ 75.1101-23 (c) (1)	\$ 50.00	\$ 50.00
4015300	§ 75.1712	\$ 50.00	Vacate ²
4004141	§ 75.364 (h)	\$ 50.00	\$ 50.00
4004143	§ 75.503	\$ 119.00	Vacate ²
4004144	§ 75.503	\$ 119.00	\$ 119.00
4003846	§ 77.205 (a)	\$ 119.00	\$ 119.00
4041466	§ 77.1103 (d)	\$ 119.00	\$ 119.00
4004151	§ 77.1605 (k)	\$ 119.00	\$ 50.00 ¹
4017904	§ 75.370 (a) (1)	\$ 136.00	\$ 136.00
4017908	§ 75.333 (g)	\$ 136.00	\$ 136.00
4017909	§ 75.400	<u>\$ 136.00</u>	<u>\$ 50.00¹</u>
		\$1,747.00	\$1,254.00

Having considered the representations and documentation presented, (Tr. 4-17), I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i).

ORDER

Accordingly, the motion for approval of settlement is

¹The Secretary moves to modify the citation to delete the "significant and substantial" designation.

² The Secretary moved to vacate this citation.

GRANTED, Citation Nos. 4015300 and 4004143 are **VACATED AND DISMISSED**, Citation Nos. 4217422, 4015295, 4004151 and 4017909 are **MODIFIED** as indicated and Broken Hill Mining Company is **ORDERED TO PAY** a penalty of \$1,254.00 within 30 days of the date of this order. On receipt of payment, these cases are **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Hobart W. Anderson, President, Broken Hill Mining Co., Inc., P.O. Box 356, Sidney, KY 41564 (Certified Mail)

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
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SEP 6 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-996
Petitioner	:	A. C. No. 15-07201-03644
v.	:	
	:	Docket No. KENT 94-997
HARLAN CUMBERLAND COAL COMPANY,	:	A. C. No. 15-07201-03645
Respondent	:	
	:	Docket No. KENT 94-998
	:	A. C. No. 15-07201-03646
	:	
	:	Docket No. KENT 94-1024
	:	A. C. No. 15-07201-03647
	:	
	:	C-2 Mine
	:	
	:	Docket No. KENT 94-1307
	:	A. C. No. 15-08415-03624
	:	
	:	D-1 Mine

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
H. Kent Hendrickson, Esq., Rice and Hendrickson,
Harlan, Kentucky, for Respondent.

Before: Judge Maurer

In these consolidated cases, the Secretary of Labor (Secretary) has filed petitions for assessment of civil penalties, alleging violations by the Harlan Cumberland Coal Company (Harlan Cumberland) of various and sundry mandatory standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard before

me on May 23, 1995, in London, Kentucky. The parties filed posthearing briefs and proposed findings of fact and conclusions of law on August 1, 1995, which I have duly considered in writing this decision.

During the course of the trial of these cases, and even afterwards, the parties discussed and negotiated settlements concerning some of the citations contained in these five dockets. I will deal with and dispose of these settled citations in this decision as well as decide the remaining issues concerning the still contested citations, in order, by docket number.

In addition to the arguments presented on the record in support of the proposed settlements, the parties also presented information concerning the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlements, and pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, I rendered bench decisions approving the proposed settlements. Upon further review of the entire record, I conclude and find that the settlement dispositions which have been previously approved are reasonable and in the public interest, and my bench decisions are herein reaffirmed.

Docket No. KENT 94-996

The parties have agreed to settle 12 of the 14 citations included in this docket as follows:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487440	03/22/94	75.400	\$ 204	\$ 153
4242386	04/04/94	75.362(b)	189	140
4242389	04/04/94	75.503	189	140
4242392	04/04/94	75.503	189	140
4242393	04/04/94	75.1100-2(f)	189	140
4242396	04/04/94	75.330(b)(2)	189	140
4242397	04/04/94	75.330(b)(2)	189	140

4242398	04/04/94	75.1100-2(i)	235	176
4242399	04/04/94	75.400	189	140
4242400	04/04/94	75.1107-16(c)	189	140
4487521	04/04/94	75.601-1	189	140
4487522	04/04/94	75.904	189	140

Two substantially identical citations remain to be decided in this docket which were tried before me and were subsequently briefed by the parties.

Citation No. 9885355, issued on December 14, 1993, by MSHA Inspector Calvin E. Riddle, alleges a violation of the standard found at 30 C.F.R. § 70.208(a) and alleges that respondent failed to "take a valid respirable dust sample during the Oct.-Nov. 1993 bimonthly sampling cycle for the Designated Area Sampling Point No. 904-0. . . ." Citation No. 9885356 alleges the same with regard to Designated Area Sampling Point No. 904-1.

Inspector Riddle testified that on December 9, 1993, his office received two Advisories of Noncompliance, Failure to Submit notices as generated by the Respirable Dust Processing Laboratory of MSHA's Pittsburgh Safety and Health Technology Center. The advisories indicated that MSHA had not received valid respirable dust samples during the October-November 1993 bimonthly sampling cycle from Harlan Cumberland for Designated Areas 904-0 and 904-1 of the C-2 Mine. After reviewing these notices, Inspector Riddle issued Citation Nos. 9885355 and 9885356, pursuant to section 104(a) of the Mine Act, for two violation of 30 C.F.R. § 70.208(a).

Basically, respondent's defense is that the required dust samples were in fact collected and subsequently placed in the United States Mail, properly addressed to MSHA's Pittsburgh laboratory. Respondent is at a loss to explain why they apparently never reached their destination.

Mr. Eddie Sargent, respondent's Safety Director, testified regarding respondent's dust sampling procedures and sponsored two dust cassette sampling cards, signed by himself, indicating that the appropriate samples for the two designated areas were timely collected during the sampling period.

Mr. Sargent testified that he personally transported the dust cassettes to respondent's office at Gray's Knob, Kentucky. Once there, he logs the dust cassette card number from each sample into the book for that particular mine, and then places the cassette into the box designated for outgoing mail.

Respondent's general manager, Mr. Clyde Bennett, takes over from there, as a general rule. Normally (95 percent of the time) he takes the dust samples from the mail box at the Gray's Knob Mine office to the post office, 1 mile away.

The crux of the matter here, of course, is that no one can certify that these particular cassettes were mailed, or not mailed, for that matter, only that the scheme related by Sargent/Bennett is the general practice of the respondent. It was not their practice to mail these cassettes certified mail or to keep any formal record of delivery to the post office.

The cited mandatory standard requires the submission of a valid respirable dust sample from each designated area during each bimonthly period. The Secretary maintains that a dust sample is not considered valid unless and until the MSHA laboratory at Pittsburgh determines that the weight of the sample complies with the appropriate dust standard. It follows then that if they do not receive a sampling cassette, for whatever reason, they are unable to make the necessary determination.

I agree with the Secretary of Labor that the operator's act of placing a bimonthly dust sample in the mail does not satisfy the regulatory requirement to provide a valid dust sample to MSHA. It must also be received and it must also be in compliance with the appropriate standard. As a practical matter, the dust sampling program would be unworkable if it were otherwise.

Accordingly, I find the violations alleged in Citation Nos. 9885355 and 9885356 to be proven as charged. The citations will be affirmed herein.

Turning now to the issue of negligence, the record evidence establishes that the respondent collected the requisite dust samples for the 904-0 and 904-1 Designated Areas at the C-2 Mine. However, respondent was unable to establish that the cassettes were actually mailed to MSHA, or that the samples were valid, i.e., complied with the applicable standard when weighed. The record is clear that MSHA did not receive the subject dust cassettes, and that, without more, is enough for me to find ordinary or "moderate" negligence on the part of the respondent in both of these violations.

After consideration of all the statutory criteria in section 110(i) of the Mine Act, most particularly the respondent's propensity to repeatedly violate this same section of the standards, I find a civil penalty of \$1000 per violation to be appropriate, and it will be assessed herein.

Docket No. KENT 94-997

The parties settled this case on the following terms:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487531	04/06/94	75.400	\$ 189	\$ 140
4487532	04/06/94	75.400	189	140
4487540	04/06/94	75.370 (a) (1)	189	140
4487806	04/12/94	75.809	189	140
4487807	04/12/94	75.809	189	140
4487808	04/12/94	75.807	189	140
4487809	04/12/94	75.400	189	140
4487810	04/12/94	75.400	189	140
4487811	04/12/94	75.1100 (2) (e)	189	140
4487813	04/13/94	75.512	189	140
4487641	04/18/94	75.512	189	140
4487642	04/18/94	75.400	189	140
4487814	04/18/94	75.370 (a) (1)	204	153
4487815	04/18/94	75.400	189	140
4487816	04/18/94	75.400	<u>189</u>	<u>140</u>
TOTAL			\$2850	\$2113

Citation No. KENT 94-998

The parties settled this case on the following terms:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487817	04/18/94	75.370(a) (1)	\$ 204	\$ 153
4487818	04/18/94	75.503	189	140
4487819	04/18/94	75.400	189	140
4487820	04/18/94	75.1702(1)	189	140
4487646	04/20/94	75.1710	189	140
4487649	04/20/94	75.326	204	153
4487652	04/25/94	75.400	<u>189</u>	<u>140</u>
TOTAL			\$ 1353	\$ 1006

Docket No. KENT 94-1024

At the hearing, the parties agreed to settle one of the four citations included in this docket as follows:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u> <u>SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
4487643	04/18/94	75.202(a)	\$ 189	\$ 140

Also, at the hearing, the Secretary vacated the three section 104(b) orders associated with the other three section 104(a) citations included in this docket which were tried before me. Therefore, Order Nos. 3165086, 3165087, and 3165088 will be vacated herein. Finally, subsequent to the hearing, the Secretary decided to vacate section 104(a) Citation Nos. 9885353 and 9885354 in view of the uncontradicted testimony of the respondent's witnesses that the No. 003 Section of the C-2 Mine produced coal for no more than 6 hours during a single shift of the relevant bimonthly sampling cycle.

That leaves just a single citation left to be decided in this docket. Citation No. 9885368, issued on January 14, 1994, by Inspector Riddle, alleges a violation of the standard found at 30 C.F.R. § 70.207(a) and alleges that respondent failed to "take

5 valid respirable dust samples during the Nov.-Dec. bimonthly sampling cycle on Mechanized Mining Unit (M.M.U.) I.D. No. 004-0 for the designated occupation code 036. . . ." The citation notes that "3 valid respirable dust samples were received and credited to this bimonthly sampling cycle."

Therefore, this citation is about the two missing cassettes. Once again, as noted earlier in this decision, the respondent defended by producing some evidence that it collected the subject dust samples and placed them in the U.S. Mail, postage prepaid, addressed to the MSHA laboratory in Pittsburgh, Pennsylvania. And once again, they were not received for whatever reason, at the laboratory, and their whereabouts remain unknown. No one has offered any explanation for their seeming disappearance.

I can only reiterate here the same rationale I previously stated in affirming the two similar citations in Docket No. KENT 94-996. Respondent has provided no direct evidence to establish that the dust cassettes were ever actually mailed. The person who generally takes the company's mail to the post office has no recollection of placing these particular cassettes in the mailstream, and respondent maintains no mailing records. Nor does it use certified mail to mail in its sampling cassettes, as others do.

In any case, the sample must be received by the laboratory in order to determine its validity. The regulation requires not just a sample, but a valid dust sample to comply with 30 C.F.R. § 70.207. And a dust sample is not considered valid until the MSHA laboratory determines that the weight of the sample complies with the appropriate dust standard.

Therefore, inasmuch as the subject dust sampling cassettes were not received by the MSHA laboratory, I find the respondent violated the cited standard, and I will affirm Citation No. 9885368 herein.

I find this to be a "serious" violation and due to the respondent's "moderate" negligence. Accordingly, after consideration of all the statutory criteria in section 110(i) of

the Mine Act, including respondent's history of violations, I find a civil penalty of \$1000 to be appropriate to the violation, and it will likewise be assessed herein.

Citation No. KENT 94-1307

The parties settled this case on the following terms:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. SECTION</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
3165096	05/19/94	75.370(a)	\$ 235	\$ 188
3165097	05/19/94	75.370(a)	235	188
4469844	06/21/94	75.400	168	140
4469846	06/21/94	75.400	178	140
4469847	06/21/94	75.523(3)(b)(4)	178	140
4469849	06/21/94	75.701	<u>168</u>	<u>140</u>
TOTAL			\$ 1162	\$ 936

According, I enter the following:

ORDER

Docket No. KENT 94-996

1. Citation Nos. 4487440, 4242386, 4242389, 4242392, 4242393, 4242396, 4242397, 4242398, 4242399, 4242400, 4487521, 4487522, 9885355* and 9885356* **ARE AFFIRMED.**

* modified negligence finding from "high" to "moderate."

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$3729 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED.**

Docket No. KENT 94-997

1. Citation Nos. 4487531, 4487532, 4487540, 4487806, 4487807, 4487808, 4487809, 4487810, 4487811, 4487813, 4487641, 4487642, 4487814, 4487815, and 4487816 **ARE AFFIRMED.**

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$2113 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-998

1. Citation Nos. 4487817, 4487818, 4487819, 4487820, 4487646, 4487649, and 4487652 **ARE AFFIRMED**.

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$1006 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-1024

1. Citation Nos. 4487643 and 9885368* **ARE AFFIRMED**.

* modified negligence finding from "high" to "moderate."

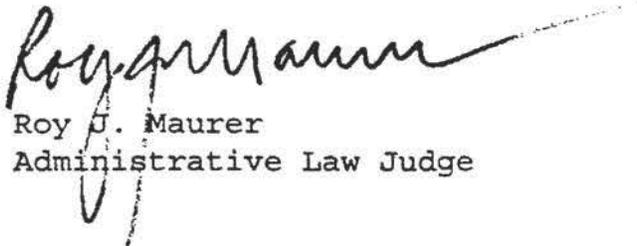
2. Citation Nos. 9885353 and 9885354 and Order Nos. 3165086, 3165087, and 3165088 **ARE VACATED**.

3. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$1140 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.

Docket No. KENT 94-1307

1. Citation Nos. 3165096, 3165097, 4469844, 4469846, 4469847, and 4469849 **ARE AFFIRMED**.

2. Respondent **IS ORDERED TO PAY** the assessed civil penalty of \$936 to the Secretary of Labor within 30 days of this decision. Upon receipt of payment, this case **IS DISMISSED**.


Roy J. Maurer
Administrative Law Judge

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor,
U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 372215-2862 (Certified Mail)

H. Kent Hendrickson, Esq., Rice & Hendrickson, P. O. Box 980,
Harlan, KY 40831 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 6 1995

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. SE 95-404-R
: Citation No. 3198331; 8/2/95
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 4 Mine
ADMINISTRATION (MSHA), : Mine I.D. No. 01-01247
Respondent :
and :
: :
UNITED MINE WORKERS :
OF AMERICA, :
Intervenor :

DECISION

Appearances: R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for the Contestant; David M. Smith, Esq, J. Alan Truitt, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for the Contestant; William Lawson, Esq. Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Respondent; Patrick K. Nakamura, Esq., Nakamura & Quinn, Birmingham, Alabama, for the Intervenor.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a notice of contest filed by Jim Walter Resources, Inc. (Contestant) challenging the issuance by the Secretary of Labor (Respondent) of Order

No. 3198331, pursuant to Section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act). In addition, Contestant also filed a motion for expedited proceedings, which was received by the Commission on August 4, 1995. On August 7, 1995, in a telephone conference call between the undersigned and counsel for Contestant and Respondent, the motion to expedite was granted and this case was scheduled for hearing on August 22 and 23. On August 15, 1995, Contestant filed a motion for partial summary decision, and Respondent filed his response on August 17, 1995. On August 17, 1995, in a telephone conference call with counsel for Contestant and Respondent, the motion was denied.¹ Subsequently, the United Mine Workers of America (UMWA) moved to intervene.

At the hearing, Johnny Jordan, Hulett Keith Chaney, Terry Lindley, and Kenneth Wayne Ely testified for Respondent. George Vass, James Reginald Lamons, and Darrel Leon Loggains testified for Contestant. The parties each filed a brief, via fax, on August 25, 1995.

Findings of Fact and Discussion

Jim Walter Resources, Inc. (Jim Walter) operates two longwall sections at its No. 4 mine. The longwall face on the section in issue is approximately 900 feet long. Roof support is provided by five foot wide shields that advance forward as the face is cut. Approximately 192 shields are placed side-by-side for the length of the face. The various parts of the shields are set forth in Respondent's Exhibit No. 1. In normal operations, each shield is moved forward, in sequence, by electronic controls that are located in an adjacent shield. The miner who operates these controls stands under the canopy of the adjacent shield. To advance the shield forward, pressure is released from the leg jacks which causes the canopy to be lowered and the pontoon to be raised. The entire shield is then advanced forward to the face. Lastly, the hydraulic leg jacks are pressurized to press the canopy up against the roof. If the height of the roof exceeds

¹The basis for the denial of the motion was set forth in the conference call, and reiterated on the record at the commencement of the hearing on August 21.

the stroke ² of the leg jacks, additional gob is placed under and in front of the advancing shield so as to raise the bottom of the shield and ensure that the stroke of the jack legs will place the canopy against the roof. In this situation, or when the base jacks, which lift up the pontoon of the shield when the canopy is depressured allowing for forward movement, are not operating properly, then the shield can become mired in the gob preventing forward movement of the shield. Timbers are then placed vertically between the canopy and the base of the shield. When the canopy is lowered to touch the top of the timber and pressure is applied, the pontoon is raised allowing the shields to be moved forward.

On August 1, 1995, Kenneth Wayne Ely, an MSHA Supervisory Mine Safety and Health Specialist, was requested to visit the No. 2 longwall at Jim Walter's No. 4 Mine, to observe a demonstration whereby timbers were used to elevate the pontoon of a shield in order to advance the shield. In the demonstration, the timber, placed in a vertical position between the canopy of the shield and the bottom of the shield, was tied to the leg jack.

After Ely returned to his office, between 7:00 p.m. and 11:00 p.m., Glenn Tinney, the subdistrict manager, related to him that he (Tinney) had conversations with miners regarding the use of timbers on the longwall to help advance the shields. In a series of conversations between Tinney and Ely, between 7:00 p.m. and 11:00 p.m., on August 1, Tinney informed Ely that miners told him of the following practices and hazards: timber butts are used to help advance the shields, timbers are placed on top of butts, rocks have been known to fall off the edge of the top of the shields, hydraulic hoses have been damaged when timbers were used, there have been unplanned movement of the shields when timbers were used, and that numerous base jacks may not be operating properly.

At approximately 11:00 p.m. on August 1, Ely received a telephone call from a miner complaining of the existence of

²Essentially, the stroke is the maximum distance that the canopy can be set above the bottom of the shield. The stroke can be set at different heights.

practices constituting an imminent danger. Ely indicated that the complaining miner reported that the longwall jack legs may have serious problems, and may not be properly pressurized. It was reported that the leg jacks were in disrepair, and that numerous base jacks were deficient or missing. It was also reported that miners using timbers to advance the longwall were holding timbers with their hands while advancing the shields, thereby placing themselves in a hazardous area where rocks might fall on them. It was further reported that the practice of using timbers to advance the shields created unplanned movement of the shields. Lastly, it was reported that miners were using a variety of blocks on top of the handrail or the pan line.

Ely left the office at approximately 11:30 or 11:45 p.m., and met with another inspector at "an eating place" (Tr. 367) on the way to the mine to discuss the section 103(g) complaint. He arrived at the mine at about 1:30 a.m. on August 2. Ely indicated that it normally takes approximately an hour and ten minutes to drive from the MSHA office to the mine.

Between 3:00 a.m. and 4:00 a.m., Ely interviewed six miners on the owl shift of the No. 1 longwall section, and other inspectors interviewed miners on the owl shift of the No. 2 longwall section. According to Ely, after reports of ten or twelve interviews were received at 6:55 a.m., an imminent danger order was issued pursuant to section 107(a) of the Act.³ Sometime between 3:00 and 4:00 a.m., Ely asked the manager of the longwall to no longer use timbers to advance the longwall until the MSHA inspectors completed the investigation. He said that the basis for this request was the information he had received from a miner on the telephone at 11:00 p.m. on August 1, requesting a 103(g) inspection. The imminent danger withdrawal order at issue alleges the following practice:

³The order at issue, No. 3198331, was signed by Kirby Smith, an MSHA inspector who was not available at the date of the hearing. At the hearing, it was stipulated that the issuance of the order was a joint effort involving Smith and Ely, and that the issue to be decided was the discretion of Ely in issuing the order.

An unsafe work practice has been identified during an investigation for 103(g) investigation as a result of a miner complaint. Testimony of persons working on #1 and #2 longwalls revealed that workers were being permitted to perform work while in a hazardous location. Workers were placing timbers and crib blocks to support longwall shield canopies while advancing longwall shields. Persons were holding timbers and/or cribs blocks (sic) in their hands while moving longwall canopies to come in contact with these timbers and/or cribs. This exposed persons to falling rock from the top and sides of the shield and to unplanned movement of the shields. Different persons were permitted to install these timbers and/or cribs blocks (sic) in a variety of ways with little or no supervision.

The order contains the following language under the heading Area or Equipment: "[t]he practice of using timbers and/or crib block to assist in the advancement of the long wall shields."

The order at issue alleges the existence of an "imminent danger" as per section 107(a) of the Act. Section(3)(j) of the Act defines an imminent danger as "... the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In Utah Power and Light Co., 13 FMSHRC 1617 (1991), the Commission reviewed the Legislative History of this decision, and concluded as follows: "[t]hus the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." (13 FMSHRC, supra, at 1621.) (Emphasis added)

The Commission rejected an interpretation of the imminent danger provision of the Act which includes, "... any hazard that has the potential to cause a serious accident at some future time" (Utah Power and Light, supra at 1622). The Commission further explained its holding as follows:

To support a finding of imminent danger, the inspector must find that the hazardous condition

has a reasonable potential to cause death or serious injury within a short period of time. An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of mines under section 107(a) in the circumstances where there is not an imminent threat to miners.

Utah Power and Light, *supra* at 1622. See also, Island Creek Coal Company, 15 FMSHRC 339 (March 1993); Wyoming Fuel Co., 14 FMSHRC 1282 (August 1992).

For the reasons that follow, I find that the evidence fails to establish that there was an imminent threat to miners.

Jim Walters does not have any work rules, safety rules, guidelines, or instructions to govern the use of timbers to advance a longwall shield. Respondent presented the testimony of three miner witnesses who work on the longwall and proffered the testimony of six additional witnesses whose testimony would be cumulative to the testimony of the miner witnesses regarding the use of timbers to advance the longwall shields. Respondent's witnesses, Johnny Jordan, who has been a longwall helper and shearer operator on the No. 2 longwall since 1983, Hulett Keith Chaney, who has been a scoop operator and inside laborer on the No. 2 longwall since 1993, and Terry Lindley, who, as an electrician and repairman, has worked on the No. 2 longwall since 1978, testified based on their observations and actions. Their essentially uncontradicted testimony establishes the existence of the following work practices regarding the use of timbers⁴ to advance the longwall shields: timbers were placed vertically between the bottom of the canopy and at various locations on the bottom such as the relay bar, pan line, and handrail of the cable trough; timbers were stacked atop cribs; timber butts were stacked atop timbers; timbers were used that had been cut unevenly, miners had to steady timbers with one hand while

⁴Timbers are oak or pine, six inches by six inches and are sawed to the appropriate length to be placed between the underside of the canopy and the bottom of the shield. Timbers are used for roof support at other locations in the mine.

operating with the other hand the rotary valve located on the shield in order to advance the shield; miners jammed the rotary valve controls with pliers, rocks, or other items in order to keep the valve set firm in a certain setting; miners rode the shield that was being advanced in situations when the shield was being moved by the rotary valve; and that in placing the timbers, miners were located in close proximity to pinch points and to the pan line, which was in operation most of the time. Jordan, Chaney, and Lindley testified, in essence, that they considered the above practices to be unsafe. They testified that the timbers were reused in advancing the longwall, and some of them had "mushroomed" on the top and were split or cracked. Chaney testified that on one occasion, when he was setting a timber under the canopy, it kicked out from the top and bumped him in the shoulder, but he did not miss any work. Lindley testified that on one occasion he was hit on the leg by a timber. In addition to the hazards of timbers kicking out and injuring miners, the miners testified to various other hazards involved in the above practices, such as miners being subject to the hazard of rocks falling off the canopies from the tip of the canopies or between the shields, especially when the shields are lowered distances more than a few inches to accommodate the length of the timber. Also, hazards exist when a single miner must balance himself by having one hand hold on to the timber and another to operate the valve lowering the canopy. As such, the miner may not observe rocks being thrown from the adjacent pan line, or he might get injured by being exposed to various pinch points upon movement of the shield. Should the shield move forward in an "unplanned" fashion as a consequence of the practice of the jamming of the rotary valves, a miner also might be injured.

Ely indicated that he issued the imminent danger order because information provided to him from the miners he interviewed on the owl shift confirmed the existence of the following practices, which had been reported to him over the telephone by a miner at 11:00 p.m. the previous evening: (1) miners were using timbers to advance the longwall and were holding the timbers with their hands and thus were placing themselves in a situation where they were exposed to falling rock (2) the unplanned movement of the shields which resulted from this practice and (3) the use of blocks and timbers in various position, such as on top of the rail or on the pan line. He stated that it, "was just a matter of luck" (Tr. 278) that no

serious injury resulted from the various practices testified to. He stated that, in his opinion, "if the practice had not been stopped immediately that there was a very good likelihood of someone going to get a serious injury, get killed" (sic) (Tr. 278) . He was asked what was imminent about the work practices that were described to him. His testimony is as follows:

A. Again, because of the variety of methods and ways that timber was being used, workers were placing themselves in an area that I thought was a high potential for an accident to occur.

Q. When?

A. Immediately.

Q. Why is that?

A. Because when we interviewed the miners that night, they described all these variety of conditons to us, and if they had continued on with those type practices, I believe that there would have been a serious injury going to occur (Tr. 279).

I find that the evidence is insufficient to establish that there was any condition or practice which, if not abated, had a reasonable potential to cause death or serious injury," ... within a short period of time" (Emphasis added.) (Utah Power and Light, *supra*, at 1622). Neither Ely nor any other inspector observed any condition that constituted an imminent danger. As testified to by Respondent's witnesses, various hazards were attendant upon the various practices of using timbers to advance the shields. Ely decided that these practices constituted an imminent danger. However, Ely did not articulate with specificity the factual basis for his conclusion that the hazardous practices created an imminent threat to the safety of miners. It might be inferred that due to the variety of practices involved herein, and the frequency of their use, that there may have been a reasonable likelihood that the various hazards created would result in an injury or illness of a reasonably serious nature. However, a distinction must be made

between conditions or practices that establish a significant and substantial violation and those that create an imminent danger (Utah Power and Light, supra, at 1622). Only the latter may properly be the subject of a Section 107(a) withdrawal order.

Chaney testified to having been bumped in the shoulder by a timber that kicked out, and Lindley testified to having been hit on a leg on one occasion by a timber. However, it is significant to note that according to the uncontradicted testimony of James Reginald Lamons, the longwall manager at the No. 4 mine, and Darel Leon Loggains the longwall manager at the No. 3 mine, timbers have been used in advancing the longwall since its inception in 1979. There is no evidence of any serious injuries resulting from these practices. Respondent offered in evidence documentation of 14 injuries that had occurred on longwall faces, 11 of which resulted from rocks falling off of top of canopies or between shields (Respondent's Exhibit No. 6). However, there is no indication that any of these injuries occurred as the consequence of the use of timbers in advancing the face.

For all of the above reasons, I conclude that it has not been established that Contestant's practices had a reasonable potential to cause death or serious injury within a short period of time. I thus find that the inspectors abused their discretion in issuing the withdrawal order at bar.⁵ Hence, the withdrawal order is to be dismissed.

⁵In his brief, Respondent relies on U.S. Steel Corp., 3 FMSHRC 131 (January 1981) (Judge Broderick) and U.S. Steel Group, Minnesota Ore Operations, 15 FMSHRC 1720 (August 1993) (Judge Barbour). To the extent that these cases are not consistent with my decision in the instant case, I choose not to follow them.

ORDER

IT IS ORDERED that Order No. 38198331 be DISMISSED.


Avram Weisberger
Administrative Law Judge

Distribution:

R. Stanley Morrow, Esq., Jim Walter Resources, Inc.,
P.O. Box 133, Brookwood, AL 35444 (Certified Mail)

David M. Smith, Esq., J. Alan Truitt, Esq., Maynard, Cooper &
Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth-Harbert Plaza,
Birmingham, AL 35203-2602 (Certified Mail)

William Lawson, Esq., Office of the Solicitor, U. S. Department
of Labor, Chambers Building, Highpoint Office Center, Suite 150,
100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

Patrick K. Nakamura, Esq., Nakamura & Quinn, Suite 300,
Landmark Center, 2100 First Avenue North, Birmingham, AL 35203
(Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 7 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 95-515-D
on behalf of	:	MSHA Case No. PIKE CD 95-03
ROBERT ROBINETTE,	:	
Complainant	:	Tall Timber Mine
v.	:	I.D. No. 15-13720
	:	
RAWL SALES AND PROCESSING CO.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 95-516-D
on behalf of DANA HAGER,	:	MSHA Case No. PIKE CD 95-04
Complainant	:	
v.	:	Tall Timber Mine
	:	I.D. No. 15-13720
RAWL SALES AND PROCESSING CO.,	:	
Respondent	:	

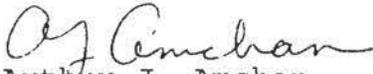
DECISION APPROVING SETTLEMENT

Before: Judge Amchan

These cases are before me pursuant to section 105 of the Federal Mine Safety and Health Act. As the Complainants have already been reinstated with full backpay and benefits, the parties have filed a motion to approve settlement and to dismiss the cases based on a reduction in the proposed civil penalties for the alleged discriminatory conduct. The terms of the settlement are that the total penalties for these matters have been reduced from \$18,000 to \$10,000. I have reviewed the settlement and conclude that it is consistent with the purposes of the Act.

ORDER

The parties' motion for approval of settlement is **GRANTED**. Respondent shall pay the \$10,000 in civil penalties within 30 days of this order. Thereupon, these cases are dismissed.


Arthur J. Amchan
Administrative Law Judge

Distribution:

Susan E. Foster, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862

Mark A. Toor, Esq., for Rawl Sales & Processing Co.,
A.T. Massey Coal Co., Inc., P.O. Box 26765, Richmond,
VA 23261

Tony Oppegard, Esq., Mine Safety Project of the Appalachian
Research & Defense Fund of Kentucky, 630 Maxwellton Court,
Lexington, KY 40508

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 7 1995

WHAYNE SUPPLY COMPANY,	:	
Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 94-518-R
	:	Order No. 4011758; 1/25/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 94-519-R
ADMINISTRATION (MSHA)	:	Citation No. 4011760; 1/25/94
Respondent	:	
	:	Mine: Job No. 17A
	:	ID No. 15-17434-A25
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 95-556
Petitioner	:	A.C. No. 15-17434-03501 A25
v.	:	
	:	Job No. 17A
WHAYNE SUPPLY COMPANY,	:	
Respondent	:	

DECISION

Appearances: Joseph A. Worthington, Esq., Smith & Smith,
Louisville, Kentucky, for Contestant;
Brian W. Dougherty, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for Respondent.

Before: Judge Amchan

Background and Issues Presented

On January 20, 1994, James Paul Blanton, a field service technician employed by Whayne Supply Company (Whayne Supply), was killed when struck by the belly pan of a bulldozer. At the time of the accident, Blanton was underneath the bulldozer

at a surface coal mine operated by Addington Mining Company (Addington) in Pike County, Kentucky. The Mine Safety and Health Administration (MSHA) conducted an investigation of this accident and issued the two contested citations at issue in this matter.¹

Citation No. 4011760 alleges a violation of section 104(d)(1) of the Act and 30 C.F.R. § 77.405(b). This regulation provides that, "[n]o work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position." Subsequent to the hearing in this matter a \$50,000 civil penalty was proposed for this alleged violation.

Citation No. 4011758 alleges a violation of 30 C.F.R. §77.1713(a). This regulation requires that at least once each shift, or more often if necessary, each active working area or active surface installation be inspected by a certified person for hazardous conditions. This citation alleges that Mr. Blanton's foreman, Charles Crisp, did not inspect Blanton's work area or arrange for Addington to make such an inspection. A \$204 civil penalty has been proposed for this alleged violation.

For the reasons stated below, I conclude that Whayne Supply violated §77.405(b) as alleged, but that such violation did not result from Whayne Supply's "unwarrantable failure" to comply with the standard. I therefore affirm the violation as a significant and substantial section 104(a) citation and assess a \$1,500 civil penalty. Citation No. 4011758 is vacated.

The events leading up to the accident

Several days prior to January 20, 1994, a D10 Caterpillar bulldozer owned and used by Addington at a surface coal mine in Pike County, Kentucky, broke down (Tr. 19-20). The dozer was moved out of the way of mining operations into a flat open field (Tr. 42-43, 84). Once Addington's mechanics determined that they could not fix this bulldozer, Addington called Whayne Supply

¹Identical citations were issued to Addington, which were contested and then settled prior to a hearing.

to send a field service technician to their mine to repair the bulldozer.

Wayne Supply sells and services Caterpillar machinery and equipment in Kentucky and Indiana. It regularly services such equipment on Addington mine sites. On the afternoon of January 19, 1994, James Paul Blanton, a field service technician working out of the Ashland, Kentucky branch office, was called by his supervisor, Charles Crisp, and assigned to the Addington mine site the next morning (Tr. 245).

On January 20, Blanton drove his service truck from his home to Addington's No. 17A Mine in Pike County. Upon his arrival, he met with Addington's foreman, Ronnie Keaton. Keaton sent Blanton to repair the disabled D10 bulldozer. Later in the morning Keaton drove to the bulldozer to oversee the digging of a shallow trench (Tr. 134). The bulldozer was then pushed over the trench so that Blanton could lower the belly pan and gain access to the vehicle's defective torque converter².

Prior to beginning work on the bulldozer, Blanton repositioned his service truck so that the right rear of the vehicle was close to the bulldozer (Exhibit G-8, photo 2). Blanton's truck was equipped with a small crane located on its right rear. This crane is normally used to support a chain which is run under the belly pan and attached to the opposite track to prevent the pan from falling abruptly when the bolts are loosened (Exh. C-3, Tr. 216, 408-09).

Blanton spoke briefly to Keaton, Addington's superintendent David Maynard, Addington's maintenance foreman James Cox and the D10's operator, Tony Boggs³. He was then left alone to repair

²The D10 bulldozer has three belly pans, which are removable sections on the bottom of the vehicle, designed to allow access to components located directly above (Tr. 152-53). To gain access to the torque converter, Blanton had to loosen the bolts of the middle belly pan, allowing it to swing down on hinges on one side of the pan (Tr. 117-122, Exh. G-8, photo Nos. 10-13).

³At the hearing on May 2, 1995, Boggs testified that Blanton told him that the crane boom would not work when he tried to warm

the D10's torque converter. Shortly before noon he was found dead or dying, pinned by the belly pan underneath the bulldozer. He was found in a sitting or kneeling position. The belly pan, which weighed approximately 500 pounds, had swung down on its hinges and was laying against his neck and back. The bolts holding up the pan had been removed with an air wrench. The belly pan had not been secured by a chain or other device before the bolts had been loosened.

Terry Crawford, a Whayne Supply technician who was at the Addington mine to repair another vehicle, arrived at the accident site shortly after Blanton was discovered. Crawford climbed on the back of Blanton's service truck and hit the top button of the control panel for the crane boom (Tr. 229). The crane boom did not move. Crawford then told Addington's maintenance supervisor, James Cox, that the boom did not work (Tr. 230). On the next day Crawford told MSHA investigators that he tried to move the boom and that it did not work (Tr. 231).

I conclude that the Secretary has not established that the boom did not work on the morning of January 20, 1994. I credit Crawford's testimony that he was unfamiliar with the controls on Blanton's truck and hit the wrong button to move the crane (Tr. 332-36, Exh. C-6). I also credit the testimony of Service Manager Jeffrey Suttle that since Blanton's air compressor worked just prior to the accident, the boom would also have worked (Tr. 379). Finally, the boom did work when Foreman Crisp activated it on January 25, 1994, albeit at a much higher ambient temperature (Tr. 128, 154, 239, 363-67).

fn. 3 (continued)

up his truck at 1:00 a.m., on January 20, 1994, and that he had trouble with the air compressor as well (Tr. 58). I am unable to credit this testimony in view of the fact that when interviewed by MSHA on January 21, 1994, Boggs did not mention that Blanton had said the boom was not working (Tr. 90-93). At the earlier interview Boggs told MSHA that Blanton said he had trouble starting his truck early in the night but that he was able to start it later (Tr. 90). This is consistent with foreman Crisp's account of his conversations with Blanton prior to the accident (Tr. 245-48).

Moreover, even if the boom had not worked, Blanton had the means to safely secure the belly pan before loosening its bolts. His truck was equipped with a cable come-along which he could have used to do this task safely without the boom (Tr. 368, Exh. G-4).

Contestant violated 30 C.F.R. § 77.405(b)

Whayne Supply does not contend that Blanton removed the belly pan in a safe manner. It questions the applicability of the cited standard and the degree to which MSHA holds it responsible for Blanton's negligence. The Secretary takes the position that when the bulldozer was pushed over the trench dug by Addington, it became "raised" within the meaning of section 77.405(b) (Tr. 300). I concur with this interpretation of the regulation and find that Whayne Supply violated this standard as alleged, because Blanton's conduct is imputed to Whayne Supply for liability purposes, A. H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983). The regulation prohibits work under machinery or equipment that has been raised until it has been "securely blocked."

I interpret "securely blocked" to have the same meaning as the phrase "blocked or mechanically secured to prevent accidental lowering," in the corresponding metal/non-metal safety standard at 30 C.F.R. § 56.14211(b) (see Midwest Material Corporation, 16 FMSHRC 636, 638 n. 1 (ALJ April 1995-review granted June 5, 1995). Thus, when the bolts were loosened on the belly pan, working under the belly pan violated the standard unless the pan was blocked or secured with a device such as a metal chain hooked to a crane or come-along.

Is Blanton's Negligence Imputed to Respondent for
Purposes of determining whether the violation was due
to an "unwarrantable failure" and assessing a
penalty⁴?

The negligence of a rank-and-file miner ordinarily cannot be imputed to an operator for penalty purposes. However, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct, Southern Ohio Coal Co., 4 FMSHRC 1459, 1464-5 (August 1982).

Although I am unaware that the Commission has so held directly, it follows that the same rule applies to the imputation of a rank-and-file miner's conduct for purposes of determining whether an operator's violation was due to an "unwarrantable failure⁵." Mr. Blanton was not a supervisory employee. However, I impute his negligence to Respondent, because the record does not establish that Whayne Supply took such reasonable steps in

⁴Civil penalties were proposed in this matter after the May 2-3, 1995 hearing. The contest cases were stayed pending issuance of the proposed penalties from May 18, 1994, to February 24, 1995, when I set them for hearing. In my notice of hearing, I invited the parties to seek consolidation of civil penalty proceedings or to present evidence regarding the section 110(i) penalty criteria, depending on whether or not civil penalties were proposed by MSHA prior to hearing. At the hearing on May 2, 1995, the Secretary's counsel advised me that the Assistant Secretary had decided to wait to propose civil penalties (Tr. 8-9).

⁵In Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 196-7 (February 1991), the conduct of a rank-and-file miner was imputed to the operator in finding unwarrantable failure because the miner was acting as the agent of the operator in conducting workplace examinations. I do not find that decision applicable to the instant case. Although there may be situations in which an employee working alone should be deemed the agent of the operator for civil penalty/unwarrantable failure purposes, I do not think that is so in all cases.

training and supervising Blanton, that it should be completely absolved of responsibility for his violative conduct for negligence and penalty purposes.

There is no indication that Blanton received any formal training regarding safe procedures for removing a belly pan in the field (Tr. 216-220, 255-56). Whayne Supply service technicians are trained to avoid or minimize time spent under a suspended load (Tr. 255-56, 405). It is not clear how a technician would understand the application of this rule to belly pan removal. There is no evidence that Mr. Blanton was ever instructed by Whayne Supply that if he had to get under the belly pan, he had to have it secured before he started loosening the bolts. There is also no evidence that Blanton had been instructed or trained to remove the bolts in a manner whereby only one arm would be under the belly pan, as described by Mr. Crawford (Tr. 346-7).

Whayne Supply hires experienced mechanics and relies heavily on on-the-job training for its field technicians (Tr. 208-09, 219, 372). Blanton received no supervision in the performance of his tasks. His foreman, Charles Crisp, never reviewed his performance and relied on reports from other Whayne Supply employees and possibly customers (Tr. 254).

Mr. Blanton's reputation was that of a very competent and safe mechanic (Tr. 144-45, 165, 172-73, 244). Indeed, Addington maintenance supervisor James Cox sometimes specifically asked Whayne Supply to dispatch Blanton (Tr. 173). By all accounts, Blanton's failure to use a cable to support the belly pan was very unusual (Tr. 159, 229, 368).

Nevertheless, I cannot conclude that in the absence of specific training as to proper procedures for securing a belly pan in the field, that Blanton's violative act was so unforeseeable that Whayne Supply should be totally absolved from any responsibility for it. The removal of the belly pan is apparently a common task for Whayne Supply's field technicians. In the absence of training in the proper procedure, the failure of a technician to secure the belly pan was not completely beyond Whayne Supply's control.

Blanton's negligence and therefore Whyne's negligence was not sufficiently "inexcusable or aggravated" to constitute an "unwarrantable failure" to comply with the Act

In retrospect, Mr. Blanton's conduct on January 20, 1995, was very unwise. One nevertheless has to assume that he greatly underestimated the likelihood that the belly pan could swing down on him. Otherwise, he would not have placed himself under the belly pan after he had loosened the bolts⁶.

Conduct rising to the level of "unwarrantable failure" has been characterized by the Commission as "inexcusable or aggravated" as to opposed to "thoughtless" or "inattentive." Emery Mining Corp., 9 FMSHRC 1991, 2001 (December 1987). Particularly in light of the fact that Mr. Blanton's actions did not compromise the safety of others, I would characterize his behavior as "thoughtless," rather than "inexcusable or aggravated." I find his negligence to fall short of that needed to establish an "unwarrantable failure," and therefore affirm the citation issued to Whyne Supply as a "significant and substantial" violation of section 104(a) of the Act.

Finally, in assessing Whyne Supply's responsibility for the violation, it is necessary to consider the Secretary's contention that Contestant's procedure for removing belly pans did not comply with the standard (Secretary's brief at pp. 25-28, Tr. 274, 286-7, 297-8). MSHA argues that even if Blanton had followed this procedure, there would have been a violation of §77.405(b). It contends that to comply with the standard either cribbing must be placed underneath the belly pan before the bolts are loosened or two chains must be secured under it.

MSHA's concession that two chains would satisfy the standard (Tr. 286-7) establishes that the Agency does not interpret its regulation to only allow cribbing as means of "securely blocking"

⁶To some extent Blanton's conduct simply defies explanation. He apparently was in good spirits on the morning of January 20 (Tr. 90) and was familiar with the proper procedure for removing belly pans (Tr. 145).

raised equipment. Furthermore, the MSHA program policy manual states that cribbing is not the only method of compliance with section 77.405. It provides as follows:

77.405 Performing Work From a Raised Position: Safeguards. Mechanical means that are manufactured as an internal part of the machine for the purpose of securing a portion of the machine in a raised position are acceptable as meeting the requirements of this section.

Although this manual does not have the force of law, it may provide assistance in interpreting an MSHA regulation, King Knob Coal, Co., 3 FMSHRC 1417, 1420 (June 1981). Given the Agency's recognition that means other than cribbing fulfill the requirements of the standard, it must do more than show that cribbing was not used to establish a violation.

To conclude that use of one chain violates the standard, the record would have to show that a reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that relying on one chain was a violation, Ideal Cement Company, 12 FMSHRC 2409 (November 1990). This has not been established. To the contrary, the record indicates that Whayne Supply's procedure is the accepted practice in its industry (Tr. 160, 182-83, 200-01, 283, 322).

Furthermore, the record does not indicate that this practice is not a prudent one (Tr. 431-34). Indeed, the use of cribbing or a jack in the field when lowering the belly pan may be more dangerous than securing the belly pan with a single chain suspended from the boom of the Autocrane (Whayne Supply's brief at pp. 23-26)⁷. I regard this as an additional reason to

⁷The most convincing argument that Whayne Supply makes in this regard involves the exposure of the technician when lowering the belly pan and then when bolting it back in place after repairing the torque converter. It appears to be very difficult to move the bulldozer once the belly pan is secured with a chain (Tr. 397-98, 403). Unless the bulldozer is moved, the technician must get under the raised pan to remove the blocking material in order to lower the pan sufficiently to get at the torque

interpret the standard in a manner that allows this procedure. Thus, in assessing Contestant's negligence in this matter, I reject the contention that Whayne Supply's customary procedure for lowering belly pans violated section 77.405(b).

Assessment of a Civil Penalty

The Secretary has proposed a \$50,000 penalty for Citation No. 4011760. I conclude a penalty of such magnitude is not consistent with the criteria set forth in section 110(i) of the Act. Of these factors, the most important is the degree of Whayne Supply's negligence. The Secretary, in its narrative findings for a special assessment, characterizes Whayne Supply's negligence as "high." I would characterize it as "moderate." This assessment considers both the "thoughtlessness" of Mr. Blanton and the lack of formal training provided by Whayne Supply regarding belly pan removal. While I conclude that Whayne Supply may have relied too much on Mr. Blanton's prior experience, it certainly was not a ridiculous assumption that he knew not to place himself under a belly pan after the bolts had been loosened.

The gravity of the violation is obviously quite high as established by Mr. Blanton's tragic death⁸. These two factors lead me to conclude that a \$1,500 penalty is appropriate under section 110. Such a penalty is also consistent with Whayne Supply's size, previous violation history and good faith in abating the violation. Such a penalty clearly would not jeopardize Whayne Supply's ability to stay in business.

I regard Whayne Supply's responsibility for the violation herein as comparable to that of the operator in Midwest Material

fn. 7 (continued)

converter. The miner would also have to tighten the pan's bolts prior to reinstalling the cribbing material, or work under the unblocked belly pan while reinstalling these blocks (or jack) for longer than it takes to simply tighten the bolts.

⁸I conclude that the violation herein clearly meets the criteria for "significant and substantial" in Mathies Coal Co., 6 FMSHRC 1 (January 1984).

Corporation, supra. The only distinctions I see between the two cases are that one of the employees involved in the fatal accident in Midwest was a supervisor, while Mr. Blanton was not. On the other hand, Blanton had worked for Whayne Supply for considerably longer than those miners had worked for Midwest Material. On this basis, I would find Whayne Supply somewhat more responsible than Midwest for not adequately training or supervising its employees.

Whayne Supply did not violate 30 C.F.R. §77.1713(a) in failing to perform or arrange for an on-shift examination of Mr. Blanton's work area.

Section 77.1713(a) requires an examination of each active working area and each active surface installation by a certified person at least once each shift. An active working is defined in section 77.2 as any place in a coal mine where miners are normally required to work or travel.

The theory of the citation is that Mr. Blanton's foreman, Charles Crisp, failed to make such an examination or arrange to have such an examination made by Addington. However, I conclude that examinations of the active working that satisfy the standard were made by Addington's foreman, Ronald Keaton, and superintendent David Maynard (Tr. 42-43). Both were certified to make such inspections (Tr. 42, 147).

After sending Blanton to the open field where the D10 bulldozer was located, Keaton drove to that location. He had his equipment operators dig a trench for Blanton to accommodate the belly pan (Tr. 133-35). Keaton asked Blanton if he wanted the bulldozer moved again and Blanton said no. I conclude that Keaton made a sufficient examination of the work area to assure that the work site presented no hazards to Mr. Blanton. A sufficient examination of an open flat field removed from mining operations may differ from what satisfies the requirements of §77.1713(a) in an area in which, for example, blasting is going to take place.

The fairly cursory look at Blanton's work area by Keaton and Maynard fulfilled the obligations of Addington and Whayne Supply under the cited standard (See e.g., testimony of MSHA Inspector Stewart at Tr. 291). The hazard that killed

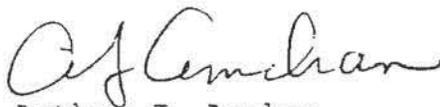
Mr. Blanton had nothing to do with the condition of his work area. The cited standard placed no obligation on Addington to supervise the manner in which Blanton performed his tasks or inspect his truck⁹. Similarly, the standard and the Mine Act do not require Whayne Supply to provide one-on-one supervision of a miner at all times. Having found that a workplace examination satisfying the requirements of §77.1713(a) was performed, I vacate Order No. 4011758.

ORDER

Citation No. 4011760 is affirmed as a significant and substantial violation of section 104(a) of the Act. A civil penalty in the amount of \$1,500 is assessed.

Citation No. 4011758 is **VACATED**.

The assessed penalty shall be paid within 30 days of this decision.



Arthur J. Amchan
Administrative Law Judge

⁹The Secretary argues that Whayne Supply violated section 77.1713(a) because Addington supervisory personnel did not inspect Blanton's service truck or the bulldozer for hazards (Secretary's brief at pp. 30-31). In the instant case, Addington fulfilled its obligations by merely observing the area in which Blanton was to perform his work.

Distribution:

Joseph A. Worthington, Esq., Smith & Smith,
400 North First Trust Centre, 200 South Fifth St.,
Louisville, KY 40202-3238 (Certified Mail)

Brian W. Dougherty, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Rd.,
Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

SEP 11 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 94-373-M
Petitioner : A.C. No. 24-01450-05502 QYQ
 :
v. : Docket No. WEST 95-76-M
 : A.C. No. 24-00936-05522
 :
KONITZ CONTRACTING, INC., : Docket No. WEST 95-77-M
Respondent : A.C. No. 24-01813-05510
 :
 : Zortman Mine; Konitz
 : Portable Crusher; Portable
 : Crusher No. 2

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S.
Department of Labor, Denver, Colorado,
for Petitioner;
William E. Berger, Esq., Wilkins & Berger,
Lewistown, Montana, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Konitz Contracting, Inc. ("Konitz"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege five violations of the Secretary's safety regulations. For the reasons set forth below, I affirm the citations and assess penalties in the amount of \$175.00.

A hearing was held on April 20, 1995, in Billings, Montana. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. WEST 94-373-M

On November 4, 1993, MSHA Inspector Richard S. Ferreira inspected Konitz's operation at the Zortman Mine in Phillips

County, Montana. He issued Citation No. 4331677 alleging that Konitz failed to submit to MSHA for approval a training plan for its miners at the Zortman Mine. The safety regulation cited, 30 C.F.R. § 48.23, provides that each mine operator must have an MSHA approved training plan for its employees before mining commences. The inspector determined that the violation was not serious, was not of a significant and substantial nature ("S&S"), and was caused by Konitz's moderate negligence.

At the time the citation was issued, Konitz was an independent contractor at the Zortman Mine, a surface gold mine. Konitz produced crushed rock with a portable crusher for use at the mine. Before Konitz began operating at the mine in early October 1993, employees of Zortman advised Tom Konitz, the owner, that MSHA training would be required for Konitz's employees. Mr. Konitz called the local MSHA field office about the training requirements and was referred to Mr. Rodric Breland, the MSHA District Manager, in Denver, Colorado. Mr. Breland referred Mr. Konitz to Robert Koenig, an MSHA specialist in the Denver office. Mr. Konitz described the nature of the work that Konitz would be performing at the Zortman Mine and Mr. Koenig told him what training that would be required. (Tr. 135-36). After Mr. Konitz obtained additional advice from Zortman employees, Konitz trained the four employees that would be operating the portable crusher at the mine site. The training lasted about eight hours.

As a result of his conversations with Mr. Breland and Mr. Koenig, Mr. Konitz received a letter from Mr. Breland setting forth the training that would be required. (Ex. G-2). The letter states, in part: "the following determination was made regarding training requirements for your employees working at Zortman: If your employees are experienced at their particular jobs ... they can be trained as 'Newly employed experienced miners' (48.26)." Id. MSHA officials did not advise Mr. Konitz, either over the telephone or in the letter, that Konitz was required to submit a written training plan for MSHA's approval.

Konitz has never operated at a metal mine or a coal mine. It normally operates its portable crushers at locations that are separate from other mines. These operations are subject to MSHA's training regulations at 30 C.F.R. § Part 48, but MSHA is not permitted to enforce these requirements at Konitz's other facilities because of a provision in the Federal budget.¹ As a

¹ Each year the Federal budget contains a provision prohibiting the enforcement of MSHA's training regulations at certain types of mines. In fiscal year 1994, which included October 1993, the budget contained the following language in the paragraph setting forth MSHA's appropriations: "Provided, That none of the funds appropriated under this paragraph shall be obligated or expended to ... carry out that portion of section

consequence, Konitz has never been cited for failing to submit training plans at its other operations.

Konitz abated the violation by conducting an additional eight hour training class. Both classes were taught by Ken Bowser, the crusher operator. He testified that the training was essentially the same in both sessions. The miners involved had previously operated this portable crusher.

I find that Konitz violated section 48.23 because the operator did not have an approved training plan in place at the time of the inspection. The Commission and courts have held that the Mine Act is a strict liability statute. Asarco, Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). I further find that the violation was not serious because the miners had received the same basic training during its unapproved training session. I find that Konitz negligence was very low because Konitz relied on the advice of MSHA officials in setting up its training program. These officials unintentionally misled Konitz into believing that the training it provided complied with the requirements of Part 48. No mention was made of the need for a written, pre-approved training plan.

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining an appropriate civil penalty. Based on this criteria, I assess a nominal penalty of \$5.00 for this violation rather than the \$400 penalty proposed by MSHA. Konitz was issued seven citations in the 24 months preceding the inspection. (Ex. G-1B). I also find that Konitz is a small operator with 2,310 hours of production in 1993. (Tr. 9). I find that the civil penalty assessed would not affect Konitz's ability to continue in business and that the violation was timely abated.

B. WEST 95-76-M

1. Citation No. 4409808

On July 26, 1994, Inspector Ferreira inspected Konitz's Portable Crusher in Fergus County, Montana. He observed a haulage truck traveling through an area where he believed a 110 volt power cord was stretched across the dirt. He observed the alleged violation while sitting in his truck some distance away. (Ex. G-3). He issued Citation No. 4409808 alleging that a single

104(g)(1) of [the Mine] Act relating to the enforcement of any training requirements, ... with respect to any sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mine." H.R. Doc. No. 3, 103d Cong., 1st Sess., Budget of the United States Government, Fiscal Year 1994, at Appendix-801 (1993).

phase, 110 volt extension cord was not bridged or protected against mobile equipment. The safety standard, 30 C.F.R. § 56.12005, provides that mobile equipment shall not run over power conductors unless the conductors are properly bridged or protected. The inspector determined that the violation was serious, was not S&S, and was caused by Konitz's low negligence.

Konitz contends that the power cord was not located where the haulage truck was traveling, but was in a different area. (Tr. 142-44). The area that the inspector observed was a haulage road. Mr. Konitz testified that the cord was not across the haulage road. Id. He testified that the cord went to the test shack and that the only vehicle that could run over it "would be a pickup pulling up to the test shack." (Tr. 144). Konitz abated the condition by burying the electric cord.

I find that Konitz violated the safety standard because the electric cord was not protected. Although it may have not been on the haulage road, it was located in an area where mobile equipment would run over it. The insulation on the cord could be damaged by mobile equipment and an employee could receive an electric shock.

Taking into consideration the civil penalty criteria, I assess a penalty of \$20.00 for this violation. I find that the violation was moderately serious and was caused by Konitz's low negligence. My findings for the remaining penalty criteria are the same as discussed in WEST 94-373-M, except that this crusher has a history of one citation in the 24 months preceding the inspection. (Ex. G-1A).

2. Citation No. 4409809

On the same date, Inspector Ferreira issued Citation No. 4409809 alleging that a rotating shaft on the Pioneer Crusher was not protected by a guard to prevent employees from accidentally contacting the shaft. The cited safety standard, 30 C.F.R. § 56.14107(a) provides that moving machine parts shall be guarded to protect persons from contacting shafts and other moving parts that can cause injury. The inspector determined that the violation was serious, was not S&S, and was caused by Konitz's low negligence.

Konitz contends that the equipment in question was taken out of service two years prior to the date of the hearing. (Tr. 145, 156). The citation was issued to Orville Olson, the crusher operator. Inspector Ferreira testified that the citation was abated by installing screening material around the shaft. (Tr. 39). I credit the testimony of the inspector. The Pioneer crusher must have been removed from service at a later date.

I find that Konitz violated the cited safety standard because the rotating shaft was not guarded. An employee could be injured if he or his clothing came in contact with the rotating shaft. I agree with the inspector that the violation was not S&S because there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury. I also find that the violation was moderately serious. I affirm the inspector's finding that the violation was caused by the operator's low negligence. Miners were in the area on an infrequent basis. Taking into consideration the civil penalty criteria, I assess a penalty of \$30.00 for this violation.

C. WEST 95-77-M

1. Citation No. 4331679

On November 17, 1993, Inspector Ferreira inspected Konitz's operation at the Zortman Mine in Phillips County, Montana. He issued Citation No. 4331679 alleging that Konitz failed to have circuit breakers or fuses for the electrical circuits at the crusher. The cited safety standard, 30 C.F.R. § 56.12001, provides that circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type or capacity. The inspector determined that the violation was serious, was S&S, and was caused by Konitz's low negligence.

Konitz does not deny that the electrical equipment was not protected by circuit breakers or fuses. Mr. Konitz testified that magnetic starters for the equipment contained "heaters" (overcurrent devices) that adequately protected the circuits. In addition, he testified that MSHA has inspected this crusher many times over the past ten years and never mentioned that fuses or circuit breakers are required. He stated that he spent about \$10,000 to install new circuits on his two crushers. (Tr. 147-48).

I find that Konitz violated the safety standard. Overcurrent devices in magnetic starters are designed to protect motors from burning out, not to protect employees from electric shock, and these devices do not meet the safety standard. The portable crusher is moved around and also vibrates during operation. (Tr. 47-49). The material being crushed is very abrasive and it gets into electrical boxes and other components. The protective layer around power conductors could wear through, causing a phase-to-phase fault. Id. Fuses and circuit breakers will open the circuit in the event of a fault.

I also find that the violation was serious and S&S. The evidence establishes that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). I recognize that Konitz has never had an electrical

injury at its crushers, but assuming continuing normal mining operations, it was likely that an injury or a fatality would occur. I affirm the inspector's determination that the violation was caused by Konitz's low negligence.

Taking into consideration the civil penalty criteria, I assess a penalty of \$60.00 for this violation. My findings for the remaining penalty criteria are the same as discussed in WEST 94-373-M, above.

2. Citation No. 4409807

On July 19, 1994, Inspector Ferreira inspected Konitz's Portable Crusher No. 2 in Fergus County, Montana. He issued Citation No. 4409807 alleging that an employee was shoveling spilled material out from under the unguarded self-cleaning tail pulley on the jaw crusher. The safety standard, 30 C.F.R. § 56.14107(a), provides that moving machine parts shall be guarded to protect persons from contacting tail pulleys and other moving parts that cause injury. The inspector determined that the violation was serious, was S&S, and was caused by Konitz's low negligence.

Konitz does not deny that a guard was not present but argues that a hazard was not created because the tail pulley was underneath the jaw crusher. The inspector observed a man reaching with a shovel under the crusher. Mr. Konitz testified that the most that could happen is that the shovel would be pulled out of the employee's hand. The pinch point of the tail pulley was about two and one half feet from the edge of the crusher. (Tr. 129-30; Ex. J-1). The inspector testified that the hands of the man who was shoveling were only inches from the tail pulley. All witnesses agreed that a hazard is presented if an employee's hands come within inches of the tail pulley. Given that the edge of the pulley was only a few feet away from the bottom edge of the crusher and the inspector saw an employee shoveling under the crusher, I find that the Secretary established a violation of the safety standard.

I also find that the violation was serious and S&S. The evidence establishes that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature, assuming continuing normal mining operations. Anyone shoveling under the crusher while the conveyor was operating could be seriously injured. I affirm the inspector's determination that the violation was caused by Konitz's low negligence. Taking into consideration the civil penalty criteria, I assess a penalty of \$60.00 for the violation.

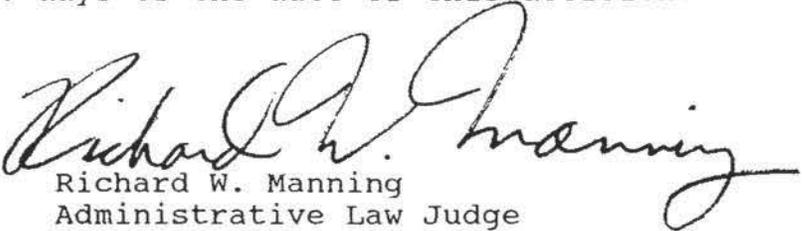
II. CIVIL PENALTY ASSESSMENTS

The citations are affirmed, as set forth above, and the following penalties are assessed:

<u>Citation Nos.</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
4331677	48.23	\$ 5.00
4409808	56.12005	20.00
4409809	56.14107(a)	30.00
4331679	56.12001	60.00
4409807	56.14107(a)	60.00
	Total Penalty	\$175.00

III. ORDER

Accordingly, the above-listed citations are **AFFIRMED** and Konitz Contracting, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$175.00 within 40 days of the date of this decision.


Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

William E. Berger, Esq., WILKINS & BERGER, P.O. Box 506, Lewistown, MT 59457 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 12 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 95-143-D
on behalf of PHILLIP DALTON, : MSHA Case No. HOPE CD 94-13
:
on behalf of DANIEL DAVIS, : Docket No. WEVA 95-144-D
:
MSHA Case No. HOPE CD-94-14
:
on behalf of HAROLD MARCUM, : Docket No. WEVA 95-145-D
:
MSHA Case No. HOPE CD 94-14
:
on behalf of HENRY SMITH, : Docket No. WEVA 95-146-D
Complainants : MSHA Case No. HOPE CD 94-15
v. :
:
Tug Valley Coal Processing Co.
W.R. MOLLOHAN, INC., : Mine I.D. No. 46-05890
Respondent :

DECISIONS

Appearances: Elizabeth S. Lopes, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Complainants;
Joseph M. Price, Esq., Sean Harter, Esq.,
Robinson & McElwee, Charleston, West Virginia,
for the Respondent.

Before: Judge Koutras

These proceedings concern discrimination complaints filed by MSHA on behalf of the complainants pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainants allege that they were discharged from their employment with the respondent for complaining about safety hazards at the coal processing plant site where they were working as painters and sandblasters. The respondent denied any discrimination and

asserted that the complainants were terminated for legitimate non-discriminatory reasons. MSHA subsequently amended the complaints seeking civil penalty assessments against the respondent for the alleged discrimination. A hearing was held in Charleston, West Virginia, and the parties appeared and participated fully therein.

Issues

The issues presented include: (1) whether the respondent discriminated against the complainants by terminating their employment for engaging in protected activities, (2) the appropriate remedies to be applied on behalf of the complainants, and (3) the imposition of appropriate civil penalty assessments to be assessed against the respondent for the alleged discriminatory conduct.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

MSHA's Testimony and Evidence

Complainant Henry Smith testified that he has been employed as a painter and sandblaster for approximately 25 years. He is a member of Local Union 813, serves as a job steward, and is hired for jobs through a union agent out of the union business hall. Mr. Smith stated that he was hired by the respondent on July 27, 1994, and began work the next day at the Tug Valley Coal Processing Company on a painting and sandblasting job that the respondent was performing under contract with the mine operator.

Mr. Smith stated that he complained about the lack of safety lines and belts while he was working 60 to 70 feet off the ground, and the absence of choker connectors for the high pressure sandblasting hoses that he worked with. He stated that

he communicated his safety concerns daily to respondent's foreman, Mr. Pauley, but continued working after Mr. Pauley assured him that he would take corrective action. However, on July 31, 1994, he informed Mr. Pauley that he would no longer perform any work and would "shut the job down" because Mr. Pauley had not corrected the conditions. Mr. Smith stated that he asked Mr. Pauley for other work, but was informed that there was none available. Mr. Smith then left the work site and was next scheduled to work on August 3, 1994, and he informed Mr. Pauley that he would return to work if his safety concerns were taken care of.

Mr. Smith stated that after he was informed by his union business agent that he had received a letter from the respondent informing him that the respondent would no longer hire him and the other complainants (Exhibit C-14), they returned to the mine site on August 3, 1994, with MSHA inspectors and filed a section 103(g) safety complaint requesting an MSHA investigation of their safety complaints (Exhibit C-1).

Mr. Smith further testified about additional jobs that he acquired subsequent to his termination by the respondent and copies of his earnings are a part of the record (Exhibit C-3). He also indicated that he was unemployed from approximately September 20, 1994 to October 28, 1994.

On cross-examination, Mr. Smith stated that he received no unemployment compensation subsequent to his termination because his benefits were exhausted. He confirmed that he filed no safety complaints with MSHA until after he was informed that he had been terminated by the respondent. He further testified about certain work that he performed at the plant site on August 3, 1994, and confirmed that Mr. Pauley provided him with a hard hat, safety glasses, and a safety belt and lanyard at that time. However, Mr. Smith claimed that the lanyard was insufficient because it restricted his movements and he could not readily attach it to anything that would allow him to do his job while keeping him secure.

Mr. Smith stated that he discussed his safety requests further with Mr. Pauley on August 3, 1994, and that complainants Dalton and Davis were present. He did not believe that

complainant Marcum was present at that time. He further stated that he again discussed the absence of hose chokers with Mr. Pauley and believed that 75 to 100 chokers were required to be installed on all of the hoses to prevent them from rupturing under high pressure. Mr. Smith reiterated that he informed Mr. Pauley that he was shutting the job down for safety reasons and Mr. Pauley informed him that he had no other work available.

Discussion

At the conclusion of Mr. Smith's testimony and during a recess while awaiting the testimony of MSHA's next witness, the parties were afforded an opportunity to resume their settlement discussions which were previously initiated and discontinued without resolution. The parties informed the presiding judge that after further discussions, including consultations with respondent's management and the complainants, and with their approval, the parties reached a proposed settlement of all of the complaints.

The parties presented the proposed settlement on the record. The respondent agreed to pay the complainants back wages totaling \$8,500. Complainants Phillip Dalton, Daniel Davis, and Henry Smith will be paid \$2,275 each, and complainant Harold Marcum will be paid \$1,675. In addition, the respondent agreed to pay a total of \$800 in civil penalty assessments to MSHA, prorated at \$200 for each of the alleged violations of section 105(c) of the Act, in settlement of the cases. In consideration of all of these settlement payments, the parties agreed that these matters may be dismissed. Each party will bear its own litigation costs.

After careful consideration of the pleadings filed in these proceedings, the arguments presented in support of the proposed settlement, and pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, the settlement was approved from the bench. In approving the settlement, I took into consideration the fact that the respondent has paid \$8,057 in civil penalty assessments to MSHA in settlement of citations and orders that were issued on August 3, 1994, as a result of the section 103(g) complaint, and the fact that the respondent's contract to perform further work at the Tug Valley Processing Plant was terminated by the mine owner as a result of the safety complaints and citations

that were issued. Under all of these circumstances, I conclude and find that the settlement of the instant complaints satisfies the deterrent intent of the Mine Act and is in the public interest. Accordingly, my bench decision is herein re-affirmed, and the settlements in question **ARE APPROVED**.

ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. The respondent shall pay \$2,275 to each of the complainants, Phillip Dalton, Daniel Davis, and Henry Smith in satisfaction of their claims in these proceedings.
2. The respondent shall pay \$1,675 to complainant Harold Marcum in satisfaction of his claim in these proceedings.
3. The respondent shall pay a civil penalty assessment of \$800 to MSHA in satisfaction of the alleged violations in these proceedings.
4. The respondent shall comply forthwith with the terms of the settlement agreement. All of the aforementioned payments shall be made by the respondent within thirty (30) days of the date of these decisions and orders, and upon full compliance with the agreement, these matters **ARE DISMISSED**.


George A. Koutras
Administrative Law Judge

Distribution:

Elizabeth Lopes, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Blvd., Suite 516,
Arlington, VA 22203 (Certified Mail)

Joseph M. Price, Esq., Sean Harter, Esq., Robinson & McElwee,
600 United Center, P.O. Box 1791, Charleston, WV 25326
(Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 13, 1995

KENNETH F. COLE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 94-548-D
: :
U. S. STEEL MINING COMPANY, : PITT 94-03
Respondent :
: Cumberland Mine

DECISION

Appearances: Mr. Kenneth F. Cole, pro se, Morgantown,
West Virginia, for Complainant;
R. Henry Moore, Esq., Buchanan Ingersoll,
Professional Corporation, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Maurer

This proceeding concerns a complaint of discrimination filed by the complainant (Kenneth F. Cole) against U. S. Steel Mining Company (U. S. Steel) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act).

On January 9, 1995, U. S. Steel filed a Motion for Summary Decision (which I am treating as a Motion to Dismiss), alleging, inter alia, that the instant complaint is barred by the statute of limitations and by laches. Subsequently, on June 29, 1995, the undersigned held a limited hearing for the complainant to explain why his complaint should not be dismissed because of his failure to timely file this belated section 105(c) complaint with the Mine Safety and Health Administration (MSHA). I also considered a related matter. That is, his failure to seek Commission review of an earlier identical complaint that had been rejected by MSHA back in March 1992.

A chronology of the significant events which gave rise to the instant complaint is as follows:

- January 13, 1992 - Complainant is involved in an altercation at the mine with a fellow rank-and-file employee. He alleges he was injured during the incident and requested that the company complete an accident report that he could take to his doctor. They refused.
- February 6, 1992 - Complainant filed a section 105(c) complaint with MSHA alleging that he had asked the company to file an accident report concerning the January 13, 1992, incident, but they refused. They also allegedly threatened to suspend him with the intention to fire him if he filled out a report on the incident himself.
- March 31, 1992 - After an investigation, MSHA notified the complainant that they had determined "no violation" of section 105(c) of the Mine Act had occurred. They also notified him that he had the right, within 30 days, to file his own action with the Commission. He did not do so, however, until now.
- April 14, 1994 - Complainant refiles his original complaint with MSHA, which is now before the Commission.
- July 11, 1994 - MSHA once again notifies complainant that they have determined "no violation" of section 105(c) of the Mine Act has occurred.
- August 10, 1994 - FMSHRC receives the complaint at bar.

The critical two dates for purposes of this motion are January 13, 1992, the date of the altercation, and April 14, 1994, the date the instant section 105(c) complaint was filed with MSHA.

As noted in the above chronology, complainant had earlier filed a timely complaint with MSHA on February 6, 1992; but when it was denied on March 31, 1992, he failed to follow through with filing his own appeal to the Commission by the end of April 1992.

As the respondent complains of in his motion, the complainant failed to follow through with his original 1992 complaint and only now has refiled his complaint with MSHA some 2 years and 3 months after the alleged discriminatory activity occurred.

In accordance with section 105(c)(2) of the Mine Act any miner who believes he has been discharged or discriminated against may, within 60 days of the alleged act of discrimination, file a complaint with the Secretary of Labor. The Secretary is then required to conduct an investigation and make a determination as to whether or not a violation of section 105(c) has occurred. If the Secretary determines that the miner's allegations of discrimination are valid and a violation has occurred, he is required to file a complaint on the miner's behalf with the Commission.

Pursuant to section 105(c)(3) of the Act, if the Secretary determines that a violation of section 105(c) has not occurred, he must so inform the miner, and the miner then has a right to file a complaint on his own behalf with the Commission within 30 days of notice of the Secretary's determination.

Ordinarily, when dealing with late-filings of a few days or even a few months, the Commission has determined that the time limits in sections 105(c)(2) and (3) "are not jurisdictional" and that the failure to meet them should not result in dismissal, absent a showing of "material legal prejudice." See, e.g., Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986). However, in that same decision, the Commission also stated that "[t]he fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay. . . ." Here, we are dealing with an extraordinarily late filing in excess of 2 years. At some point there has to be an outer limit, if the 60-day rule contained in the statute has any meaning at all.

In David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 9, 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984) (table), the Commission affirmed a dismissal of a miner's discrimination complaint filed 6 months after his alleged discriminatory discharge. The Commission stated that "timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation," 6 FMSHRC 24.

Mr. Cole's explanation for his failure to follow-up on the March 1992 rejection of his original complaint by MSHA was that he put it into the hands of one Mr. Brunsak, a union official, in early April of 1992. Both Mr. and Mrs. Cole were left with the impression that he (Brunsak) would file the appeal with FMSHRC for him. That appeal would have been timely taken only if filed on or before April 30, 1992. In fact, nothing was ever filed with FMSHRC and Mr. Brunsak denies he ever gave any such assurances to the Coles.

U. S. Steel's position is that the proper and appropriate procedural route for the complainant after receiving the Secretary's March 31, 1992, determination that no violation of section 105(c) occurred would have been the filing of a complaint with the FMSHRC within the 30 day time limit. Arguably, by failing to do that, complainant has waived his right to file any subsequent complaints with MSHA concerning the same incident. This is essentially what Mr. Cole did in this case. Rather than file an appeal of the Secretary's adverse determination with the Commission back in April of 1992, he refiled the same complaint with MSHA 2 years later, in April of 1994. That refiled complaint is now before me under section 105(c)(3) of the Act after a second adverse determination by MSHA.

In Herman v. IMCO Services, 4 FMSHRC 2135, 2138-2139 (December 1982), the Commission observed that the placement of limitations on the time periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by:

...preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just

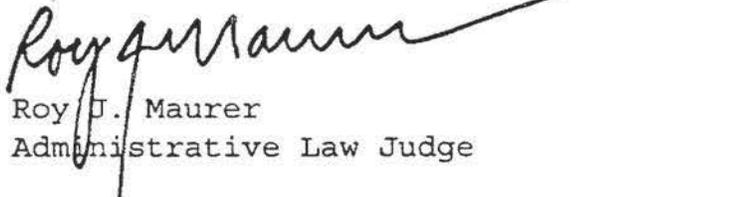
claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Under the circumstances, I conclude that complainant has not shown justifiable circumstances to excuse his seriously late-filed complaint. The refiled complaint was filed over 2 years out of time and alleges nothing that was not already considered and rejected by MSHA in the original complaint of discrimination filed shortly after the incident in 1992.

Accordingly, complainant's refiled complaint filed with MSHA on April 14, 1994, is found to be excessively stale and will be dismissed herein.

ORDER

In view of the foregoing, the complainant's refiled complaint is found to have been untimely filed and on that basis, the respondent's motion to dismiss this case is **GRANTED** and the complaint is **DISMISSED**.


Roy J. Maurer
Administrative Law Judge

Distribution:

Mr. Kenneth F. Cole, Route 10, Box 370, Morgantown, WV 26505
(Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, Professional Corporation, 600 Grant Street, 58th Floor, Pittsburgh, PA 15219-2887 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 18 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 95-17
Petitioner	:	A. C. No. 44-06240-03590 A
v.	:	
	:	Mine No. 1
GARY WAYNE CRABTREE, Employed	:	
by J&E COAL COMPANY	:	
INCORPORATED,	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 95-18
Petitioner	:	A. C. No. 44-06240-03591 A
v.	:	
	:	Mine No. 1
DANNY KEITH CRABTREE, Employed	:	
by J&E Coal Company	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Colleen A. Geraghty, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Gary Wayne Crabtree, Honaker, Virginia, *Pro Se*;
Danny Keith Crabtree, Honaker, Virginia, *Pro Se*.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Gary Wayne Crabtree and Danny Keith Crabtree pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that each of the respondents knowingly authorized, ordered or carried out,

as an agent of J&E Coal Company, violations of Sections 75.400 and 75.403 of the Secretary's mandatory health and safety standards, 30 C.F.R. §§ 75.400 and 75.403, and seek penalties of \$1,400.00 against each Respondent. For the reasons set forth below, I find that Danny Keith Crabtree knowingly violated the regulations and assess a penalty of \$400.00, and that Gary Wayne Crabtree knowingly violated Section 75.403, but did not knowingly violated Section 75.400, and assess a penalty of \$400.00.

A hearing was held on July 11, 1995, in Abingdon, Virginia. MSHA Coal Mine Inspector Vearl Hileman, MSHA Supervisor Larry A. Coeburn, MSHA Special Investigator Michael D. Clements and miner Roy W. Honaker testified for the Secretary. Respondent Gary Wayne Crabtree was called as a witness by the Secretary and testified further at the request of the judge.

DANNY KEITH CRABTREE

At the start of the hearing, counsel for the Secretary stated that the Secretary and Danny Keith Crabtree had reached a settlement in his case. The agreement provides for a reduction in penalty from \$1,400.00 to \$400.00 and payment of the penalty by Mr. Crabtree in two monthly installments of \$200.00 each.

Having considered the representations of the parties, (Tr. 5-9), I conclude that the settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i), and approve the settlement. The agreement's provisions will be carried out in the order at the end of this decision.

GARY WAYNE CRABTREE

On May 9, 1994, Inspector Hileman issued Citation No. 3770559 and Order No. 3770560 to J&E Coal Company. The citation alleged a violation of Section 75.400 because an

[a]ccumulation of loose coal and coal dust was allowed to accumulate in depths of 1 inch to 18 inches along the Long John belt on the 001 section, on the mine floor for a distance of approximately 300 feet, and into x cuts right and left. Accumulations were on the mine floor over the entire section in depths of 1 inch (approximately). A large quantity was present at Survey Section No. 2831 and outby in several locations.

(Govt. Ex. 1.) The citation was modified on June 8, 1994, to include "the area of the conveyor belt drive on the No. 3 conveyor belt and extending inby for a distance of 900 feet. Accumulations of 1 inch to 5 inches were present along the off side of the conveyor belt, on the mine floor." (*Id.*)

The order was for a violation of Section 75.403, stating that "[r]ock dust has not been applied to the mine roof on the 001 section[.] [A]dequate rock dust has not been applied to the mine floor as indicated by samples collected on this date[.] [T]he area affected is aprox. [sic] 300 feet in each of the 5 entrys [sic]. Also bare power wire was found at the battery charging station (energized) in dry powdery coal dust." (Govt. Ex. 2.)

Inspector Hileman testified that Danny Keith Crabtree was foreman on the day shift and was present on the morning of May 9 when the inspector observed the violations. The inspector stated that "there was quite an accumulation of coal along the [No. 3] belt line . . . one inch up to maybe 10 . . . [for] approximately 600 feet," (Tr. 20-21.), "there was extreme accumulations of coal . . . 18 inches of coal" in a large dip in the coal bed in the conveyor belt entry, (Tr. 22-23), in the No. 2 entry he "found the same conditions as I found along the belt," (Tr. 24), and that in all the entries he found "[t]he same conditions that I had found in the No. 2 entry and the No. 3 entry," (Tr. 25).

It was the inspector's opinion that "it would have taken several weeks" for the accumulations to have developed. (Tr. 26.) He believed that the accumulations had occurred:

By not being properly cleaned up as they mined daily. . . . There was other factors. The bridge system has junctions where the coal dumps from one bridge to the other, and at the junction points there is supposed to be adequate skirting there to keep the spillage from spilling. This skirting had become deteriorated to quite an extent. It was causing a lot of spilling.

(Tr. 26-27.) He further related that the accumulations were very black in appearance, and dry.

With regard to the failure to rock dust, Inspector Hileman testified that for "300 feet in each of the five entries" the roof was "[d]ark. Actually it was -- it looked gray because you don't usually have any coal dust on the mine roof to an extreme, but still have to rock dust it." (Tr. 34-35.) He also said that in the same areas the mine floor and the ribs were "black." (Tr. 35.) To confirm his opinion, he took dust samples in the No. 3 and No. 4 entries which were determined to be 37 percent and 28 percent incombustible, respectively. (Govt. Ex. 4.)

Gary Wayne Crabtree testified that he was the foreman on the evening shift, 3:00 PM to 11:00 PM. He stated that the duties of the evening shift were: "Well, we were mostly maintenance, and then we done what cleanup, if there was some cleanup needed to be done we done cleanup, and we did mostly -- well, I can't really say all the rock dusting, but generally most of the rock dusting." (Tr. 79.)

He asserted that he saw "nothing unusual" in the way of coal accumulations while performing his on-shift examination on May 6, 1994, although he did see some accumulations because "there's coal in the coal mines. . . . And you will see coal, you know, when you're in the coal mines. You'll see some coal." (Tr. 81.) Mr. Crabtree testified that the floor and ribs of the mine were rock dusted by hand using the following method: "You just open up a bag, and you just spread it out on the ribs, you know. And on the bottom, you kind of bust them up and then just kick them around." (Tr. 82.) He agreed that there "most definitely" is a visual difference between ribs and floor that have been rock dusted and ones that have not. (Tr. 85.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was brought under Section 110(c) of the Act, 30 U.S.C. § 820(c) which provides:

Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d).

Therefore, in order to find Gary Wayne Crabtree personally liable for the two violations in this case, the Secretary must prove that the violations occurred and that Mr. Crabtree knowingly authorized, ordered, or carried them out.

In this case, there is no doubt that the company violated Sections 75.400¹ and 75.403² of the Secretary's Regulations. However, while I find that Gary Wayne Crabtree knowingly violated Section 75.403, I find that the Secretary has not proven that he knowingly violated Section 75.400.

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute."

In *Roy Glenn*, 6 FMSHRC 1583 (July 1984), the Commission explained that this test also applies to a situation where the violation does not exist at the time of the agent's failure to act, but occurs after the failure. It said:

¹ Section 75.400 states: "Coal dust, including float coal dust on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

² Section 75.403 states:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum.

Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted 'knowingly', in violation of Section 110(c) when, based on the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps.

Id. at 1586. The Commission has further held, however, that to violate Section 110(c), the corporate agent's conduct must be "aggravated," i.e. it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

In this case, the evidence does not support a finding of aggravated conduct on the part of Mr. Crabtree with respect to the accumulations. In the first place, there is no direct evidence what accumulations, if any, there were on the second shift the Friday before the inspector inspected the mine. Mr. Crabtree says there was nothing unusual. In the second place, it appears that the worst accumulations were along the belt lines, which Mr. Crabtree says he did not inspect. Finally, since the first shift had already been working for about two hours when Inspector Hileman entered the mine, there is no way to determine how much of the accumulations had occurred that morning.

Ultimately, whether Gary Wayne Crabtree knowingly violated Section 75.400 depends on whether one accepts his opinion or the inspector's opinion. In view of the factors set out in the preceding paragraph, I will give Mr. Crabtree the benefit of the doubt and resolve the issue in his favor. Consequently, I conclude that he did not knowingly authorize, order or carry out the violation.

The same cannot be said, however, for the violation of Section 75.403. This violation occurred in the entries, an area the foreman was supposed to examine, not along the beltlines. As Mr. Crabtree admitted, one of the main jobs of the second shift was to rock dust. Furthermore, his testimony was less precise than about the accumulations in that he talked about rock dusting in general and not with regard to the specific occurrence. Finally, his description of how the second shift rock dusted shows that the job was not taken seriously, but was performed only half-heartedly.

When this is considered against the description by Inspector Hileman of the color of the entries that he observed on Monday morning, as well as against the results of the dust samples, taken 90 to 100 feet outby the working faces, which showed a significant deficiency of rock dust in the entries, it is apparent that little or no rock dusting had been done recently. As Mr. Crabtree acknowledged, it is easy to tell an area of the mine that has been rock dusted from one that has not.

All of this establishes that Gary Wayne Crabtree knew or should have known that proper rock dusting was not being performed and took no action to correct it. Since one of his main functions was to see that this was done, I conclude that he knowingly authorized the violation of Section 75.403.

CIVIL PENALTY ASSESSMENT

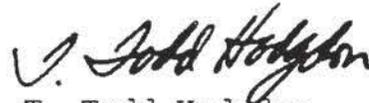
The Secretary has proposed a penalty of \$600.00 for the violation of Section 75.403. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984). While all of the criteria are not directly applicable to an individual, they can be applied by analogy.

In this case, there is evidence that Gary Wayne Crabtree has not worked in a coal mine for a year. As of the day of the hearing, he was self-employed in the logging and sawmill business and had earned about \$6,800.00 for the year. He has three children to support. Factoring all of this into the six criteria, I conclude that a penalty of \$400.00 is appropriate for this violation.

ORDER

I conclude that Danny Keith Crabtree, in accordance with the settlement agreement, knowingly authorized violations of Sections 75.400 and 75.403 at the J&E Coal Company Mine No. 1 on May 9, 1994. I further conclude that Gary Wayne Crabtree knowingly authorized a violation of Section 75.403, but did not knowingly authorize a violation of Section 75.400. Accordingly, Danny Keith Crabtree is **ORDERED TO PAY** a civil penalty of **\$400.00**, in

two monthly installments of \$200.00,³ and Gary Wayne Crabtree is **ORDERED TO PAY** a civil penalty of \$400.00. On receipt of payment, these proceedings are **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Colleen A. Geraghty, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203
(Certified Mail)

Gary Wayne Crabtree, Route 1, Box 89-A, Honaker, VA 24260
(Certified Mail)

Danny Keith Crabtree, Route 1, Box 161, Honaker, VA 24260
(Certified Mail)

/lsb

³ Evidence received since the hearing from MSHA's Civil Penalty Compliance Office indicates that Danny Keith Crabtree has already made one \$200.00 payment.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3993/FAX (303) 844-5268

SEP 19 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-96-M
Petitioner	:	A.C. No. 02-02503-05522
	:	
v.	:	Stewart Kessen Crushing
	:	
STEWART KESSEN,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Petitioner filed a motion to approve a settlement agreement and to dismiss the case. The citations, initial assessments and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>Health & Safety Standard</u>	<u>Initial Proposed Penalty</u>	<u>Proposed Settlement</u>
4335901	9/27/94	56.4201(a) (1)	\$ 168.00	\$ 117.60
4335902	9/27/94	56.9300(a)	690.00	483.00
4335903	9/27/94	56.14107(a)	288.00	201.60
4335904	9/27/94	56.14107(a)	288.00	201.60
4335905	9/27/94	56.12008	431.00	301.70
4335907	9/27/94	56.14107(a)	288.00	201.60
4356595	9/27/94	56.9300(a)	690.00	483.00
4356597	9/27/94	56.12004	<u>431.00</u>	<u>301.70</u>
		TOTALS	\$3,274.00	\$2,291.80

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

ORDER

WHEREFORE the motion for approval of settlement is **GRANTED**. **RESPONDENT SHALL PAY** to the Secretary of Labor the approved

penalties of \$2,291.80 within 30 days of this decision. Payment shall be made to Office of Assessments, Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, Pennsylvania 15251-6250. Upon such payment this case is dismissed.



August F. Cetti
Administrative Law Judge

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

W. Scott Donaldson, Esq., 5050 North 19th Avenue, Suite 409, Phoenix, AZ 85015-3209

\sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 20 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 94-104-M
Petitioner : A.C. No. 29-01380-05501 FRT
v. :
SANDY JONES CONSTRUCTION, : Sedillo Hill
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

The petitioner has filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of a proposed settlement of this matter. The initial proposed civil penalty assessment for the contested violation is \$4,000, and the respondent has agreed to settle the matter by paying a civil penalty assessment of \$1,500. In support of the proposed settlement, the petitioner has submitted information pertaining to the six statutory civil penalty assessment criteria found in section 110(i) of the Act, a discussion of the violation in question, and a reasonable justification for the reduction of the initial proposed civil penalty assessment.

The petitioner states that the mandatory standard under which the respondent was cited is subject to varying interpretations and that it cannot establish that the gravity associated with the violation was extraordinarily high. Under the circumstances, the petitioner believes that a reduction of the initially specially assessed penalty is warranted.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.31, the motion **IS GRANTED**, and the settlement **IS APPROVED**.

ORDER

The respondent **IS ORDERED** to pay a civil penalty assessment in the amount of \$1,500, in satisfaction of the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter **IS DISMISSED**.


George A. Koutras
Administrative Law Judge

Distribution:

Mary K. Schopmeyer, Esq., Office of the Solicitor,
U.S. Department of Labor, 525 Griffin Street, Suite 501,
Dallas, TX 75202

Ray Carroll Jones, Owner, Sandy Jones Construction,
HCR Box 155, Williamsburg, NM 87942

\lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 21 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-140
Petitioner : A.C. No. 15-15746-03596
v. :
 : Docket No. KENT 95-555
CONAKAY RESOURCES, INC., : A.C. No. 15-15746-03602
Respondent :
 : Docket No. KENT 94-1031
 : A.C. No. 15-15746-03593
 :
 : No. 3 Mine

DECISION

Appearances: Joseph B. Lockett, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee, for
the Petitioner;
Saul E. Akers, Safety Director, Conakay Resources,
Matewan, West Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These consolidated cases are before me based upon petitions for assessment of penalty filed by the Secretary of Labor (Petitioner) alleging violations by Conakay Resources, Inc. (Conakay) of various mandatory regulatory safety standards. Pursuant to notice, a hearing was held on July 11, 1995, in Huntington, West Virginia, concerning Docket Nos. KENT 94-1031 and KENT 95-140. Subsequent to the hearing, Petitioner filed a motion to consolidate Docket No. KENT 95-555 with Docket Nos. KENT 94-1031 and KENT 95-140. The motion was not opposed by Conakay and it is granted. It is ordered that Docket No. KENT 95-555 be consolidated with Docket Nos. KENT 94-1031 and KENT 95-140.

Findings of Fact and Discussion

The parties stipulated as to the facts of the violations cited in the orders and citations at issue. Conakay does not contest the findings set forth in the citations and orders at issue. The parties also stipulated that Conakay is a small to medium size operator, and that the violations were corrected in good faith. The only issue raised by Conakay is whether the penalty should be reduced based on the effect of the penalty on its ability to continue in business.

Saul Akers, Conakay's safety director, testified that as of May 12, 1995, Conakay "... no longer exists due to financial problems ..." (Tr. 13), as the company had only leased one mine, and that mine had been taken over by the entity from which it had been leased. Akers indicated that Conakay is not operating any mines, nor does it have any plans to operate any mines in the future.

Two financial statements were admitted in evidence on behalf of Conakay, one dated June 30, 1994, and one dated May 31, 1995. Each statement indicates that Conakay's assets and liabilities are equal. Each statement was prepared by an accountant and includes the following language. "[m]anagement had elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the users conclusions about the Companies assets, liabilities, revenues, and expenses."

Akers testified that he did not personally participate in the drafting of these financial statements. He did not have anything to do with any of the financial aspects of Conakay.

Conakay did not offer the testimony of anyone who has personal knowledge of its financial situation. The accountant who prepared the financial statements did not testify. These statements were not audits, and contained omissions that might relate to its assets, liabilities, revenue and expenses. Thus, not much probative weight was accorded the financial statements. Also, Conakay did not offer the testimony of any individual having the authority to make business decisions on its behalf. Thus, Conakay has failed to adduce sufficient reliable evidence

to establish its present financial situation. Nor has it adduced sufficient evidence to establish that it has dissolved, and definitely will never resume business. It is mere speculation to assume that it will not be able to obtain financing and elect to continue in business.

For all the above reasons, I find that there is no basis to mitigate a penalty based on its effect on Conakay's ability to remain in business. Considering the history of Conakay's violations (Government Exhibit 4), the degree of its negligence and gravity of these violations as set forth in the citations and orders at issue, and the remaining factors set forth in Section 110(i) of the Act as stipulated to by the parties, I find that the following penalties are appropriate for the violations set forth in the following citations:

KENT 94-1031

<u>Citation No.</u>	<u>Penalty</u>
4005203	\$362
4005204	\$362
4005205	\$ 50
4005206	\$431
4005210	\$ 50
4005211	\$362
4005212	\$362
4005213	\$50
4005214	\$362
4005216	\$362
4005217	\$362
4005218	\$362

KENT 95-140

<u>Order No.</u>	<u>Penalty</u>
4501453	\$7,500
4501454	\$6,000
4501555	\$7,500

KENT 95-555

<u>Order No.</u>	<u>Penalty</u>
4505565	\$267
4505566	\$1019
4505567	\$267
4505569	\$189
4505570	\$595

ORDER

It is ORDERED that Respondent shall pay a civil penalty of \$26,814 within 30 days of this decision.



Avram Weisberger
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Saul E. Akers, Safety Director, Conakay Resources, Inc., Post office Box 430, Matewan, WV 25678 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

September 21, 1995

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of	:	Docket No. WEST 95-308-D
MARTY P. BODEN,	:	
Complainant	:	
v.	:	Swanson Mine
	:	I.D. 48-00082
LION COAL COMPANY,	:	
COUGAR COAL COMPANY, successor	:	
to LION COAL CO.,	:	
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Complainant;
Brian W. Steffensen, Salt Lake City, Utah,
for Respondent.

Before: Judge Cetti

This proceeding is before me upon request for hearing filed by the operators of the Swanson Mine, I.D. No. 48-00082, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act", and under Commission Rule 45(b), 29 C.F.R. § 2700.45(b), to contest the Secretary of Labor's Application for Temporary Reinstatement on behalf of miner Marty P. Boden.

I

It is undisputed that Marty P. Boden was employed as a belt foreman at the Swanson Mine prior to his discharge on November 9, 1994. Under date of November 14, 1994, Mr. Boden filed with MSHA a complaint of discrimination which reads in part as follows:

I continued to complain to the Company Officers, the Board of Directors and to Matt Breneman about the violations in the entire beltline and about not having enough

employees to correct the violations that I could. I also complained about the return entries after walking them to follow the secondary escapeway out to the surface. I complained about the dusty roadways in the main intakes. I complained about the build up of float dust in the mine and the lack of rock dust in the mine. However, this complaining seemed to fall on deaf ears.

Then on Monday, November 7, 1994, I spoke with Anita Goodman for advice on the violations at the mine and the unwillingness of the four individuals who run every aspect of our company and the mine to correct such violations. Ms. Goodman advised me to contact the MSHA Headquarters in Arlington, Virginia. I immediately contacted the MSHA Headquarters and registered my complaints. On November 9, 1994, Mr. Steve Teetman, the MSHA inspector came to the mine with what was to begin as a Triple A inspection and was changed to a BAD inspection upon receiving my "Miner's Complaint". At approximately 2:30 p.m. this same afternoon, Brian Steffensen, James Lipscomb, Hal Rosen and Richard Anderson ordered the mine manager, Mr. Matt Brene-man to fire me for "malfeasance". Due to the fact that the list of complaints is the same things I have continued to complain about, these four men apparently knew that I was the one who called MSHA and they fired me for exercising my Miner's Rights.

II

Temporary reinstatement proceedings are governed by Commission Rule 45(c), 29 C.F.R. § 2700.45(c) which provides as follows:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may

present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

III

The Secretary filed a timely Application for Temporary Reinstatement stating that as a result of a formal investigation the Secretary determined that Mr. Boden's complaint was not frivolously brought. The Secretary specifically requests an Order requiring the operator of the Swanson Mine, Lion Coal Company and, by later amendment its successor Cougar Coal Company, to temporarily reinstate the miner, Marty P. Boden, to the position of belt foreman which he held immediately prior to his discharge on November 9, 1994, or to a similar position at the same rate of pay and with the same or equivalent duties.

The Secretary's Application for Temporary Reinstatement alleges that Respondent terminated the employment of the belt foreman Marty Boden "contrary to section 105(c) of the Act for exercising his statutory rights under the Act." The Secretary specifically states Mr. Boden contacted MSHA offices in Delta, Colorado, and Arlington, Virginia, on November 7, 1994, to complain about unsafe conditions at Lion Coal Company's Swanson Mine. As a result of Boden's safety complaints to MSHA, a Code-a-Phone spot inspection was initiated by MSHA on November 9, 1994. Mr. Boden, was terminated later that same day, November 9, 1994. The Secretary states his employment was terminated as a result of his safety complaints to MSHA.

The application's accompanying affidavit required by Commission Rule 45(a) was executed by William G. Denning. The affidavit, in relevant part, certifies the following:

- a. At all relevant times, Respondent Swanson Mine, Lion Coal Company, engaged in the production of coal and is therefore an operator within the meaning of section 3(d) of the Mine Act.
- b. At all relevant times, Marty Boden was employed by Respondent as a belt foreman and is a miner as defined by section 3(g) of the Mine Act.
- c. Swanson Mine, Lion Coal Company, is a mine as defined by section 3(h) of the Mine Act, the products of which affect interstate commerce.
- d. The alleged act of discrimination occurred on November 9, 1994, when Marty

Boden was discharged by Matt Breneman, Mine Manager.

e. Marty Boden engaged in protected activity when on November 7, 1994, Mr. Boden contacted the MSHA offices in Delta, Colorado, and Arlington, Virginia, to report unsafe working conditions at the Swanson Mine. Specifically, he complained about the belt rollers, the rock dusting and the returns. These phone calls caused MSHA to perform a Code-a-Phone inspection at the Swanson Mine on November 9, 1994.

f. During the course of Ms. Lorenzo's investigation, she conducted interviews with a number of employees, both hourly and managerial, and also conducted a review of documents provided by the mine. As a result of Ms. Lorenzo's investigation, I determined that Mr. Boden was discharged in retaliation because of his report to MSHA about unsafe conditions at the Swanson mine which caused a Code-a-Phone inspection by MSHA. Most of the miners I interviewed agree with Mr. Boden that the beltline was not safe.

g. Mr. Boden has always met an acceptable level of performance at the mine, and was characterized as a good worker by his supervisors. The mine contends that Mr. Boden was already designated for termination before the MSHA Code-a-Phone inspection because of maleficence (sic) and theft. Ms. Lorenzo's interviews with other employees of the mine do not give any credence to these charges.

IV

At the hearing the Secretary presented the testimony of the mine manager Matt Breneman, the belt foreman and Complainant Marty Boden, the MSHA special investigator Leslie Y. Lorenzo, the former company safety manager Anna Marie Boden, Ron Kalvis, a shop foreman, Greg Brown, who worked under Boden on the belts, Dennis Keller, who took over Boden's job as belt foreman when Boden was terminated, Ron Hoffman and Tara Whittaker.

Matt Breneman, the mine manager at Swanson Mine, testified substantially as follows: The Code-a-Phone message had safety complaints, the same complaints that Boden had continuously made to management, and he could tell from the complaints in the Code-

a-Phone message that Boden must have been the one who made the complaints to MSHA. After the Code-a-Phone message was received at the mine, Matt Breneman called management in Salt Lake City and talked to the Board of Directors. They put his call on a speaker phone, and R. Anderson (Dick), J. Lipscomb and Brian Steffensen participated in the call. Breneman discussed with them the Code-a-Phone message and the complaints set forth in the Code-a-Phone message. Breneman testified that in the course of that conversation Brian Steffensen told Breneman to fire Marty Boden. The mine manager replied he had no reason to fire Boden. Brian Steffensen then told him to fire Boden for "malfeasance". Breneman hung up the phone, looked at Boden and said "they want me to fire you" for "malfeasance." He briefly discussed the situation with Boden and it was determined that in order not to jeopardize his own job, Breneman should do what he was told to do. He fired Boden. Boden then left the mine immediately .

The Respondent primarily presented the testimony of management witnesses who testified that they were not satisfied with Mr. Boden's work performance as belt foreman and were concerned about his use of a company gas card and his charging mileage. Their testimony indicated that Lion Coal management was in the process of investigating Mr. Boden's work performance and were seriously considering terminating his employment before they were even aware of Marty Boden's Code-a-Phone message to MSHA.

On review of the entire record I find the testimony of the witnesses called by the Secretary, taken together, support the allegations in the Secretary's Application for Temporary Reinstatement and the assertions in its accompanying affidavit. Their testimony and the Secretary's documentary evidence clearly establish that the miner's complaint was not frivolously brought.

V

COUGAR COAL COMPANY, SUCCESSOR TO LION COAL COMPANY

On June 28, 1995, over the objection of counsel Brian Steffensen, I granted the Secretary's motion to amend all pleadings to add as a Respondent Cougar Coal Company as successor to Lion Coal Company. The evidence established that on November 29, 1994, for \$10.00 and other consideration, Cougar Coal Company assumed the right to the title and an interest in all assets except for claims against the Selengos and their affiliates, cash on hand, current accounts receivable and inventory. (Gov't. Ex. 10-B). Evidence was presented that after the November 29, 1994, transaction, the day-to-day operations at Swanson Mine continued without a break and the mine continued to produce coal. The mine and the appurtenances associated with the mining activities remained the same. The workforce remained substantially the same. Both Mine Superintendent Gene Picco and Mine Manager George Herne have been employed at this mine for several years and after

November 29, 1994, continued their employment. In addition, the corporate officers and directors for Lion Coal Company and Cougar Coal Company are substantially the same. They are as follows:

JAMES LIPSCOMB - Chairman and President of Lion Coal Company and President of Cougar Coal Company

HAL ROSEN - Treasurer of Lion Coal Company and Treasurer of Cougar Coal Company

RICHARD ANDERSON - Vice-President of Lion Coal Company and Vice-President of Cougar Coal Company

BRIAN STEFFENSEN - Secretary of Lion Coal Company and registered agent for Cougar Coal Company

Mining methods and procedures did not change and the same jobs were required to be filled. Cougar Coal Company adopted all of Lion Coal Company's MSHA approved plans and stated that they anticipate no change in mining practices. Cougar Coal Company used the same machinery, equipment and methods of production.

George Herne, mine manager for Cougar Coal Company in his letter to the MSHA District Manager, under the letterhead of Cougar Coal Company dated January 13, 1995 states as follows:

RE: The Swanson Mine
I.D. # 48-00082

Dear Mr. Kuzar,

Cougar Coal Company has taken over the operations of the Swanson Mine, ID #48-00082 from Lion Coal Company. At this time Cougar Coal anticipates no change in the mining practices employed at the Swanson Mine. For this reason Cougar Coal Company will continue to operate under Lion Coal Company's approved mining plans, and accepts these mining plans as their own.

Thank you:

/s/
George Herne
Mine Manager (Gov't. Ex. 10A pg. 4, Tr. 479)

Under the nine-factor successorship guideline enunciated in Munsey v. Smitty Baker Coal Company Inc., 2 FMSHRC 3463 (1980) I find that the Cougar Coal Company is a successor to Lion Coal Company and, as such, along with Lion Coal Company, is properly subject to the Order temporarily reinstating Marty Boden.

CONCLUSION

At the conclusion of the hearing in this matter on August 30, 1995, after evaluating the entire record I ruled from the bench that the Secretary had sustained his burden of proof in establishing that the discrimination complaint was "not frivolously brought". I concluded that the Secretary made a sufficient showing of the elements of a complaint under section 105(c) of the Act and I orally issued the reinstatement order requested by the Secretary against the operators of the Swanson Mine, Lion Coal Company and Cougar Coal Company as the successor to Lion Coal Company.

In this decision I hereby affirm in writing the oral ruling made from the bench at the conclusion of the hearing on August 30, 1995.

ORDER

As stated in my ruling from the bench at the conclusion of the hearing on this matter, the Secretary's Application for the Order of Temporary Reinstatement of Marty P. Boden is **GRANTED**. Respondents Lion Coal Company and Cougar Coal Company as successor to Lion Coal Company, are jointly and severally **ORDERED** to temporarily reinstate Marty P. Boden to the position of belt foreman which he held at the time of his discharge, or to a similar position, at the same rate of pay and with the same or equivalent duties.



August F. Cetti
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

Brian W. Steffensen, LION COAL COMPANY, 675 East 2100 South, Suite 350, Salt Lake City, UT 84106 (Certified Mail)

COUGAR COAL COMPANY, 1554 9th Street, Rock Springs, WY 82901
(Certified Mail)

Chris L. Schmutz, Esq., CHRIS L. SCHMUTZ, P.C., 265 East 100 South #300, Salt Lake City, UT 84111 (Certified Mail)

\sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 26 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-303
Petitioner : A.C. No. 15-14074-03674
v. :
PEABODY COAL COMPANY, : Docket No. KENT 95-364
Respondent : A.C. No. 15-14074-03676
: Docket No. KENT 95-423
: A.C. No. 15-14074-03678
: Martwick UG Mine
: Docket No. KENT 95-316
: A.C. No. 15-08357-03786
: Docket No. KENT 95-337
: A.C. No. 15-08357-03787
: Docket No. KENT 95-414
: A.C. No. 15-08357-03788
: Camp #11 Mine

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee and
Arthur J. Parks, Conference and Litigation
Representative, Mine Safety and Health
Administration for Petitioner;
Carl B. Boyd, Jr., Esq., Myer, Hutchinson Hanes
and Boyd, Henderson, Kentucky for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging the Peabody Coal Company (Peabody) with multiple violations under the Act and proposing civil penalties for those violations. Settlement motions were considered at hearing as to all violations except those charged in Citation Nos. 3861812 and 3861813. With respect

to the settlement the Secretary has proposed certain modifications in the citations and a reduction in penalty from \$2,970 to \$1,753. I have considered the representations and documentation submitted in these cases and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amount will accordingly be incorporated in this decision.

As noted, two citations remain at issue. They were issued fifteen minutes apart on November 1, 1994, by Inspector Darrold Gamblin of the Mine Safety and Health Administration (MSHA). Citation No. 3861812, issued pursuant to Section 104(d)(1) of the Act,¹ alleges a violation of the standard at 30 C.F.R. § 75.402 and charges as follows:

Rock dusting on the No. 2 Section MMU 00-5-0 in the 1st East panel entries was not maintained to within 40 feet of the working faces, the roof and floors of the No. 7 entry was [sic] not rock dusted for 69 feet from the face outby, the roof and floor of the connect crosscut between the Nos. 6 and 7 entries had no rock dust applied to the roof and floor being 70 feet outby the working faces of Nos. 6 and 7 entries, the No. 6 entry floor and roof had no rock dust

¹ Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard and, if he also finds that while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard and, if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

applied for a distance of 71 feet outby the working face, the No. 5 entry had no rock dust applied to the floor and roof for a distance of 95 feet. No. 3 entry had no rock dust applied to the roof and floor for a distance of 134 feet, the connecting crosscuts from No. 1 entry to No. 5 entry had no rock dust applied to the roof or floors for a distance of 190 feet.

The cited standard, 30 C.F.R. § 75.402, provides as follows:

All underground areas of a coal mine except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

Citation No. 3861813 alleges a violation of the mandatory standard at 30 C.F.R. § 75.403 and charges as follows:

A violation observed on the No. 2 Section MMU 005-0 in the 1st East entries where rock dust was required to be applied to the top, floor and sides was not being maintained in such quantities that the incombustible content combined with coal dust is not being maintained to the required minimum. Spot samples were collected at four (4) locations. No. 1 Sample No. 7 entry 60 feet outby face, No. 2 sample in the connecting cross between Nos. 6 and 7 entry 70 feet outby the working faces, No. 3 sample 60 feet outby No. 6 entry working face, No. 4 sample collected 100 feet outby No. 3 entry working face.

The cited standard provides as follows:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

It is, in fact, clear that the areas in which the latter violation (Citation No. 3861813) was charged were physically

located within the larger area in which the former violation (Citation No. 3861812) was charged (See Appendix A). It is also undisputed that the alleged violations coexisted in time. The latter charges were based upon specific spot band samples taken at four locations within the area of the former charges and were purportedly confirmed by laboratory analysis of those samples showing incombustible content below that required by both standards.

Respondent argues that the charges in these two citations are, in fact, therefore duplicative. It maintains that the lesser included violation charged in Citation No. 3861813 is not a separate and distinct violation but merges with the greater violation charged in Citation No. 3861812 and should accordingly be vacated. The Secretary rejects the contention as "without merit" claiming that the charges involve separate areas of the mine. The Secretary's claim in this regard is directly contradicted, however, by the mine map submitted by the Secretary himself. (See Appendix A).

Section 110(a) of the Act provides that "each occurrence of a violation . . . may constitute a separate offense". However, where the Secretary elects to charge in one citation a violation that is located within the same described area and is coextensive in time and nature with a violation charged in another citation, the charges are duplicative and the lesser included offense merges within the greater offense and must be dismissed. This conclusion is bottomed not on Constitutional double jeopardy protections which are applicable only to criminal proceedings but under similar standards of Constitutional due process and under the Commission's general authority to review actions by the Secretary that are an abuse of discretion. See *W-P Coal Company*, 16 FMSHRC 1407 (June 1994); *Bulk Transportation Services, Inc.*, 13 FMSHRC, 1354, 1360 (September 1991); and *Consolidation Coal Company*, 11 FMSHRC 1439, 1443 (August 1989).

Moreover, in finding that the charges merge, it is noted that the standard at 30 C.F.R. § 75.403 merely sets the specific standard of incombustible content to be maintained in the areas required by 30 C.F.R. § 75.402 to be rock dusted. Thus, in order for there to be a violation of 30 C.F.R. § 75.402 the area cited must have an incombustible content less than that specified in 30 C.F.R. § 75.403. It is clearly redundant to charge inadequate rock dusting in one citation and then charge again in another citation inadequate rock dusting within the same area based on specific tests. Essentially the only difference is that in one case specified tests were performed to verify the same violation. Moreover the two standards here cited do not impose separate and distinct duties upon the operator.

This case is therefore clearly distinguishable from *Cypress Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). There the

Commission found the two citations at issue were not, in fact, duplicative even though emanating from the same events because the two standards (30 C.F.R. §§ 56.3200 and 56.3130) imposed separate and distinct duties upon an operator. See also *Peabody Coal Company*, 1 FMSHRC 1494, Dissenting and Concurring Opinions at 1497-1498 (October 1979).

Under the circumstances of this case I therefore conclude that the charges in Citation No. 3861813 are indeed duplicative of charges in Citation No. 3861812 and must therefore be merged and vacated as a lesser included violation.

Evidence taken at hearing on Citation NO. 3861813 is accordingly relevant to the violation alleged in Citation No. 3861812 and will be considered herein. Notice of this was provided before hearings (Tr. 5). In this regard MSHA Inspector Darrold Gamblin testified that on November 1, 1994, around 2:00 a.m., he began a "Section 103(i)" spot inspection accompanied by miners' representative Joe Wiles and Foreman Dorman Ross. Gamblin observed in the No. 2 section that some locations were not rock dusted and that other areas were inadequately rock dusted. He observed that Foreman Eldon Stanley was then in the process of rock dusting by hand in areas where there was already some light rock dust. According to Gamblin 80 to 100, 50-pound-bags of rock dust would have been necessary to adequately rock dust the area. He noted that a rock dusting machine is ordinarily used on the No. 2 unit and the entire area could have been properly rock dusted within one to one-and-one-half hours using the machine.

Inspector Gamblin also testified that he took spot band samples at four locations within the cited area as noted on the face of Citation No. 3861813 and submitted those to the MSHA laboratory for analysis. The results of the analysis showed 34.1%, 56.2%, 52% and, in the No. 7 return entry, 43.8% incombustible content. This evidence along with the inspector's credible expert testimony clearly supports the cited violation.

In any event Joe Ed Wiles, a utilityman and union safety committeeman who accompanied Gamblin on this inspection, corroborated Gamblin with respect to the inadequate rock dusting, the fact that trailing cables had been run over and that Foreman Stanley was observed rock dusting by hand. Wiles further confirmed that there had been no rock dusting at all in some of the cited areas and noted an ignition potential from the roof bolting operations. Wiles also testified that on September 8, 1994, he had received complaints from other employees about the lack of rock dusting and that he reported these complaints to management. Wiles denied that the area from which the samples were taken by Inspector Gamblin were damp.

Gamblin also concluded that the violation was "significant and substantial" because of the surrounding conditions, including the fact that energized electrical cables were being run over, thereby a potential source for the phase wires to connect and cause an explosion and/or an ignition of coal dust. Gamblin also observed that there were other ignition sources, including cutting and welding performed on the maintenance shift and prior splices on an electrical cable.

More particularly, Gamblin's conclusion that the violation was "significant and substantial" was based on the following testimony at hearing:

Q. And how did you determine that this was a significant and substantial violation? In other words, what was the safety hazard involved?

A. Well, coal dust is combustible. When rock dust is not applied to it, it is a combustible material.

Q. Could this contribute to a fire or explosion?

A. Yes.

Q. You indicated this was reasonably likely to occur?

A. Yes.

Q. If the condition had continued unabated?

A. Yes.

Q. What type of injury would result?

A. Burns or fatal accidents.

Q. And you indicated that 14 people were potentially affected?

A. Yes.

I agree that the violation was "significant and substantial" and of high gravity based on the credible testimony of Inspector Gamblin corroborated by the credible testimony of Joe Wiles.

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, FMSHRC 1473, 1574 (1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (1991).

Gamblin also concluded that the violation resulted from the operator's high negligence and the Secretary argues this also constituted "unwarrantable failure". His testimony on this issue is set forth in the following colloquy:

Q. Under "negligence," you indicated that the level of negligence was high?

A. Yes.

Q. What did you base this determination on?

A. That the Operator knew the conditions and wasn't doing anything to correct it.

Q. And how did you determine that the Operator knew of the conditions?

A. By the preshift examination and by the nature of the Operator being present in the faces trying to apply dust.

Q. Who was that person that you observed trying to apply dust?

A. Eldon Stanley.

- Q. And what is his position with the Company?
- A. He's a foreman, a third-shift foreman, who looks after belt moves and the face work.

As further explained, the Secretary's rationale here is that since Foreman Stanley had a clearly insufficient supply of rock dust for the area needing rock dusting, his efforts showed both knowledge of the violative conditions and a seriously inadequate effort to abate those conditions. To further aggravate this negligence Stanley had assigned other miners to extend the beltline rather than help abate these conditions. Inspector Gamblin further credibly opined that these violative conditions had existed on the two prior production shifts as well as for a few hours on the third shift.

The Secretary further notes that prior incidents and warnings at the mine should have placed the operator on heightened notice of a problem with inadequate rock dusting. Gamblin had talked to the operator's representatives several times regarding this same type of violation, and other citations and orders had been issued for similar violations including several on the same working section as cited in the instant case.

In addition, Safety Committeeman Wiles testified that he had received complaints from roof bolters regarding the previous lack of rock dust and had reported those concerns to management. The union safety committee issued findings to Peabody officials as a result of an inspection on September 8, 1994, which included a finding that rock dusting was inadequate on the same unit cited herein and that several crosscuts had not been rock dusted or cleaned. According to Wiles the conditions were corrected for a while but then recurred. Wiles then complained to MSHA Inspector Gamblin.

I agree that this evidence supports a finding of a high degree of negligence and "unwarrantable failure". "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. *Youghiogheny and Ohio Coal Company*, 9 FMSHRC 2007 (1987); *Emery Mining Corp.*, 9 FMSHRC 1997 (1987).

In reaching my conclusion herein I have not disregarded the testimony of Steven Little, Peabody's Martwick Mine Compliance Manager. I find, however, that this testimony only further corroborates Gamblin's negligence conclusions. Little testified that it was the practice at the Martwick Mine, where they have three shifts, to use the first two shifts for production and the third shift for maintenance. According to Little, hand dusting was performed on the first two production shifts and the third

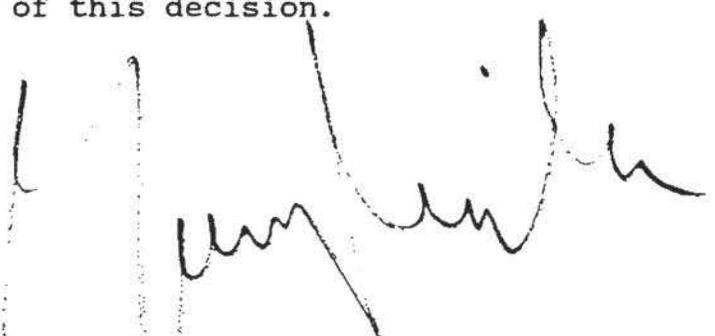
shift was reserved for additional clean-up and machine rock dusting. Little acknowledged that he was not present on November 1 when the citation was issued. He also conceded that Foreman Stanley told him that, in fact, the mine roof had not been rock dusted in the cited area. Little also admitted that cables had been run over in the area of the coal feeder, 200 to 300 feet outby the working face.

Little maintained that Gamblin told him in late 1992 that it was acceptable not to dust the roof during production shifts so long as it was done on the maintenance shift. Little failed to note however that this exception was limited by Inspector Gamblin to circumstances where the roof consisted of rock and was wet from natural moisture.

Considering the relevant criteria under Section 110(i) of the Act, I find that a civil penalty of \$3,000 is appropriate for the violation charged in Citation No. 3861812.

ORDER

Citation No. 3861813 is vacated. Citation No. 3861812 is affirmed and Peabody Coal Company is hereby directed to pay a civil penalty of \$3,000 within 30 days of the date of this decision for the violation therein. In accordance with the settlement agreement approved at hearing Peabody Coal Company is further directed to pay an additional civil penalty of \$1,753 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Mr. Arthur J. Parks, Conference and Litigation Representative, U.S. Dept. of Labor, Mine Safety and Health Administration, 100 YMCA Drive, Madisonville, KY 42431-9019 (Certified Mail)

Carl B. Boyd, Jr., Esq., Peabody Coal Company, 120 North Ingram, Suite A, Henderson, KY 42420

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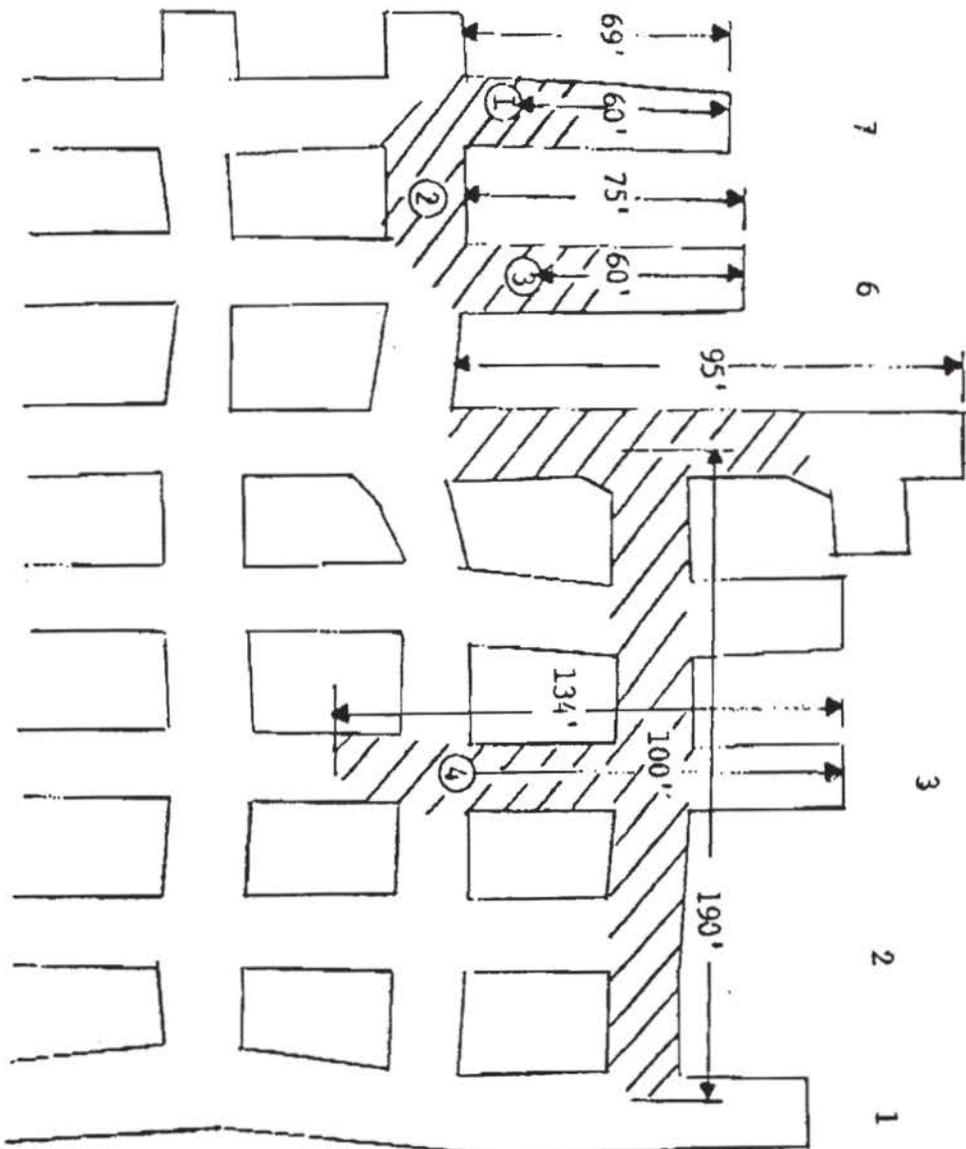
APPENDIX A



Citation No. 3861812
 No Rockdust on Roof & Floor
 (Shaded Blue)

1st East Panel Entries 11-1-94
 Martwick U.C.
 KENT 95-364
 A.C. No. 15-14074-03676
 KENT 95-423
 A.C. No. 15-14074-03678

○ Citation No. 3861813
 Random Band Sampling Points
 Where Rockdust Applied
 to Ribs Only



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 26 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-15
Petitioner	:	A. C. No. 12-01590-03542
v.	:	
	:	Little Sandy Mine
LITTLE SANDY COAL COMPANY	:	
INCORPORATED,	:	Docket No. LAKE 95-16
Respondent	:	A. C. No. 12-02160-03502
	:	
	:	Brimar Mine

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor,
U.S. Department. of Labor, Chicago, Illinois,
for Petitioner;
Richard A. Wetherill, Esq.,
215 Main Street, Rockport, Indiana,
for Respondent.

Before: Judge Barbour

These cases, which arise under the Federal Mine Safety and Health Act of 1977 (the Act) (30 U.S.C. § 801 et seq.), are before me upon petitions filed by the Secretary of Labor (Secretary) on behalf of his Mine Safety and Health Administration (MSHA). The petitions seek the assessment of civil penalties for six alleged violations of mandatory safety standards for surface coal mines.

Pursuant to notice, the cases were consolidated and heard in Vincennes, Indiana. At the commencement of the hearing, counsel for the Secretary announced that the parties had settled three of the alleged violations. Counsel orally explained the settlements, and I tentatively approved them. I stated that I would confirm my approval in writing (Tr. 10-13).

The contested issues are whether Little Sandy Coal Co. (Little Sandy) violated the cited standards at its Little Sandy Mine and Brimar Mine; if so, the validity of the inspectors' findings that the violations were significant and substantial (S&S) contributions to mine safety hazards; and the amount of the civil penalties to be assessed. The latter issue requires consideration of evidence pertaining to the statutory civil penalty criteria as set forth in section 110(i) of the Act (30 U.S.C. § 820(i)).

Stipulations

At the hearing the parties stipulated in part as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.
2. At all times relevant ... Little Sandy ... and its mines are subject to the provisions of the [Act].
3. At all times relevant ... [Little Sandy] owned and operated the Little Sandy Mine, a bituminous coal mine located in Daviess County, Indiana.
4. At all times relevant ... [Little Sandy] owned and operated the Brimar Mine, a bituminous coal mine located in Clay County, Indiana.
5. [Little Sandy's] operations affect interstate commerce.
6. The Little Sandy Mine produced 652,154 tons of bituminous coal from January 1, 1993 through December 31, 1993.
7. The Brimar Mine produced 0 tons of coal from January 1, 1993 to December 31, 1993.

8. [Little Sandy] produced 816,890 tons of bituminous coal at all of its mines from January 1, 1993 through December 31, 1993.

9. The subject citations/orders were properly served by a duly authorized representative of the [Secretary] upon an agent of Little Sandy on the date[s] indicated thereon.

10. On August 1, 1994, [MSHA] Inspector James Boyd, an authorized representative of the [Secretary] issued [C]itation No. 4260064 at [Little Sandy's] Brimar Mine ...

11. On August 2, 1994, ... Boyd issued [O]rder No. 4260072 at the Brimar Mine ...

12. On August 1, 1994, ... Boyd issued [C]itation No. 42360065 at the Brimar Mine

13. On August 2, 1994, ... Boyd issued [O]rder No. 4260073 at the Brimar Mine ...

14. On July 12, 1994, ... Boyd issued [C]itation No. 4261891 at the Little Sandy Mine ...

* * * *

16. Oil, grease, hydraulic oil, and diesel fuel are combustible materials (Joint Exh. 1; see also Tr. 16-18).

The Contested Violations

Docket No. Lake 95-15

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
4261891	7/12/94	77.1104	\$267

Citation No. 4261891 states in part:

Accumulations of combustible material oil, grease and diesel fuel [were] allowed to accumulate on the #412 Light Plant around the drive engine and exhaust manifold and frame of [the] equipment measuring up to 1 inch in depth. This condition creates a fire hazard ... (Gov. Exh. 3).

The inspector found that the alleged violation was S&S.

The Secretary's Witness

James Boyd

Inspector James Boyd, who is employed in MSHA's Vincennes, Indiana office, has been an inspector for approximately two and one half years. In July 1994, he began conducting an inspection of the Little Sandy Mine. At that time, the mine employed between 25 and 35 miners (Tr. 30, 33).

In July, Boyd met with Bob Zoglman, who is both a bulldozer operator at the mine and the mine superintendent. Boyd explained the inspection process to Zoglman. In addition, Boyd checked the on-shift book for reported hazardous conditions and discussed with Zoglman the importance of having a competent person inspect equipment before putting it into use (Tr. 31).

The Little Sandy Mine consists of two pits. Bob Zoglman is in charge of one pit and his brother, Randy Zoglman, is in charge of the other. Each of the brothers traveled with Boyd, when he was at their respective pits (Tr. 32).

On July 12, 1994, Boyd inspected the light plant at Bob Zoglman's pit. The plant consists of a small trailer onto which a light is affixed and a three cylinder diesel engine on the trailer which powers a generator (Tr. 35). The generator produces the electricity for the light. The light illuminates the edge of the pit's embankment, so that equipment operators are aware of the edge (Tr. 36-37). Also, the light illuminates the pit in order to assist miners working below (Tr. 36). The light is used at the night almost exclusively (Id.; see also Tr. 59-60).

When Boyd inspected the plant during the day, the light was not on and the diesel engine was not running (Tr. 59). Boyd and Zoglman went to the light plant area because rock trucks were dumping spoil there and Boyd wanted to make certain the trucks were not getting too close to the embankment's edge (Tr. 39). The rock trucks were the only equipment that came near the plant on a regular basis. No other structures were near the plant (Tr. 65).

When inspecting the plant, Boyd found oil, grease and diesel fuel around the diesel engine, on the engine's exhaust manifold and on the frame of the equipment. The accumulated material measured up to one inch deep on the frame (Tr. 41). Boyd speculated that some of the oil and grease was the result of "a little leakage" of the engine, and that some of the oil accumulated when a miner failed to clean up after changing the engine's oil. In Boyd's opinion, the accumulated diesel fuel was the result of an overflow when the engine's fuel tank was filled (Tr. 41-42). Boyd did not think that the accumulations were the result of normal use.

Boyd stated that he knew that the accumulations included grease because of the accumulations' "colorization" and thickness (Tr. 50, see also Tr. 51). Boyd was asked if he would change his mind about the presence of grease if he were told the engine had no grease fittings? He stated that he would not, because facilities like light plants are used by miners to store grease (Tr. 50-51). He admitted, however, that he did not know for certain how the grease accumulated on the plant (Tr. 55). He also agreed that when the oil was changed, the oil drain was opened in order to cause any spilled oil to drain down the frame and onto the ground (Tr. 61).

Boyd believed that the accumulations created a fire hazard, and that if the accumulations caught on fire, a miner could have suffered burns or smoke inhalation trying to extinguish the flames. In addition, a fire could have spread to any nearby equipment (Tr. 42).

Boyd found that the condition was S&S because of the "reasonable likelihood of a fire" (Tr. 43). Possible ignition sources were the accumulated materials on the exhaust manifold and the electric wiring saturated with some of the accumulations

(Tr. 43). The engine could overheat the exhaust manifold leading to a fire and/or a ground could fail and the wiring could heat. (Id.).

Boyd also found that Little Sandy was negligent in allowing the accumulations to exist. Someone had to start the engine on each evening shift in order to illuminate the light, someone had to put fuel into the engine, and someone had to check the oil. The person or persons who had to do these things should have observed and cleaned up the accumulations (Tr. 43-44). In addition, although the light plant did not have to be inspected daily, it's electrical components had to be inspected monthly (Tr. 69-70). Any violation that was observed during the inspection should have been corrected (Tr. 70).

Little Sandy's Witness

Bob Zoglman

Zoglman has worked for Little Sandy since 1975 and has been superintendent at the Little Sandy Mine since 1982. He stated that the light plant has been at the mine for at least twelve years. The plant does not require greasing and it has no grease fittings (Tr. 75). During his years at the mine, Zoglman never observed grease on the light plant (Id.)

In addition, Zoglman did not believe there was an accumulation of oil and diesel fuel on the manifold. Had one been there, it would have melted off. Nevertheless, he agreed that it is common to see oil or oil mixed with dirt around the manifold bolts (Tr. 81).

Zoglman acknowledged that there were accumulations of "something" on the frame of the light plant. Although it was possible there was some oil or diesel fuel involved, Zoglman believed that the "something" was "mostly dirt" (Tr. 80, see also Tr. 82).

There was a hole on the frame that allowed oil from the engine to run onto the ground (Tr. 76-77). Therefore, it was unthinkable that an inch thick accumulation of oil ever was present on the frame of the light plant. Zoglman never had seen an accumulation that thick (Tr. 77).

Zoglman did not think that the cited condition constituted a safety hazard because the pan that held most of the alleged combustible material was too far from the engine for an ignition to occur (Tr. 77). There was a distance of at least two feet between the engine and the pan. In all of his years with the company, he never had seen a light plant catch on fire (Tr. 78). Moreover, the closest structure to the light plant was 700 feet away and the light plant was 50 feet away from trucks that come to the area to dump spoil (Tr. 78).

Finally, Zoglman stated that when he was told by Boyd that the accumulations constituted a violation, he immediately tried to correct the condition. It is not a practice at the mine to contest an inspector's finding of a violation (Tr. 86).

The Violation

Section 77.1104 states in pertinent part that "[c]ombustible materials ... shall not be allowed to accumulate where they can create a fire hazard."

I accept Boyd's testimony to the extent of finding that, as he stated, there was an accumulation of oil and diesel fuel around the frame of the equipment and on the exhaust manifold of the engine (Tr. 41). His testimony was more specific than Zoglman's regarding the appearance of the accumulation and its depth. Moreover, even Zoglman agreed that there was an accumulation of "something" (Tr. 80), and although Zoglman described that "something" as mostly dirt, he acknowledged that it was possible the dirt included oil and diesel fuel (Tr. 82).

Zoglman took issue with Boyd's assertion that the accumulation included grease, and I agree that the evidence does not support finding that grease was present. Zoglman's testimony established that the engine on the light plant did not have grease fittings, and Boyd's testimony regarding the presence of grease tended to be speculative (see Tr. 50-51).

However, the presence of grease is not essential to the Secretary's case. The oil and diesel fuel on the engine and frame constituted an accumulation of combustible materials within the meaning of the standard, and this is so even if the

oil and fuel were mixed to some extent with dirt, as undoubtedly they were.

Further, I conclude the accumulated materials created a fire hazard. They were in the open, on the engine and in the vicinity of the engine. A malfunction of the engine could have ignited the nearby accumulations. Or, had the exhaust manifold heated sufficiently, the accumulations around the bolts of the manifold could have ignited. To establish the violation, the Secretary did not need to prove that an ignition would have happened but rather that it could have happened, and he met his burden of proof.

S&S and Gravity

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (30 C.F.R. § 814(d)(1)). A violation is properly designated significant and substantial, "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)).

In Mathies Coal Co. 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth its well-known test for determining the S&S nature of a violation. The Commission also emphasized that the question of whether a violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved (Texas Gulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)). Finally, a S&S determination must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC 822, 825 (April 1981); Halfway Incorporated, 8 FMSHRC 8 (January 1986)).

The Secretary has established the first two elements of the Mathies test in that there was a violation of section 77.1104, and the violation presented a discreet safety hazard. In the latter regard, I note that if the accumulations had caught on

fire, a miner or miners near the light plant could have been burned.

However, the Secretary has failed to establish the third element of the test. The evidence does not support finding there was a reasonable likelihood that the fire hazard would have resulted in an injury because it does not support finding there was a reasonable likelihood the accumulations would have caught on fire. The evidence presented by the Secretary was primarily limited to Boyd's conclusionary statement that a fire was reasonably likely (Tr. 43). Boyd did not explain how an ignition was reasonably likely to occur. For example, he did not testify concerning the temperature necessary for the manifold accumulations to ignite and the likelihood of that temperature being reached. He did not testify regarding studies or tests that indicated the likelihood of an ignition. Nor did he testify that such an ignition ever occurred previously at the mine, or anywhere else, for that matter.

Further, there was no testimony that the engine suffered from any mechanical defects that could have served as an immediate ignition source or that it was prone to such defects as mining continued. Even if there had been such defects, I agree with Zogelman that the distance of two feet between the pan where most of the accumulations existed and the engine, significantly reduced the likelihood that an ignition source on the engine would have ignited the accumulations below (Tr. 77-78).

Finally, few miners worked or traveled in the immediate vicinity of the light plant. Dump trucks did not travel within 50 feet of the plant and the nearest structural facility was 700 feet away (Tr. 78). The only miner near the light plant while the engine was operating was the miner who started the engine on the evening shift, unless the person who inspected the light plant monthly did so at night, which seems unlikely (Tr. 43-44).

In sum, under the circumstances in existence at the light plant on July 12, 1994, I cannot find that there was a "confluence of factors" necessary to create a reasonable likelihood of an ignition (Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988)) or of an injury. Nor was such a confluence likely

as mining continued. I conclude therefore that the violation was not S&S.

The gravity of a violation is gauged by the seriousness of possible injuries and the likelihood of the injuries occurring. Obviously, if a miner or miners had been burned, their injuries could have been serious. However, the likelihood of an ignition and of a miner or miners being injured by the ignition was so low, I find that the violation was not serious.

Negligence

Negligence is the failure to exercise the standard of care required by the circumstances. The light plant was used daily. There was a possibility that combustible fuel and/or lubricants could spill or leak and accumulate. Reasonable care required that the plant, including its engine, be checked periodically for accumulations and, when they existed, that they be cleaned up. The presence of the prohibited accumulations establishes that Little Sandy failed to meet this standard of care, and I conclude that the company was negligent.

Docket No. Lake 95-16

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
4260064	8/1/94	77.1104	\$ 270

Citation No. 4260064 states in part:

Combustible material[,] hydraulic oil, was allowed to accumulate on the Hitachi Shovel Numerous oil leaks were observed on the hydraulic system located under the operator[']s cab and across from it on the right side, puddles of oil, [were] located in these areas and on the frame of the equipment. This condition creates a fire hazard (Gov. Exh. 4).

The inspector found that the alleged violation was S&S.

The Secretary's Witness

James Boyd

Boyd testified that during June and July 1994, he inspected the Brimar Mine. During the inspections he was accompanied by the mine superintendent, Wayne Jeffers (Tr. 89-90). The Brimar mine is a surface coal mine. Between 10 and 15 persons were then employed at the mine (Tr. 90).

On August 1, 1994, Boyd inspected a Hitachi shovel that was used to load overburden into haulage trucks (rock trucks). The shovel is a large piece of equipment with a long boom. The shovel is powered by two diesel engines. The mechanical functions of the shovel are controlled by a hydraulic system (Tr. 96-97).

Upon inspecting the shovel, Boyd observed numerous leaks in the hydraulic system. He noted pools of oil under and around the operator's cab as well as oil on the frame of the equipment (Tr. 94-95, 97). The oil was leaking from the hydraulic valves and hoses in the area of the valve chest (Tr. 98). The main pool of oil was eight to ten feet long. The oil had saturated some of the dust surrounding it and Boyd estimated the oil had been accumulating for two or three days (Tr. 98-99).

Boyd testified that he was told the shovel operator had not inspected the shovel before it was put into service. Boyd also remembered being told by both Jeffers and the shovel operator that they believed an accumulation of combustible materials was not a violation until the accumulation was one quarter of an inch thick (Tr. 99-100) (Boyd recorded this conversation in his notes (Tr. 104; Gov. Exh. 6).)

Boyd believed that an injury was reasonably likely to have resulted from the violation because of the danger of fire. He stated, "within the last two or three years ... we've had about four of these particular machines ... burn in this area" (Tr. 100). If a fire occurred, Boyd expected the shovel operator to suffer burns, or smoke inhalation, or to be injured trying to leave the shovel. He stated, "[T]hese machines ... burn so ... fast they ... put a little axe in the operator's cab so [that] if

[the] machine gets on fire ... [the operator] can burst [the] front window out ... and just leap out the window" (Id.).

In Boyd's opinion, potential ignition sources for the oil were provided by the shovel's electric wiring, and by the 24 volt battery that is used to start the shovel's diesel engines (Tr. 118). (However, Jeffers and the shovel operator did not believe the accumulations presented a fire hazard because the company never had experienced a fire on a Hitachi shovel (Tr. 104, Gov. Exh. 6). In addition, the shovel had an operational automatic fire suppressant system that was supposed to put out any fire (Tr. 113).)

Boyd decided to issue a citation for the accumulations (Citation No. 4260064) at around 10:50 a.m. (Gov. Exh. 4). Boyd then discussed with Jeffers the time required to clean up the accumulations. According to Boyd, Jeffers suggested 6:00 p.m. and Boyd set that as the time for abatement (Tr. 102; see Gov. Exh. 4).

Boyd returned to the mine around 9:00 a.m. on August 2 (Tr. 107). The shovel had been operating (Tr. 108, 115). Boyd found that the conditions on the shovel were almost the same as they had been at 10:50 a.m., the day before. Boyd stated that although there had been some effort to clean up around the valve chests and the two diesel engines, no effort had been made under and around the operator's cab (Tr. 111-112).

Boyd testified that he was told by the company's master mechanic that the company's clean up efforts included some steam cleaning and the replacement of some of the hydraulic system's O rings and hoses (Tr. 108, 110). Boyd saw one hose that was new, but he did not inspect the machine to determine if the mechanic was telling the truth about the O rings (Tr. 111). (He explained that given the location of the O rings, he could not have seen them, in any event, and thus could not have determined whether they had been replaced (Tr. 109-110).) In Boyd's view, whatever had been done to the O rings had not corrected the problem because the accumulations were still present (Tr. 102-103). Jeffers should have realized that more efforts were needed (Tr. 117).

Boyd described the accumulations that existed on August 2, as a mix of oil that was present on August 1, and oil that had accumulated since he issued the citation, ("[s]ome of it was old oil, some of it ... [was] new" (Tr. 103)). Boyd agreed that in general, as O rings wear, they leak, and that when O rings and hoses are replaced, there also is some leakage (Tr. 117).

Because the accumulations had not been abated within the time set, Boyd issued an order of withdrawal at 9:30 a.m. on August 2 (Gov. Exh. 5). Boyd explained:

Jeffers knew he had a given time to correct this ... violation ... I have no knowledge how many hours he worked on it, but [Jeffers] elected to put the equipment back into service and ceased working on it (Tr. 116).

* * * *

[W]hen I looked and [saw] the accumulation was still there to the same degree as when I'd issued the citation, then that's where my determination came from that an honest effort had not been made ... to correct the violation (Tr. 117).

Little Sandy's Witness

Wayne L. Jeffers, Sr.

Wayne Jeffers confirmed that oil was present on the shovel (Tr. 125). Jeffers had no recollection of telling Boyd that he did not think there was a violation until there was an accumulation of one fourth inch, but he recalled telling Boyd that he did not think the oil that was present was bad enough to be a fire hazard (Tr. 140).

Once the shovel was cited, Jeffers stated that he directed that it be taken out of service (Tr. 125-126). In order to clean up the accumulations, Jeffers had the master mechanic repair "some leaks and bad hoses" and do "some ... steam cleaning" (Tr. 126). Jeffers also stated that a lot of the accumulations were scraped off the shovel (Tr. 128). The mechanic was assisted by the shovel operator and a truck driver (Tr. 127-128). Jeffers

estimated that they worked on the shovel from the time it was cited until possibly 6:00 p.m. (Tr. 127).

Jeffers left the mine around 6:00 p.m. At that time, the shovel needed more cleaning, and Jeffers assigned two of the night shift truck drivers to the task (Tr. 129-130). He estimated that before the order was issued, a total of 20 man hours was spent cleaning the accumulations (Tr. 133).

Jeffers returned to the mine on August 2, around 4:30 a.m. He stated that he believed that the shovel was "real clean" at that time (Tr. 130). Therefore, he ordered that the shovel be put back into service. He explained, "Once you make the repairs and do cleaning, you have to run the machine a certain amount to see if ... your repairs are complete" (Id., see also Tr. 131). Before he could determine if the repairs had been successful in stopping the oil leaks, Boyd arrived (Tr. 131).

Jeffers did not recall what he said when Boyd told him he was going to issue a withdrawal order (Tr. 138-139). However, he was sure he told Boyd that the shovel had been cleaned and that some of the leaks had been fixed. He added that Boyd should have been able to see what had been done (Tr. 139).

After the order was written, Little Sandy personnel put in more O rings and new hoses. Jeffers maintained the shovel was not steam cleaned again and that it looked worse when the order was terminated than it did when it was issued (Tr. 132, 137).

Raymond C. Weber

Raymond C. Weber has worked for Little Sandy for almost ten years. He is the head mechanic at the Brimar Mine. On August 1, after the citation was written, Weber was assigned to correct the cited conditions. Weber testified that Boyd told him the areas about which he was concerned were the "swing pump areas and another valve area" (Tr. 149, 151). Boyd also wanted the accumulated grease removed from around the automatic greaser pins (Tr. 153).

Weber stated working on the shovel around 11:00 a.m. He stopped work around 3:30 p.m. because the shovel was going to be steam cleaned by the shovel operator and another miner (Tr. 142).

In the meantime, the shovel operator helped Weber change hoses and install O rings. In addition, the shovel operator scraped accumulated grease from the machine (Tr. 142-143).

Weber stated that between 11:00 a.m. and 3:30 p.m., on August 1, he replaced at least four O rings, a supply line, and some hoses (Tr. 143). Weber claimed that his efforts stopped the main leaks. He added that although there were more "seeps," they were inevitable on a hydraulic shovel and that such seeps had to be worked on continuously (Tr. 143; see also Tr. 146). He did not have time to fix all of the leaks because the machine had to be steam cleaned (Tr. 144).

After Weber left the mine on August 1, he did not work on the machine again until the order of withdrawal was issued (Tr. 144). The shovel was steam cleaned prior to the order being issued. Weber believed that the night crew finished cleaning the shovel around 3:00 a.m. on August 2 (Tr. 150). According to Weber, the house area of the shovel was "pretty clean," although a little bit of the accumulation might have remained on the boom (Tr. 146).

Richard Edwards

Richard Edwards is the shovel operator. Edwards understood the citation required him to replace the O rings, change a few hoses and clean the shovel. The machine was shut down while this work was on-going (Tr. 155). According to Edwards, work on cleaning the accumulations started around 11:00 a.m. Edwards helped with the cleaning (Tr. 155). He also helped Weber replace the O rings and hoses (Id.). He worked until around 5:00 p.m., when the night shift began (Tr. 156).

When Edwards left at 5:00 pm., there was between a half gallon and a quart of oil remaining on the machine. It was located in front of the engines. Edwards did not believe the accumulations would catch on fire (Tr. 156-157). He acknowledged that there was a battery located about three or four feet from the accumulations, but it was higher than the oil and the oil would have to have been blown on the battery for the oil to ignite. This would only happen if an O ring malfunctioned, but if that occurred, he would shut off the power on the shovel and eliminate the ignition source (Tr. 157).

Because the shovel was not steam cleaned before the order of withdrawal was terminated, Edwards stated that the condition of the shovel probably was worse when the order was "lifted" than when it was imposed (Tr. 158).

Charles Stephens

Stephens was a truck driver at the Little Sandy mine when the citation and order were issued. He worked from 5:00 p.m., August 1, until 5:00 a.m., August 2. (Tr. 165-166).

Stephens was told to steam clean the shovel. He testified that he and another miner did so from 5:00 p.m. to 9:00 p.m. (Tr. 167). Stephens did not feel the shovel needed to be cleaned. He believed the day shift had cleaned it adequately (Tr. 168). He stated: "I thought it was really ridiculous, but I was told to do it" (Id.).

Stephens also stated that grease from the boom pins had fallen toward the bottom of the operator's house. The grease was described by Stephens as "nasty" and he agreed that it was not steam cleaned (Tr. 169). Everything else was steam cleaned and the miners used two 500-gallon tanks of water to do the cleaning (Id.).

Joseph L. Hensley

Joseph L. Hensley presently is a safety consultant for twelve private companies. He is a former MSHA inspector and former master mechanic for Amax Coal Corporation. He is familiar with hydraulic shovels (Tr. 172-173).

He testified that all such shovels develop leaks (Tr. 182-183). He stated also that he was familiar with four instances in which hydraulic shovels had caught on fire. The causes ranged from a broken hydraulic line that sprayed oil onto the shovel's extremely hot turbo charger, to men working on the shovel with an acetylene torch (Tr. 173).

Hensley did not agree with Boyd's testimony that the oil leaks on the cited shovel would have ignited. He believed the chances were "very, very small" (Tr. 174).

According to Hensley, the same day the order was issued, he went to the Little Sandy Mine and viewed the shovel. Around 3:00 p.m. on August 2, he took pictures of the shovel. (Since the order was issued at 9:30 a.m., the pictures were taken approximately five and one half hours after the order was imposed (Tr. 177, Gov. Exh. 5). Hensley identified the pictures (Tr. 175; Resp. Exh. 2).) He described the shovel depicted in the pictures as a "very, very nice looking machine" (Tr. 179). He stated that he did not think it possible to get the shovel any cleaner (Tr. 179). If he had found a shovel in that condition when he was an inspector, he would not have written a withdrawal order (Tr. 180).

The Violation

The company agreed that the violation of section 77.1104 existed as charged (Tr. 92).

S&S and Gravity

The first element of the National Gypsum test has been met. There was a violation of the cited standard. I conclude the second element has been established also. I accept the testimony of Boyd that accumulations of combustible oil and grease existed in the vicinity of potential ignition sources (e.g., the 24 volt battery and electrical wiring (Tr. 118)). Obviously, had the oil and grease caught on fire, the shovel operator would have been endangered. Boyd's testimony that once a fire started it burned rapidly was not disputed (Tr. 100). The presence of the prohibited accumulations therefore, subjected the shovel operator to the hazard of burns and smoke inhalation, or worse.

I also conclude that there was a reasonable likelihood of an ignition of the accumulated oil and grease. The accumulations were extensive. Boyd testified without dispute that the main pool of oil was 8 feet to 10 feet long (Tr. 98). There also were extensive accumulations of grease. Boyd believed a fire was reasonably likely because four machines had caught fire within the last two or three years (Tr. 100). Although, on its own, this testimony is insufficient to establish the reasonable likelihood of an ignition on the cited shovel, there is other testimony from which that likelihood can be inferred.

All of the witnesses agreed that a major source of the accumulation was the malfunctioning of the hydraulic system's O rings, and that problems with the rings were recurring and frequent. Edwards, the shovel operator, stated that the shovel's 24 volt battery could serve as an ignition source if an O ring malfunctioned (i.e., if "you blow an O ring" (Tr. 157)) and oil was sprayed on the battery (Id.). Edwards did not believe this would happen because the loss of the O ring would cause a drop in oil pressure which, in turn, would cause him to shut down the machine (Tr. 157). However, Edwards could have been away from the controls when the pressure dropped. Or, he could have been at the controls and been slow in responding. Or, given the rapidity with which the combustible materials can ignite, Edwards could have been at the controls and simply not have shut down the shovel rapidly enough to avert an ignition. With the number of recurrent O ring problems the hydraulic system was experiencing, I conclude it was reasonably likely an O ring would have "blown" and sprayed the battery with oil. I further conclude it was reasonably likely that an ignition would have resulted.

Finally, had an ignition occurred, resulting injuries from burns or smoke inhalation certainly could have been of a reasonably serious nature. Therefore, I find that the violation was S&S.

The violation also was serious. The likelihood of an ignition combined with the extent of injuries that reasonably could have been anticipated establishes the violation's grave nature.

Negligence

I further conclude that Little Sandy was negligent in allowing the accumulations to exist. Boyd believed the accumulations had collected over a period of two to three days (Tr. 98-99). Given the extensive nature of the oil and grease, I find that this was in fact the case. The accumulations were visually obvious and reasonable care required that they be cleaned up prior to the shovel being put into service. Little Sandy failed in this regard, and in so doing, negligently allowed the violation to exist.

Good Faith Abatement

During the course of the hearing it became evident that Little Sandy wished to raise the issue of the validity of the section 104(b) order of withdrawal. I explained to counsels that I did not believe I could rule on the validity of the order because Little Sandy had not filed a contest of the order within 30 days of its receipt. However, I noted that the evidence the company intended to present regarding the circumstances surrounding its efforts to abate the violation and the reasonableness of the inspector's decision not to further extend the time for abatement of the citation was relevant with respect to the civil penalty aspects of the case (Tr. 92-93).

Since the hearing, nothing has been brought to my attention that causes me to change my view that the reasonableness of the time for abatement of a citation may not be contested in a civil penalty proceeding unless the operator has contested the order pursuant to section 105(d) of the Act (30 U.S.C. § 815(d)) and the contest proceeding has been consolidated with the civil penalty proceeding.

Nonetheless, and as I stated at the hearing, the issue of Little Sandy's good faith in attempting to achieve rapid abatement of the violation is before me with respect to the civil penalty aspects of the case (30 U.S.C. § 820(i)). Good faith requires an operator to assign sufficient manpower and resources to accomplish abatement and for the miners assigned to work diligently within the time given to achieve abatement. After considering all of the testimony, I conclude that Little Sandy did not exert good faith efforts to comply.

I accept Boyd's explanation that after consulting with Jeffers, he set 6:00 p.m. as the time to have the accumulations cleaned up (Tr. 102). I also accept Jeffers testimony that the shovel was not cleaned of accumulations when he left the mine around 6:00 p.m., and that he assigned men to work on it that night (Tr. 129-130). I do not credit the essence of Little Sandy's good faith argument -- i.e., that through the diligent efforts of the men assigned, the shovel was cleaned of accumulations by 4:30 a.m., August 2, and was put back into service (Tr. 130).

Boyd testified without dispute that when he viewed the shovel on the morning of August 2, he could see that some effort had been made to clean up around the valve chests and the diesel drive engines, but that no effort had been made around the front of the shovel and that "even ... Jeffers ... stated that ... area had not been cleaned" (Tr. 111-112). Jeffers did not deny he made this statement.

It was incumbent upon Jeffers, as the representative of Little Sandy, to explain the company's abatement efforts to the inspector -- who was not present when they allegedly took place -- and to point out why the front of the shovel had not been cleaned. Jeffers did not satisfactorily fulfill this obligation, and I infer from his failure to do so that uncleaned areas observed by Boyd on the morning of August 2, were the result of the company's lack of good faith efforts and not, as the company would have it, new accumulations that had come into being since 4:30 a.m. that morning.

To put it another way, while I believe that Weber, Edwards and Stephens all worked on cleaning the machine, I conclude their efforts were inadequate. (In this regard, I note Stephens testimony that the grease from the boom pins was not cleaned at all (Tr. 169).) The testimony presented by Little Sandy did not overcome the inference established by the Secretary that the company had not made good faith efforts to remove the cited accumulations from the shovel.

<u>Order/</u>			<u>Proposed</u>
<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4260065	8/1/95	77.1607(i)	\$292

Citation No. 4260065 states:

Dust control measures were not taken on the haulage road from the No. 1 pit area to the refuse dump area. Dust conditions created from passing haulage trucks and equipment, significantly reduced the visibility of the drivers and the equipment operators (Gov. Exh. 7).

The inspector found that the alleged violation was S&S.

The Secretary's Witness

James Boyd

Boyd stated that on August 1, 1995, he and Jeffers were in a vehicle following rock trucks on the haul road that leads from the No. 1 pit area of the Brimar Mine to the refuse dump. The dirt-surfaced road is approximately two and one half to three miles long. During the trip, Boyd observed the dust raised by the rock trucks (Tr. 185). In addition to the rock trucks, he believed he recalled seeing a bulldozer on the roadway. The dust kicked up by the trucks he was following and by the trucks passing him obscured Boyd's vision. He believed that the vision of the truck drivers and the equipment operator was obscured as well (Tr. 186).

Boyd stated that he discussed the dust condition with Jeffers, and told Jeffers he was going to issue a citation for a violation of section 77.1607(i). (The citation was issued at 10:30 a.m. (Gov. Exh. 7).) Boyd asked Jeffers how much time it would take to correct the condition, and Jeffers stated that it could be taken care of by 5:00 p.m. (Tr. 186).

Because of the reduced visibility, Boyd believed that an injury was reasonably likely. Moreover, if the trucks collided with one another or with other equipment, the injury could be permanently disabling (Tr. 187). Boyd agreed, however, that he did not know of any previous accidents on any of the haulage roads maintained by Little Sandy (Tr. 198). He found the condition to be S&S because of "the reasonable likelihood and the visibility of the people ... [that are] operating ... [the] large equipment on the haul[age] roads" (Tr. 188). In Boyd's opinion, Little Sandy could have avoided the problem by using water to wet the road or by using a grader to scrape off the dust (Tr. 188).

On the morning of August 2, Boyd again followed the rock trucks from the pit to the dump. There was no indication that the company had tried to control the dust. Therefore, at 9:40 a.m., Boyd issued a section 104(b) withdrawal order for failure to abate the cited condition (Tr. 189; Gov. Exh. 8).

On cross-examination, Boyd agreed that Jeffers told him the road had been watered for the entire day after the citation was

issued on August 1 (Tr. 192). Boyd admitted that he did not know what the company had done with regard to the condition between the time he cited it and 5:00 p.m., the time he set for abatement (Tr. 193). However, he stated that if the road had been watered as Jeffers maintained, he should have seen dark areas along the side of the road, or in the middle of the road on August 2. When Boyd failed to see any "discolorization" he "knew [the company] ... had not put enough water down to control the dust" (Tr. 201).

On August 2, Boyd spoke with Jeffers about the condition of the road and Jeffers told him that the water truck was broken on the evening shift and that there was nothing else to use to wet down the road (Tr. 189-190, 193). Boyd read from the notes he made on August 8, regarding the condition:

Wayne Jeffers stated to me that a fitting on the fuel tank on the water truck was broken . . . [a]nd they did not have a mechanic on the 2nd shift to repair the water truck, so they could not have watered the roadway, unless he took someone off a piece of equipment to perform the repair work on the water truck (Gov. Exh. 9).

Boyd explained that he did not believe an "honest effort" had been made to abate the violation because the company could have made some arrangement to have the water truck repaired and then would have used it to control the dust (Tr. 191). Boyd could not recall whether Jeffers also told him that he had gone to the Farm Bureau Co-operative to purchase the needed fitting for the water truck (Tr. 193).

Little Sandy's Witness

Wayne L. Jeffers, Sr.

Jeffers described the road in question as being 80 to 100 feet wide. Two eighty-five-ton rock trucks used the road. The trucks traveled one half mile from where they were loaded to where they dumped (Tr. 202). Jeffers believed it was "almost impossible" for the trucks to collide because of the dust

(Tr. 203). Nor did Jeffers understand how dust would have restricted the drivers' vision when the trucks followed one another, or when they met (Id.)

Jeffers testified that around the time the citation was issued on August 1, the company had not yet watered the road and that the dust was rising. Jeffers said nothing to Boyd about the citation (Tr. 203).

On August 1, the rock trucks used the road from approximately 6:00 a.m. to 5:00 p.m. (Tr. 216). The trucks also used the road from the beginning of the day shift on August 2, (6:00 a.m.), until the order was issued (9:40 a.m.) (Tr. 218-219).

After Boyd told Jeffers he was going to issue a citation, Jeffers testified he made arrangements to water the road. Jeffers stayed at the mine until around 6:00 p.m or 7:00 p.m., on August 1.

The road was watered throughout the day shift and until the end of the shift by Rick Scarbrough (Tr. 206, 211). Jeffers could not recall whether it was also watered that night (Tr. 212).

However, when Jeffers returned to the mine the following day (August 2), the water truck was not functioning and Jeffers assigned Weber to repair it. Weber told Jeffers that a part was needed. Jeffers then left the mine to pick up the part at the Farm Bureau Co-operative (Id.). Boyd stated that he arrived at the Co-operative around 7:00 a.m. (Tr. 207). Jeffers identified a copy of a receipt from the Co-operative. The receipt is dated August 2 (Tr. 207; Def. Exh. 3).

When Boyd returned on the morning of August 2, Jeffers and Boyd had a discussion about why the truck was not functioning. Jeffers stated that he told Boyd he did not have a mechanic on the night shift. Boyd said that if Jeffers was making a "true effort" to get the water truck fixed, he would have called in a mechanic (Tr. 213).

Raymond Weber

Master mechanic Weber testified that shortly after he arrived for work on the August 2 day shift, he was advised that the water truck had broken down. Weber made what repairs he could and then waited to complete the repairs until the needed parts from the Co-operative arrived (Tr. 221). He stated that he finished around 8:00 a.m., and that the truck was then ready to be put back into service (Tr. 222).

Rick Scarbrough

Rick Scarbrough was a scraper operator in August 1994. He testified that on August 1, he was taken off of his normal job and was asked by Jeffers to run the water truck (Tr. 225). He started operating the truck around 10:00 a.m. He believed that he watered the road until his shift ended around 5:00 p.m. (Tr. 226). As best he could recall, he refilled the truck about six times during the shift (Id.). He experienced no problems with the truck (Tr. 227).

He described the condition of the road when he started to water it as not "that bad" (Tr. 227). Dust was present on the road but it did not impede his visibility. The dust was normal for August (Tr. 228).

Robert Hay

Robert Hay, a truck driver, drove a haulage truck over the road. He did not think the road was dusty on August 1, (Tr. 234). He stated that there were only two trucks hauling on the road and that you could see a truck coming "a mile away" (Tr. 234-235). He estimated that the two trucks made about 80 trips along the road during a shift. The trucks traveled the road about once every ten minutes (Tr. 238). Besides the trucks, there are instances when someone worked along the road or when the foreman's truck traveled the road (Tr. 235).

The Violation

Section 77.1607(i) requires that "[d]ust control measures shall be taken where dust significantly reduces visibility of equipment operators." I conclude the testimony supports finding that the violation occurred.

Boyd's concern about reduced visibility for truck drivers was based upon his personal observation. On August 1, he traveled the road behind a truck. He observed the dust as it was kicked up by the truck ahead of him, as well as the dust that was created by a passing truck. In both instances, the dust obscured his vision (Tr. 186). It was reasonable for him to infer that a truck driver who was following a truck or who encountered a passing truck would have had his or her vision similarly reduced.

Boyd's observation of the extent of the dust was buttressed by Jeffers testimony, that at the time the citation was issued, the company had not watered the road and that the dust was increasing (Tr. 203). Although Jeffers stated he did not understand how dust would restrict a driver's visibility if trucks were meeting on the road (*Id.*), Boyd's concern was not for the moment of meeting but for the moments after the trucks had passed one another, when drivers had to travel through the dust each truck raised or when one truck followed another. At these times, I believe the drivers' vision was significantly reduced.

Scarborough, who watered the road after the citation was issued, stated that he did not think the dust was "that bad," but there is no testimony that he passed or followed any other vehicles while he was working on the road (Tr. 228). Similarly, Hay, who drove a truck on the road, testified that truck drivers could see one another coming, but, like Scarborough, Hay did not address what happened immediately after the trucks passed one another or when one vehicle followed another.

S&S and Gravity

The Secretary has established the first two elements of the Mathies test, and his proof also meets the third. There was a violation of section 77.1607(i). There was a discrete safety hazard in that the significantly reduced visibility of the drivers could have caused an accident involving the trucks and/or other equipment or persons on or along the road. In addition, I conclude there was a reasonable likelihood of an accident.

While only a few vehicles used the road and only a few miners occasionally worked along it (Tr. 185, 203, 234-235), it takes but seconds of lost visibility for a driver to lose sight of a vehicle, or to lose sight of the person he or she is approaching, or for a driver to fail to see a vehicle that has stopped suddenly. The trucks made frequent trips over the road - - approximately 80 in all. They traveled the road every ten minutes (Tr. 235, 238). Given the frequency with which the trucks used the road and the occasional presence of other vehicles and miners along and on the road, I conclude that in the context of continuing operations at the mine, a dust-induced accident was reasonably likely. If such an accident occurred, the resulting injury or injuries could have been permanently disabling or even fatal.

Because, as stated, if an accident occurred due to the reduced visibility, it could have resulted in a serious injury or worse and because the likelihood of an accident was more than remote, this was a serious violation.

Negligence

The violation was visually obvious. Jeffers stated that the dust was rising (Tr. 203). It was August, and trucks had been using the road. Given these factors, mine management did not exercise the care required by the circumstances when it failed to have dust control measures implemented. Little Sandy was negligent in allowing the violation to exist.

Good Faith Abatement

The citation resulted in the issuance of a section 104(b) order of withdrawal at 9:40 a.m. on August 2, when Boyd determined that the violation had not been abated within the time given, and that the time should not be extended (Tr. 189; Gov. Exh. 8). As stated previously, I do not believe I have the authority to rule on the validity of the order of withdrawal in this civil penalty proceeding. However, much of the evidence presented by Little Sandy is relevant to the issue of the company's good faith in attempting to achieve rapid compliance, and on the basis of the evidence, I conclude that the company exhibited good faith.

After a discussion with Jeffers, Boyd set 5:00 p.m., August 1, as the time within which the violation should be abated (Tr. 186; Gov. Exh. 7). However, Boyd did not return at 5:00 p.m. or at any other time that day. He came back to the mine on the morning of September 2. Boyd stated that at that time he did not see any dark areas along the road which would have indicated that the road had been watered. Therefore, he "knew" that no efforts had been made to abate the violation (Tr. 201).

Little Sandy's witnesses were adamant that the road had been watered and that the condition had been rectified by 5:00 p.m., or shortly thereafter, as required. Jeffers stated that the road was watered by Scarbrough from right after it was cited until the end of the day shift (Tr. 206, 211) and Scarbrough persuasively testified that he watered the road from around 10:00 a.m. to 5:00 p.m. on August 1, by making approximately six trips over the road (Tr. 227).

I have no reason to disbelieve these witnesses. Certainly, their testimony was not a recent version of events. Boyd stated on cross-examination that Jeffers told him on the morning of August 2, that the road had been watered the entire day after the citation was issued (Tr. 192). Moreover, Boyd admitted that he did not know what the company had done between the time he cited the violation and 5:00 p.m. (Tr. 193).

The fact that Boyd detected no dark areas along the road on August 2, does not necessarily mean that the road had not been watered on the day shift on August 1, especially since the water truck broke down during the night shift of August 1-2, and water that had been applied up until 5:00 p.m., could have evaporated by the time Boyd checked.

For these reasons I find that Little Sandy established that it exhibited good faith in attempting rapidly to abate the violation of 77.1607(i).

Other Civil Penalty Criteria

Size

Boyd testified that the Little Sandy Mine employed between 25 and 35 miners, and that 10 and 15 miners were employed at the Brimar Mine (Tr. 33, 90). In addition, the parties stipulated that Little Sandy produced 652, 154 tons of coal in 1993 (Stip. 6). I conclude from this that Little Sandy is a medium size operator.

History of Previous Violations

Between August 1, 1992 and July 31, 1994, the company had a total of 64 assessed violations (Gov. Exh. 2). This is a moderate history of previous violations.

Penalty Amounts

Considering the statutory penalty criteria, I assess the following civil penalties:

Docket No. Lake 95-15

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Penalty</u>
4261891	7/12/94	77.1104	\$267	\$ 50

Docket No. Lake 95-16

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Penalty</u>
4260064	8/1/94	77.1104	\$270	\$270
4260065	8/1/95	77.1607(i)	\$292	\$200

Settlements

I have reconsidered the settlements in light of the explanations offered by counsel, and I continue to find they are appropriate (see Tr. 10-13). Therefore, the settlements are approved.

Docket No. Lake 95-15

<u>Order/ Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Settlement</u>
4261886*	7/11/94	77.1605(d)	\$50	\$50
4261890**	7/12/94	77.1605(d)	\$50	\$ 0
4261894**	7/12/94	77.1605(d)	\$50	\$ 0

*Little Sandy agreed to pay the penalty proposed (Tr. 10).

**The Secretary moved to vacate the citation due to difficulties with his proof (Tr. 10-12).

Order and Dismissal

Little Sandy is ORDERED to pay the penalties assessed within 30 days of the date of this decision. The Secretary is ORDERED to modify Citation No. 4261891 by deleting the S&S finding and to vacate Citation No. 4261890 and Citation No. 4261894 within the same 30 days.

Upon payment of the penalties and modification and vacation of the citations, these proceedings are DISMISSED.

David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution:

Ruben R. Chapa, Esq., Office of the Solicitor, U.S. Dept. of Labor, 8th Floor, 230 S. Dearborn St., Chicago, IL 60604

Richard A. Wetherill, Esq., 215 Main St., Rockport, Indiana 47635

Charles R. Bates, Engineer, Little Sandy Coal Company, Inc., Lamar, IN 47550-0016

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 26 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 94-357-D
ON BEHALF OF SAMUEL KNOTTS, :
Complainant : MORG CD 94-3
v. :
 : Coalbank Fork No. 12
TANGLEWOOD ENERGY, INC., :
FERN COVE, INC., :
RANDY BURKE, AND RANDALL KEY, :
Respondents :

DECISION

Appearances: James V. Blair, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
Paul O. Clay, Jr., Esq., Fayetteville,
West Virginia, for Respondents.

Before: Judge Maurer

On June 20, 1995, I found that the respondents had violated section 105(c) of the Act by discharging the complainant on January 28, 1994. I retained jurisdiction pending a final decision on damages.

After reconsideration of the entire trial record and the parties' post-trial submissions on the issue of damages, I find the respondents jointly and severally liable for the payment of damages in the following particulars:

a. Samuel Knotts is entitled to back pay in the total amount of \$20,760 less \$3640 which he received in state unemployment benefits, or \$17,120 net back pay;

b. Samuel Knotts is entitled to costs of \$508;

c. Samuel Knotts is entitled to interest on the above two awards in the amount of \$1,762.80; and

d. The Secretary of Labor is entitled to a civil penalty in the amount of \$1000 for the violation of the Mine Act.

The Secretary sought a civil penalty of \$25,000 in this case which I find to be clearly unwarranted. This was a relatively close "mixed-motives" case where the complainant prevailed by the thinnest of margins. The record also indicates that the respondents herein are experiencing serious financial difficulties in the coal mining business including several hundred thousand dollars in unpaid civil penalties. These difficulties, combined with the back pay, costs, and interest being awarded to the complainant herein, lead me to conclude that \$1000 is an appropriate civil penalty pursuant to the criteria contained in section 110(i) of the Act. I also believe that the total monetary award to the complainant in this case is itself a serious disincentive against future violations of the discrimination provisions of the Mine Act by these respondents.

ORDER

1. Respondents **ARE ORDERED TO PAY** the complainant the amounts set forth herein as back pay, costs, and interest awards within 30 days of this order.

2. Respondents **ARE ORDERED TO PAY** the Secretary of Labor the amount set forth above as a civil penalty within 30 days of the date of this order.

3. This Decision and the Decision of June 20, 1995, together constitute my final disposition of the issues in this proceeding. Upon payment of the amounts referred to in Paragraph Nos. 1 and 2, above, this case **IS DISMISSED**.


Roy J. Maurer
Administrative Law Judge

Distribution:

James V. Blair, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Paul O. Clay, Jr., Esq., Laurel Creek Road, P. O. Box 746, Fayetteville, WV 25840 (Certified Mail)

dcp

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 11, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-420-M
Petitioner	:	A. C. No. 10-01907-05505
	:	
v.	:	
	:	Portable Crusher No. 2
BECO CONSTRUCTION COMPANY,	:	
Respondent	:	

ORDER TO SUBMIT INFORMATION

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement for the one violation in this case.

Citation No. 4343823 was issued for a violation of 30 C.F.R. § 56.1000 because the operator did not notify MSHA when the crusher was moved. The violation was designated non-significant and substantial but negligence was evaluated as high. The originally assessed penalty was \$1,000. The parties request that the citation be modified to reduce negligence from high to moderate and that the proposed penalty be reduce to \$700. According to the parties, the operator mistakenly believed that notification of the commencement of operations at the new location was sufficient to comply with the standard.

I accept the parties representations and agree that negligence should be characterized as moderate. However, I am concerned about the size of the proposed settlement amount in light of the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). MSHA in the narrative findings for special assessment considered this violation as non-serious. A \$700 penalty for a non-serious violation with only moderate negligence on the part of the operator appears excessive.

Accordingly, it is **ORDERED** that within 30 days of the date of this order the parties again confer and again advise with respect to a proposed settlement amount.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive style with a large, sweeping initial "P".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101

Merrily Munther, Esq., Penland, Munther, Boardman, 350 North 9th, Suite 500, P. O. Box 199, Boise, ID 83701

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-185
Petitioner	:	A. C. No. 29-00224-03667 A
	:	
v.	:	Cinnarron Mine
	:	
JAMES LEE HANCOCK, EMPLOYED	:	
BY PITTSBURG & MIDWAY COAL	:	
COMPANY,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS ORDER ACCEPTING FILING

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against respondent, James Lee Hancock, under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810(c), hereinafter referred to as the "Act". Respondent seeks to have the petition dismissed on the ground that the Secretary has failed to act in a timely manner.

The case involves one citation and three orders issued to respondent's employer, Pittsburgh and Midway Coal Company, under section 104(d) of the Act, 30 U.S.C. § 814(d), for alleged violations of the Act and its mandatory standards. The citation and first order were issued on July 15, 1993, and the subsequent two orders were issued on June 16, 1994.

Petitions for the assessment of civil penalties for the same conditions also were filed by the Secretary against respondent's employer, Pittsburg and Midway Mining Company, under section 110(a) of the Act, 30 U.S.C. § 820(a). The first two items were the subject of an ALJ decision after hearing which affirmed the citation and order. Pittsburg and Midway Mining Company, 16 FMSHRC 2260 (Nov. 1994). The latter orders are presently on stay before an Administrative Law Judge pending possible assignment of this case (Docket No. CENT 95-13).

On April 3, 1995, a civil penalty assessment was issued by the Secretary against respondent under section 110(c), supra.

Thereafter, on April 24, 1995, respondent timely requested a hearing. 29 C.F.R. § 2700.26. The Secretary is allowed 45 days after the hearing request to file his penalty petition. 29 C.F.R. § 2700.28. The time for filing or serving any document may be extended for good cause shown and the request for extension must be filed before the expiration of the time allowed for filing. 29 C.F.R. § 2700.9. The Solicitor filed a request for an extension of time within which to file the penalty petition on June 12, 1995, which was the 45th day. The request was served upon respondent, but not upon his counsel. An order dated June 19, 1995, granted the extension. On July 11, 1995, the Solicitor filed a second motion for a further extension of time. This motion was served upon respondent's counsel who on July 21, 1995, filed a memorandum in opposition to the both the first and second requests for extensions. An order dated August 7, 1995, directed the Solicitor to respond to the matters raised in respondent's memorandum.¹

Respondent first seeks dismissal on the ground that the requests for extensions should not be granted. The Solicitor explains the basis for his requests as follows: Two petitions for the assessment of civil penalties were filed against respondent's employer under section 110(a) regarding the same conditions for which respondent has been cited. The Solicitor consulted with his colleagues who had been assigned the other cases. As already noted, one of those dockets had been heard and decided and the Solicitor acquired and read the hearing transcript which was 449 pages. He represents that he did not want to file the 110(c) petition unless and until he could reliably determine respondent was the responsible agent and that bringing suit was appropriate in accordance with the statute's substantive requirements.

I accept the Solicitor's explanation. It was proper for him to review the entire record compiled before he was assigned the case. Indeed, it would have been irresponsible for him not to have done so. I have previously permitted the late filing of penalty petitions upon a showing of good cause where there has been no prejudice shown. And I have noted the large number of mine safety cases. Here the nature of the case and the overall caseload constitute good cause for the two thirty day extensions. In particular, considering what the Solicitor had to do to

¹The penalty petition was filed on August 7, 1995, and the answer was filed on August 21, 1995.

familiarize himself with the case, the requested extensions are not excessive. Power Operating Company Incorporated, 15 FM3HRC 931, (May 1993), Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992), Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981). See also the Commission's decision in Rhone-Poulenc, 15 FMSHRC 2089 (October 1993) aff'd, 57 F.3d 982 (10th Cir. 1995). In addition, although the operator has alleged prejudice, it has not demonstrated any injury resulting from these extensions. In light of the foregoing, I grant the extensions sought by the Solicitor for the filing of the penalty petition.²

Respondent also seeks dismissal of this case because 17 months elapsed between the first two citations dated July 15, 1993, and the notice of proposed assessment dated December 22, 1994. Respondent states that the operator is in the midst of a reduction in force which significantly increases the risk that critical witnesses will no longer be available and that relevant documents will not be located. He also advises that his employment was terminated on July 14, 1995. Based upon these assertions, respondent alleges prejudice.

In reply, the Solicitor sets forth what transpired during the time it took MSHA to complete its investigation. On January 18, 1994, a special investigator was assigned to conduct a 110(c) investigation. Because of other 110(c) investigations to which the investigator was assigned, he did not commence work on this case until May 9, 1994. In the course of his activities the investigator determined that two additional unwarrantable failure violations existed and therefore, on June 16, 1994, issued two additional orders. The subsequent orders were added to the investigation on June 30, 1994. Two weeks later, on July 13, 1994, the special investigation report and supporting materials which consisted of more than 400 pages and contained interviews and signed statements, were sent to MSHA's Office of Technical Compliance in Arlington, Virginia. That office completed its review in two weeks, finding agent liability, and forwarded the files to the MSHA Division of the Solicitor's office, also

²Since the first request for extension was not served upon respondent's counsel, both requests are before me and I have considered both of them. Accordingly, respondent has not been injured by the lack of service. I have previously declined to dismiss a penalty petition for lack of service. Power Operating, supra.

located in Arlington. On December 12, 1994, the Solicitor in Arlington completed review and approved a finding of liability under section 110(c). The file was returned to Denver and on December 22, 1994, the District Manager mailed the notice of proposed assessment to respondent.

Without doubt, seventeen months between the first citations and the proposed assessment notice constitute a considerable period of time. This is particularly so when this period is viewed together with the extensions of time for filing the penalty petitions. From the information furnished by the Solicitor it appears that much of the elapsed time was taken up with delays in handling the case rather than by actual work. The special investigation took six weeks. But six months passed before an investigator was assigned to the case and an additional three months went by because the special investigator was working on other cases. Also the case was with the Solicitor in Arlington for five months.

Nevertheless, it must be borne in mind that both the investigation and the various levels of internal review were necessary for a proper evaluation of agent liability and a knowing violation. The time used to evaluate the case could reasonably be viewed as affording some assurance that resources of both the individual and the government would not be wasted by the bringing of an unworthy case.

Moreover, this case does not exist in a vacuum. I take note that data in the Commission's docket office shows the following: In 1990 there were 147 completed investigations under section 110(c), 49 of which were contested for a contest rate of 33%. In 1991 there were 256 such investigations, 126 of which were contested for a contest rate of 49%. In 1992 there were 308 investigations, 142 of which were contested for a contest rate of 46%. In 1993 there were 293 investigations, of which 128 were contested for a contest rate of 44%. In 1994 there were 251 investigations, 177 of which were contested for a contest rate of 70%. The number of investigations is rather high and the rate at which they are contested has risen sharply.

Section 110(a) provides that a citation be issued to an operator within a reasonable time. The legislative history speaks in terms of reasonable promptness for the issuance of such citations. S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977), reprinted in, Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the

Federal Mine Safety and Health Act of 1977, at 618 (1978). No such requirement specifically applies under section 110(c), but elemental fairness would seem to require application of this condition to 110(c) cases. Relevant to the meaning of this requirement is the legislative history which specifically recognizes that there may be instances where a citation will be delayed because of the complexity of the issued raised, a protracted accident investigation or other legitimate reason. S. Rep. No. 181, supra at 30, Legislative History, supra at 618.

In view of the considerations set forth above and after carefully weighing all the factors, I conclude that good cause existed for the delays. The Solicitor is, however, cautioned that the delays in processing which occurred here are troubling.

In addition and most importantly, respondent has not demonstrated that he has been prejudiced by the delays. He asserts that he runs the risk of witness and document unavailability. But he does not show that any such unavailability has occurred. In this case I will not infer prejudice from the passage of time alone.

Respondent cites the ALJ decision in Curtis Crick, 15 FMSHRC 735 (April 1993). In that case the Secretary did not timely request an extension within which to file the penalty petition. It is therefore, distinguishable from this matter. To the extent that Curtis Crick is contrary to anything herein, it is not binding upon me and I decline to follow it. 29 C.F.R. § 2700.72. More to the point is the recent ALJ Order Denying Motions To Dismiss dated August 8, 1995, in Cedar Creek Quarries et al, 17 FMSHRC_____, (Docket No. WEST 94-637 et al). In Cedar Creek the Administrative Law Judge refused to dismiss a 110(c) case where the investigation took fifteen months.

In light of the foregoing, I conclude that the time elapsed between the issuance of the first citations and the Notice of Proposed Assessment does not constitute a basis for dismissal in this case. In addition, I conclude that dismissal is not warranted when the 60 day extensions granted the Solicitor is added to the prior period.

In light of the foregoing it is ORDERED that the motion to dismiss be DENIED.

It is further ORDERED that the filing of the penalty petition be ACCEPTED.

The case will be assigned by separate order.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in black ink on a white background.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Robert A. Goldberg, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Laura E. Beverage, Esq., Jackson & Kelly, 1660 Lincoln Street, Suite 2710, Denver, CO 80264

Mr. James Lee Hancock, HCR 63, Box 201, Raton, New Mexico 87741

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 414, Arlington, VA 22203

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