NOVEMBER 1985

Commission Decisions

10-17-85	The NACCO Mining Company	LAKE 85-87-R	Pg. 1729
11-13-85	The NACCO Mining Company	LAKE 85-87-R	Pg. 1733
11-15-85	Kenneth Wiggins v. Eastern Assoc. Coal Corp.	WEVA 82-300-D	Pg. 1766
11-19-85	Gary Goff v. Youghiogheny & Ohio Coal Co.	LAKE 84-86-D	Pg. 1776
11-21-85	Dilip Paul v. P.B. - K.B.B., Inc.	CENT 83-42-DM	Pg. 1784

Administrative Law Judge Decisions

11-01-85	Co-Op Mining Company	WEST 84-64	Pg. 1794
11-04-85	Wayne Howard v. Double D & T Coal Co., & Little Robin Coal Co., Inc.	WEVA 85-48-D	Pg. 1800
11-04-85	Pyro Mining Company	KENT 84-236	Pg. 1805
11-06-85	Hobet Mining & Construction Co.	WEVA 84-113-D	Pg. 1807
11-08-85	MSHA/Dennis Jones v. Southern Ohio Coal Co.	WEVA 85-299-D	Pg. 1817
11-12-85	Beckley Coal Mining Company	WEVA 85-28	Pg. 1818
11-13-85	Jimmy R. Mullins v. Beth-Elkhorn Coal Corp.	KENT 83-268-D	Pg. 1819
11-14-85	Stemco Coal Company, Inc.	KENT 85-156	Pg. 1900
11-18-85	Bear Coal Company, Inc.	WEST 85-51	Pg. 1906
11-18-85	Emery Mining Corporation	WEST 85-95-R	Pg. 1908
11-19-85	Lava Products, Inc.	WEST 84-72-M	Pg. 1921
11-19-85	Pyro Mining Company	KENT 85-12	Pg. 1926
11-21-85	Youghiogheny & Ohio Coal Company	LAKE 85-59	Pg. 1938
11-22-85	MSHA/Acton etal. v. Jim Walter Resources	SE 84-31-D	Pg. 1952
11-25-85	Local 1859, Dist. 22, UMWA v. Emery Mining	WEST 85-70-C	Pg. 1956
11-25-85	Disciplinary Proceeding	D 85-2	Pg. 1957
11-25-85	Alamo Transit Mix Concrete Co.	CENT 84-18-M	Pg. 1961
11-25-85	Keffler & Rose Enterprises, Inc.	LAKE 85-49	Pg. 1967
11-25-85	Local 1859, Dist. 22, UMWA v. Emery Mining	WEST 85-68-C	Pg. 1969
11-26-85	N.L. Baroid-Div. of N.L. Industries, Inc.	CENT 85-6-M	Pg. 1970

NOVEMBER

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

Local 5817, District 17, UMWA v. Monument Mining Corporation and Island Creek Coal Company, Docket No. WEVA 85-21-C. (Judge Koutras, Sept. 27, 1985).

Kenneth Hall v. Clinchfield Coal Company, Docket No. VA 85-8-D. (Judge Broderick, September 27, 1985).

Secretary of Labor on behalf of Donald Hale v. 4-A Coal Company, Inc., Docket No. VA 85-29-D. (Judge Kennedy, October 1, 1985).

Secretary of Labor, MSHA v. Westmoreland Coal Company, Docket Nos. WEVA 82-152-R, 82-369. (Judge Melick, October 11, 1985).

Review was denied in the following cases during the month of November:

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 84-98. (Judge Kennedy, Interlocutory Review of October 4, 1985 Order).

Secretary of Labor on behalf of Phillip Cameron v. Consolidation Coal Co., Docket No. WEVA 82-190-D. (Judge Merlin, October 22, 1985).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 17, 1985

THE NACCO MINING COMPANY	:	
	:	
v.	:	Docket No. LAKE 85-87-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
and	:	
	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

On September 13, 1985, Nacco Mining Company notified the Commission of its belief that an ex parte communication between the presiding administrative law judge, Joseph B. Kennedy, and a witness who had testified before him had occurred subsequent to the hearing in this matter. According to NACCO, it had requested the judge to place a statement detailing the conversation in the public record, but the judge had not done so.

On September 17, the Commission issued an order directing the judge and the witness to submit sworn statements "making a full and complete disclosure of all circumstances surrounding the alleged conversation and all details of its substance." Both participants to the conversation have submitted the ordered statements, although it must be noted that the judge's statement is much in the nature of an argumentative brief. Nacco has filed a response to the judge's statement in the form of a rebuttal.

Based on our review of these submissions we conclude that an ex parte communication within the meaning of 5 U.S.C. § 551 (14) occurred when the miner who had appeared before the judge as a witness contacted the judge to tell him that he believed that the operator subsequently had threatened his job. This is especially true in the present case where the witness was the individual who engaged in the conduct causing the operator to be charged with a violation of the Act. This communication did not concern the merits of the review proceeding pending before the judge, however, and therefore was not a prohibited ex parte communication under 5 U.S.C. § 557(d) and 29 C.F.R. § 2700.82. Nevertheless, in Knox County Stone Co., 3 FMSHRC 2478 (Nov. 1981), the Commission required that when even "innocent or de minimis ex parte communications occur ... they shall be placed on the public record...." 3 FMSHRC at 2486. The judge states that immediately after his conversation with the miner he placed his contemporaneous notes of the conversation in the "public record" and arranged a conference telephone call among all parties during which the substance of the earlier call was reiterated. 1/ The judge suggests that in doing so he fulfilled all applicable requirements.

It is evident from the record, however, that the judge never informed the operator of the fact that he had placed his notes in the record. In fact, after the operator respectfully requested the judge to place a statement describing the nature of the conversation in the record, the judge failed to follow through on his "first thought .. to give [NACCO] a statement, together with a copy of the notes of the conversation ... which were in the public record." Statement at 9. Instead of following this course, which is the obvious and proper method of addressing the operator's legitimate concerns, the judge, without explanation, scheduled a further hearing for the purported purpose of allowing questioning of the miner-witness regarding the conversation. In doing so the judge erred. Although a judge has discretion in regulating the course of proceedings before him, in this instance there is no record support justifying such a further hearing. The "conspiracy" theory espoused by the judge is utterly lacking in record foundation. In this scenario, conjured up by the judge, the operator's attorney may have caused the operator's foreman to "threaten" the miner, knowing that the miner would then contact the judge, thereby allowing the operator's attorney to move to have the judge removed from the case. This unsupported speculation on the part of the judge plainly is an insufficient basis for subjecting the parties to a further hearing. Therefore, the judge's order scheduling a further hearing is vacated.

Since the statements initially sought by the operator have now been placed in the record, the case is returned to the judge for necessary further proceedings on the merits. Before we do so, however, we briefly address certain other areas of concern. First, we reject the judge's

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1/ We will assume that the notes were, in fact, placed in the official public record. This assumption is not made without some pause, however. In footnote 9 of his statement the judge attempts to broaden the meaning of public record. As the judge is well aware, there is only one official public record associated with every Commission docket. A document is either in such record or it is not.

attempt to justify his solicitation of the off-the-record contact with the miner-witness that occurred. Whether the judge was motivated by section 105(c) of the Mine Act, 30 U.S.C. § 815(c), or the Federal Victim and Witness Protection Act, 18 U.S.C. §§ 1512-1515, those statutes place the responsibilities sought to be assumed by him in the hands of law enforcement personnel, not administrative law judges of this adjudicatory Commission. If the judge wishes to advise witnesses before him of their rights under federal statutes he should at least make sure his advice is accurate. By seeking to assume the role statutorily placed in other federal departments the judge has confused the adjudicatory function of this agency with the prosecutorial function of MSHA. Second, while we are aware of the concern raised by the operator regarding whether, in light of the tenor and content of certain statements in the judge's submission, a fair decision on the merits of the proceedings can be rendered by the judge, the better course of action is to provide the judge the opportunity to render a final decision based strictly on the record and in accordance with the Commission's rules and the requirements of the APA. Upon completion of this duty, the usual review mechanism is available for measuring the judge's findings and conclusions against applicable standards.

Accordingly, our previously imposed stay of proceedings is dissolved and the case is returned to the judge for briefing by the parties on the merits, if desired, and entry of a final disposition on the merits.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 1985

THE NACCO MINING COMPANY	:	
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 85-87-R
and	:	
UNITED MINE WORKERS OF AMERICA	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

On October 17, 1985, the Commission returned this proceeding to the administrative law judge with instructions to proceed to a final disposition on the merits. In this order the Commission explained why an off-the-record conversation between the presiding judge and a witness who had appeared before him, although ex parte, was not a prohibited ex parte communication. The Commission also explained why a further hearing ordered by the judge was unwarranted. Contrary to a request by the operator that the case be reassigned, the Commission further explained why the presiding judge should be given an opportunity to decide the case based on the record before him in accordance with governing procedures.

On November 5, 1985, the judge placed in the record a "Statement of Nonacquiescence". We attach the judge's statement to this order as a means of demonstrating its content that is preferable to any attempt to summarize it. In his statement the judge declares that he "cannot, in good conscience, become a party even tacitly to the Commission's suppression order or permit my silence to be so construed regardless of the consequences in terms of further political retaliation" (Statement at 2-3), and he states that he is "compelled to disassociate myself from the strictures on decisional autonomy implicit in the Commission's order of remand." Statement at 6.

In view of the judge's expressed refusal to follow the order of the Commission in this matter, his jurisdiction in this proceeding is hereby terminated. This case is reassigned to the Chief Administrative Law Judge for the completion of the proceedings on the merits that was previously ordered.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
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November 5, 1985

THE NACCO MINING COMPANY v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) and UNITED MINE WORKERS OF AMERICA	:	Docket No. LAKE 85-87-R

STATEMENT OF NONACQUIESENCE

In his sworn statement of September 28, 1985 (copy attached), the trial judge set forth his reasons for believing that the Rule 82 inquiry initiated at the request of the coal operator's lawyers should proceed to hearing to determine whether Nacco or any other interested persons "knowingly made or knowingly caused to be made" the potentially disqualifying ex parte communication of August 8, 1985.

By its order of October 17, 1985, however, the Commission abruptly terminated the trial judge's jurisdiction to pursue the matter and proceeded to whitewash and coverup the serious questions of misconduct raised by the trial judge's statement.

The record shows that in order to escape the thicket of its complicity and absolve the operator of responsibility, the Commission chose to foreclose inquiry into why Mr. Sikora did what

he did when he did it. It also chose to foreclose inquiry into why the coal operator's lawyers, after first conceding there was no impropriety involved in the Palmer contact, decided to use it to suggest disqualification.

Ignoring the serious adverse inferences that flow from Nacco's refusal to permit Mr. Sikora to testify or even make a written statement, the Commission in an act of administrative noblesse oblige granted Nacco and its lawyers the functional equivalent of a Fifth Amendment immunity. Thus, without consulting the other parties and in cavalier disregard for the Sunshine Act, the Commission has decreed that it is not going "to let the sun shine in".

Because the Commission's disposition of Nacco's interlocutory appeal approves Nacco's proposal to suppress a legitimate inquiry and condemns the trial judge for seeking a full and true disclosure of the facts, I wish the record to show my nonacquiensence in the Commission's action. I find the Commission's action to be not simply in error but <u>in pari delicto</u> and not simply an abuse of discretion but an egregious abuse of process and usurpation of the powers conferred by Congress under § 556(c) of Title 5 of the United States Code (the APA) on the trial judge.

Subsection (c)(4) of § 556 as well as § 557(d)(1)(D) of the Sunshine Act specifically and independently empower the presiding judge to "take depositions or to have depositions taken when the ends of justice would be served." I cannot in good conscience

become a party even tacitly to the Commission's suppression order or permit my silence to be so construed regardless of the consequences in terms of further political retaliation.

The Commission's remand order of October 17 also raises matters of concern to the trial judge and those interested in vigorous enforcement of the mine safety laws.

First is the Commission's admonition to the trial judge to refrain from advising miners who appear as witnesses against mine operators of the protection afforded them against retaliation or retribution.

The suggestion that miners' retaliation complaints can be addressed only to the Mine Safety and Health Administration of the Department of Labor is clearly erroneous. The courts have held that "an employee's right to testify freely in mine safety proceedings encompasses the giving of statements" and the "filing of complaints" with government officials other that MSHA investigators. See Secretary v. Stafford Construction Company, 732 F. 2d 954 (D.C. Cir. 1984); Phillips v. Board of Mine Operations Appeals, 500 F. 2d 772 (D.C. Cir. 1976), cert. denied 420 U.S. 938 (1975).

As the court noted in Stafford Construction, Congress intended that the Mine Act be "construed expansively to assure that miners will not be inhibited in any way from exercising rights afforded by this legislation." Indeed, since the anti-discrimination provisions of the Mine Act apply to MSHA as well as any other "person" who discriminates, it would be incongruous

to suggest that a miner discriminated against by MSHA can file his complaint only with MSHA. See Local 9800, UMWA v. MSHA, 2 FMSHRC 2680 (1980). 1/

As my statement of September 28, 1985, points out, the same considerations apply with equal, if not greater, force to complaints of retaliation or intimidation under the recently enacted Victim and Witness Protection Act of 1982.

My second concern with the remand order is its suggestion that the trial judge's criticism of the actions of the Commission indicates an incipient disqualifying bias against Nacco. I find the Commission's attempt to place its thumb on the scales of justice while the underlying safety enforcement proceeding is still before the trial judge on the merits highly improper. It is arrogant and unprincipled to suggest the trial judge ignore the impressions that resulted from the evidence he heard and the decision he rendered before the August 8 contact.

Whether the adverse bench decision of July 31 provided the motive or impetus for the Sikora threat of August 7 that resulted

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1/ It is worth noting that the office of the solicitor of the Department of Labor, the erstwhile prosecutor, declined to sponsor Mr. Palmer as a witness. The solicitor apparently knew that Mr. Palmer would testify that he was in effect required to risk his life and that of his fellow miners in order to keep his job. For the office of the solicitor to elicit such highly incriminating testimony would be most damaging to Nacco's claim that it had no responsibility for Palmer's actions. Calling Palmer to testify would also have been a violation of former Secretary Ford B. Ford's policy of "cooperative enforcement". It was clear to this trial judge, therefore, that if Mr. Palmer was to receive any witness protection it would have to come from the trial judge. I could not in good conscience on the one hand encourage Mr. Palmer to testify freely and on the other leave him to the tender mercies of Nacco and MSHA.

in the allegedly disqualifying contact by Palmer on August 8 was the principal reason the trial judge ordered the taking of their depositions. The question of whether the trial judge was "set up" was not something "conjured up" by the trial judge. Both the Union and MSHA thought the inquiry on this should go forward. Because the Commission decided the inquiry might be embarrassing to Nacco, it has, I believe, improperly intervened to order that the Rule 82 inquiry not proceed. This is the type of coverup that impugns the integrity of the Commission's process.

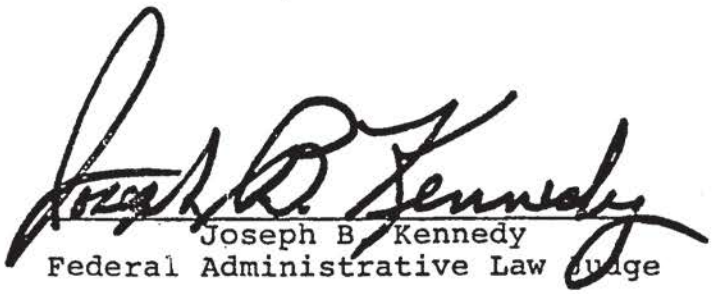
Finally, I find most disturbing the Commission's tacit promise to circumvent, if necessary, the deferential standard of review applicable to the trial judge's findings. Under the statute and controlling decisions of the courts such findings are conclusive if supported by substantial evidence. Donovan v. Phelps Dodge Corp., 709 F. 2d 86 (D.C. Cir. 1983). The Commission's reference to the "usual review mechanism" as the standard against which the trial judge's final disposition will be "measured" is most disquieting as it is a standard not reflected in either the statute or the case law.

We all know that "mechanisms" are subject to manipulation and certainly the imprecise concept of disqualifying bias or its appearance is one of them. In view of the Commission's personal involvement in the unsuccessful attempt to disqualify the trial judge, it would have been more prudent and judicious for the Commission to have remanded the matter for final disposition by

the trial judge, with recusal of the Commission from its review function leaving that to the courts as provided by precedent and the statute.

For these reasons, I feel compelled to disassociate myself from the strictures on decisional autonomy implicit in Commission's order of remand.

Accordingly, it is DIRECTED that this statement of non-acquiesence be made a part of the public record of this proceeding. It is FURTHER DIRECTED that this statement be served on the Commission and the parties, and be published to those committees of Congress responsible for oversight of the Commission's activities.



Joseph B. Kennedy
Federal Administrative Law Judge

Distribution As Ordered.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 1985

THE NACCO MINING COMPANY	:	
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 85-87-R
and	:	
UNITED MINE WORKERS OF AMERICA	:	

TRIAL JUDGE'S RESPONSE

Pursuant to 28 U.S.C. § 1746 and subject to the penalties for perjury, the trial judge in this proceeding makes the following statement in response to the Commission's order of September 17, 1985.

I.

On July 19, 1985, William E. Palmer, a continuous mining machine operator for Nacco Mining Company testified as a bench witness in this proceeding. 1/ Prior to giving his testimony, the trial judge advised Mr. Palmer on the record of his witness

1/ Mr. Palmer was the mining machine operator allegedly responsible for the unwarrantable failure (working under unsupported roof) violation charged in this proceeding. He was listed as a witness for Nacco in its pretrial submission of July 15, 1985. At the commencement of the hearing on July 18, 1985, however, Mr. Reidl, counsel for Nacco, announced that he would not call Mr. Palmer as a witness for the operator. The trial judge then ordered the appearance of Mr. Palmer as a bench witness (Tr. 48-51).

protection rights under § 105(c) of the Mine Act and instructed him, pursuant to the Federal Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515, to contact the trial judge's office "if he felt he was being unfairly retaliated against by anyone as a result of his testimony" (Tr. 415). 2/

Neither during the introduction of the witness Palmer, nor at any time during the balance of the trial did counsel for Nacco or any other party raise any objection to the handling of the witness Palmer. The trial on the merits concluded on Wednesday, July 31, 1985, with the trial judge rendering an unfavorable tentative bench decision against Nacco. 3/

Eight days later, on Thursday, August 8, 1985, the trial judge received a call from Mr. Palmer. In substance, Mr. Palmer, after first identifying himself, said that in the dinner hole the night before his section foreman, Stanley Sikora, told him in the presence of the rest of the crew that he, Sikora, had to produce 550 tons of coal per shift or lose his job and that if he lost his job he was going to take someone with him. Palmer said he considered Sikora's statement was a threat against his job.

2/ Section 6 of the Witness Protection Act provides that in "any proceeding before a Federal Government agency which is authorized by law" the presiding officer "should routinely" advise witnesses on steps that may be taken to protect them from intimidation. Section 1513 provides criminal penalties for retaliating against witnesses and informants in official proceedings. The legislative history shows that this prohibition "extends to the situation where the retaliation takes the form of discharging a person from his job." Sen. Rep. 97-532, 97th Cong., 2 Sess. 20-21 (1982).

3/ A copy of the bench decision is attached as Exhibit A.

Palmer also complained that Nacco had put the original helper back, the "greenhorn", and told him, Palmer, that he had to run the miner in every cut, except one. The trial judge told Mr. Palmer he would make a record of his complaint.

The trial judge made typed notes of Mr. Palmer's complaint, placed them in the public record and asked the office manager to place a conference call to counsel for the parties. When the conference operator reported a two-hour lead time would be required to complete the call, the trial judge left instructions to set up the call for 3:00 p.m. The trial judge's conversation with Mr. Palmer lasted approximately three minutes. To verify the authenticity of the call, the trial judge asked Mr. Palmer for his address and phone number. There were no other details offered or solicited. The trial judge has not spoken to Mr. Palmer on or off the record since August 8, 1985. 4/

Mr. Sikora testified as a witness for Nacco in this proceeding. He claimed he did not know and had no reason to know that Mr. Palmer had operated the continuous mining machine in a manner that showed a reckless disregard for his safety and that of his co-workers. Despite its claim that Sikora was not and should not have been aware of what Palmer did, Nacco suspended him for approximately three weeks without pay for his failure to notice

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4/ A copy of the trial judge's contemporaneous notes of his conversation with Mr. Palmer and later with counsel as they appear in the public record are attached hereto and made a part hereof as Exhibit B. The trial judge put his notes in the public record not to record an illegal oral communication with Mr. Palmer but to establish a record of Mr. Palmer's complaint and the fact that it had been relayed to counsel for investigation.

and report Mr. Palmer's dereliction. Further, Nacco never denied the fact that the violation occurred or its potential for causing a fatality or seriously disabling injury. The sole contest was over Nacco's responsibility for Palmer's admittedly highly culpable act. This was phrased as a challenge to the propriety and legality of the subdistrict manager's finding that the violation was unwarrantable and that the 104(a) citation should be upgraded to a 104(d)(1) citation.

The post hoc simplicity of the factual and legal issues presented masked the fact that from the outset the stakes for all parties were high. If the tentative bench decision is confirmed and upheld, Nacco may be subject to summary closure orders until it passes a "clean" inspection. This could make the risk of noncompliance very expensive for Nacco. On the other hand, MSHA and the Union believe that recission of the unwarrantable failure finding may significantly and substantially increase the risk of death or disabling injuries in this mine. Under the circumstances, it is understandable that the operator would seek the sympathetic assistance of the Commission in removing the trial judge from further participation in the decision of this case.

After the conference call came in at 3:00 p.m., on Thursday, August 8, 1985, the trial judge relayed to counsel the substance of Mr. Palmer's complaint. As the trial judge's handwritten notes indicate, there was general agreement that Mr. Palmer's complaint raised no ex parte considerations. In fact, Mr. Reidl,

counsel for Nacco, stated that he thought the complaint had "no relevance" to the concluded contest proceeding. See footnote 10, infra. Its relevance to a violation of § 105(c) was left for counsel to investigate.

The only off-the-record communication that ever occurred between Mr. Palmer and the trial judge was on August 8, 1985, as relayed to counsel. It was not an illegal or prohibited communication within the meaning of the Sunshine Act because:

1. All parties were on notice from the time Mr. Palmer testified on July 19, 1985, that he was to report any retaliatory action to the trial judge. No counsel objected to this procedure. The legislative history of the Sunshine Act shows Congress knowingly intended to exclude two categories of off-the-record communications from the definition of "ex parte communication" as set forth in 5 U.S.C. § 551(14). Thus, as the Senate Report noted: "A communication is not ex parte if either (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable notice. If a communication falls into either of these two categories, it is not ex parte." Legislative History, Sunshine Act, 233, 533, 571 (1976). From and after July 19, 1985, counsel for Nacco had advance notice with adequate opportunity to object to the possible receipt of an off-the-record communication by the trial judge from Mr. Palmer. Counsel for Nacco never objected or demanded the right to be present when and if such a communication occurred.

2. All parties were seasonably informed of the substance of Mr. Palmer's report to the trial judge and the trial judge's notes of the communication were placed in the public record at the time it was made.

3. Mr. Palmer was a bench witness who appeared under compulsory process. His complaint to the trial judge and its contemporaneous relay to all parties was a protected activity under the Mine Act and "consistent with the interests of justice and the policy" of both the Mine Act and the Sunshine Act. 5 U.S.C. § 557(d)(1)(D); 30 U.S.C.§ 815(c)(1).

4. Mr. Palmer was not an "interested person" within the meaning of § 557(d)(1)(A) of Title 5 because he had no "special interest" in the outcome of the contest proceeding in which he testified as a public witness. Leg. His., supra, 231.

5. Mr. Palmer's complaint was not relevant to the merits of the contest proceeding which was concerned only with events which occurred in June 1984. It could not influence the trial judge's decision as the hearing on the merits was concluded and a tentative bench decision adverse to Nacco made on July 31, 1985.

In Patco v. FLRA, 685 F. 2d 547, 563 (D.C. Cir. 1982), the Court held that in the Sunshine Act, "Congress sought to establish common-sense guidelines to govern ex parte contacts in administrative hearings, rather than rigidly defined and woodenly applied rules." The Act is not a no-fault liability statute. Its sanctions apply only to "a party" who "knowingly makes or knowingly causes to be made" a communication in violation of § 557(d). Mr. Palmer, of course, was not a party to this proceeding and neither was the trial judge. Further the trial judge did not "knowingly make or knowingly cause to be made" an off-the-record communication by Mr. Palmer. The timing of the communication was, insofar as the trial judge was concerned, pure happenstance.

The Sunshine Act and its legislative history show that sanctions may be imposed on a party, a new trial granted, or disciplinary action taken against an agency official only where a contact was "knowingly made or knowingly caused to be made" and was not "clearly inadvertent," "unintentional", "innocuous" or "non-

prejudicial". 5/ Patco v. FLRA, supra 564-566, 567, 574-575; 5 U.S.C. § 557(d)(1)(D); 556(d). Indeed, in Patco the court held that Congress intended that the drastic sanctions of dismissal or denial of a party's interest should be applied only in the rare case where a party secretly and corruptly sought to influence the decisionmaking process. Id. 564-565, 571, 574-575. At this stage of this case, all we know is that the contact was made by a nonparty. What we do not know is whether Mr. Palmer was the witting or unwitting instrument of a party's desire to establish an ex parte contact. Because Mr. Palmer was employed by one of the parties, Nacco, at the time of the contact, because recent decisions by the Commission lend color to the view that any ex parte communication, however inadvertent, innocuous or harmless,

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5/ Contrary to Nacco's suggestion, the Commission may not void a proceeding or censure a trial judge for an "inadvertent", "innocuous" or "nonprejudicial" ex parte contact. The legislative history shows that a proceeding may be voided or disciplinary action taken against an agency official only where (1) the contact was "knowingly made or knowingly caused to be made by a party" and (2) such action is "consistent with the interests of justice and the policy of the underlying statues administered by the agency." Legislative History, supra, 232-234; 532, 533; 570-571. The Senate Report noted:

> "The subsection specifies that an agency may rule against a party for making an ex parte communication only when the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, the committee concluded that an agency should not definitively rule against a party simply because of an inadvertent violation. It is expected that an agency will rule against a party under this subsection only in rare instances." Leg. Hist., supra, 534.

may justify removal of the trial judge from the proceeding, 6/ and because one of the parties, Nacco, might benefit by removal of the trial judge or voiding of the proceeding, the trial judge in the interest of justice and fairness to all concerned ordered the record reopened and the matter set for hearing after Nacco indicated it wished to challenge the Palmer contact and "all other off-the-record contacts between" the trial judge and Mr. Palmer. 7/

As in Patco, the trial judge under the authority of section 557(d)(1)(D) and 556(d) set Mr. Reidl's inquiry for exploration at a hearing, not because he assumed he "would find serious wrongs or improprieties, but because the allegations of misconduct were serious enough to require full exploration." Id. 566.

The trial judge believes that the steps he took to publicly record and relay Mr. Palmer's complaint to the parties in interest on August 8 fully satisfied the Sunshine Act's requirement of public disclosure of an off-the record communication. Patco, supra, 564. The second remedy, the application of sanctions against any party that "knowingly" violated the Act was to be explored at the hearing at which Mr. Palmer, Mr. Sikora or any other witnesses necessary to a full and true disclosure of the facts would be called. Without explanation for its precipitate action, the Commission stayed this hearing indefinitely on September 17.

6/ T. P. Mining Company, 7 FMSHRC 1010 (July 10, 1985); Peabody Coal Company, 7 FMSHRC ____, (August 5, 1985).

7/ Nacco has never furnished any factual basis for its inflammatory assertions concernning "other off-the-record" contacts.

II.

Since on August 8 counsel voiced no problem with Mr. Palmer's communication to the trial judge and since the trial judge had concluded that receipt of the communication was wholly "consistent with the interests of justice and the purposes of the underlying statues administered by the agency" (5 U.S.C. § 557(d)(1)(D), 556(d))), he gave no further thought to the matter until August 19 when he received Mr. Reidl's August 13 letter demanding a "written statement describing in detail all off-the-record communications that have taken place between you and Mr. Palmer." In light of Mr. Reidl's statements during the August 8 conference call, the trial judge was, to say the least, surprised at this "demand." The trial judge's first thought was to give Mr. Reidl a statement, together with a copy of the notes of the conversation with Palmer which were in the public record. But then the trial judge realized that such candor might not be consistent with the interests of justice or fair to Mr. Palmer, the other parties or the trial judge. For this reason and because of the shocking breadth of the charges, as more fully developed in Part III below, the trial judge issued an order on August 20 setting a hearing for September 11 at which the parties would be able to examine Mr. Palmer regarding not only his August 8 conversation with the trial judge but any others that might have occurred. On September 4, the trial judge issued a further order in which, inter alia, he ordered Nacco to

submit a statement from Mr. Sikora regarding his August 7 conversation with Mr. Palmer.

On September 17, the Commission summarily obstructed the orderly procedure adopted by the trial judge for ascertaining the true facts pertaining to Nacco's charges. The basis of the Commission's September 17 order is the allegation by Nacco that the trial judge engaged in a prohibited ex parte communication with Mr. Palmer on August 8. As relief for this allegedly improper communication, Nacco requested that the Commission (1) order the trial judge to "place on the public record a written statement detailing the substance of an alleged ex parte communication" of August 8, 1985, (2) assign another judge to conduct a special hearing to determine "the nature, extent, source and effect of this and any other ex parte communication connected with this case" and (3) to vacate the trial judge's orders of August 20 and September 4. Notification of Ex Parte Communication (hereafter Notification). p.2.

For any component of the requested relief to be granted, a finding must be made that an ex parte communication prohibited by Commission Rule 82 occurred during the trial judge's phone conversation with Mr. Palmer on August 8. Rule 82 directs that a statement of an ex parte communication be placed in the public record and authorizes the issuance of such orders as fairness requires <u>only</u> "[i]n the event an ex parte communication in violation of this section occurs." As we have seen, no prohibited

ex parte communication occurred on August 8. 8/.

Assuming for purposes of argument that Mr. Palmer violated 5 U.S.C. § 557(d)(1)(A) and Rule 82 by phoning the trial judge ex parte on August 8, the actions of the trial judge took following that phone conversation complied fully with the Sunshine Act and Rule 82 and thus provided Nacco with all the protection and relief to which it is entitled.

As stated above, immediately upon the conclusion of Mr. Palmer's call, the trial judge placed the fact and substance of his call on the public record of this proceeding. 9/ In addition, in order to ensure that the parties received actual notice of Mr. Palmer's communication, the trial judge also placed a conference call to counsel for the parties. During that call, the trial judge informed counsel that he had received a call from Mr. Palmer and relayed its substance. See Affidavit of Paul W.

8/ The trial judge notes that the Commission's September 17 order does not initiate any disciplinary proceeding under Rule 82 against the trial judge. As Rule 82 expressly provides, such a proceeding must be preceded by an appropriate notice to those against whom an "ex parte communication" charge is being made, and no decision on or factual findings relevant to the charge may be made unless based upon the record of an evidentiary hearing at which the accused have been afforded the opportunity to present their own evidence and cross-examine the witnesses presented against them. The September 17 order contains no such notice and provides no such opportunity for an evidentiary hearing.

9/ The legislative history of the Sunshine Act defines the term "public record" as "the docket or other public file containing all the material relevant to the proceedings, including the public file of * * * related matters not accepted as evidence in the proceeding." Leg. Hist., supra, 233. The file in which the trial judge placed his typed notes of Mr. Palmer's communication is clearly part of the "public record" of this proceeding.

Reidl (Attachment 2 to Nacco's Notification), paras. 4-6. 10/ Thus, on August 8, within four hours of Mr. Palmer's call, the parties had actual and complete notice of the substance of the communication he had made to the trial judge, and, as a result, they had the opportunity to respond on the record in any manner they deemed appropriate.

The trial judge's August 8 memorandum for the record and conference call to counsel for the parties fully satisfied the requirements of 5 U.S.C. § 557(d)(1)(C). Section 557(d)(1)(C) provides that, following receipt of an improper ex parte oral communication, a presiding official "shall place on the public record of the proceeding * * * [a] memorand[um] stating the substance of [the] oral communication * * * *. The Senate report on the Sunshine Act defined the purpose of § 557(d)(1)(C) as follows (Leg. Hist., supra, 232):

> The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. * * * In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

10/ It is relevant to note that, as shown by his affidavit, Mr. Reidl did not even suggest during the August 8 conference call that he believed Mr. Palmer's call may have been an improper ex parte communication. Indeed, Mr. Reidl acknowledges that, during the conference call, he "asked why were we having this conversation." Id., para. 7. Nacco's failure even to suggest on August 8 that an ex parte communication problem might exist strongly suggests that the challenge to Mr. Palmer's communication is nothing but a desperate effort to have the trial judge's tentative decision vacated by the Commission and this case assigned to another trial judge.

The trial judge's actions on August 8 following Mr. Palmer's phone call provided just such actual notice to the parties of his call and of the nature of his communication. Thus, Nacco has already obtained all the protection and relief to which it might possibly be due as a result of Mr. Palmer's communication to the trial judge on August 8. 11/

Since Nacco has already obtained the relief to which it was due if Mr. Palmer's call was an improper ex parte communication, it is plainly not entitled to, and there is clearly no need for, the assignment of "a Special Judge to hold an evidentiary hearing to determine the nature, extent, source and effect of this and other ex parte communications connected to this case involving" the trial judge. Notification, p. 2. 12/

Stripped of its pejorative rhetoric, Nacco's position is that trial judges who receive what may be an ex parte communication, who then fully comply with the APA and Rule 82 by placing the communication on the public record and who go even further by

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11/ Indeed, since the Commission has not issued any regulation which requires its trial judges to go beyond placing a memorandum of an ex parte communication in the public record (see Rule 82(b)(2)), Nacco and the parties were not in any sense "entitled" to the conference call placed to them on August 8 by the trial judge.

12/ Nacco's reference to "other ex parte communications" is totally unsubstantiated. Based upon a single call from a witness to the trial judge and as part of its apparent effort to avoid the consequences of his tentative decision, the company raises--without the slightest evidence--the specter of further illegal ex parte communications in this proceeding. Its reference to such "other" communications in wholly without merit and provides no basis whatsoever for the assignment of a "Special Judge."

providing actual notice of the communication to the parties and an opportunity to respond must be subject to Commission or "Special Judge" review to determine whether they remain capable of adjudicating the case. Nacco's position is absurd and an insult to the integrity of the Commission's administrative law judges. It must be rejected in the firmest terms by the Commission. 13/

III.

Under the Sunshine Act and the Commission's rules, whenever a communication received from an outside source is challenged as illegal or prohibited, the judge presiding over the proceeding has to make an initial determination of (1) whether the communication was a prohibited ex parte contact, and (2) whether it was seasonably and adequately disclosed in the public record. For reasons already stated, the trial judge believed the Palmer contact was not a prohibited ex parte contact and that in any event it had been seasonably disclosed in the public record. By its letter of August 13, however, Nacco asserted a right to challenge not only the Palmer contact of August 8 but other unspecified ex parte contacts "that have taken place between you and Mr. Palmer."

When the trial judge issued his order of August 20, 1985, therefore, he contemplated that the reopened hearing would

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13/ Nacco has not alleged any bias or any unfair conduct on the part of the trial judge in this proceeding. Rather, its request for the assignment of a special judge is premised solely upon the trial judge's receipt of Mr. Palmer's call.

explore the facts relating to the Palmer contact of August 8 and whatever other facts Nacco had to offer as to other contacts between Mr. Palmer and the trial judge. Because counsel for Nacco declined to produce Mr. Sikora voluntarily as a witness, the trial judge determined to await the receipt of Mr. Palmer's testimony which, if Mr. Reidl were correct, would disclose the other alleged contacts between him and the trial judge. He also determined that depending upon Mr. Palmer's disclosures it might be necessary to call Mr. Sikora or other witnesses with knowledge material to a full and true disclosure of the facts. Because the trial judge was not in a position to respond to Nacco's request for the disclosure of contacts with Mr. Palmer that never occurred, the trial judge determined that in fairness to all parties, as well as the trial judge, Mr. Palmer's sworn testimony as to all contacts between him and the trial judge should be taken in open court. 14/

Surprisingly enough, Nacco objected not only to making Sikora available voluntarily but to any hearing at all to explore its charges including its charges of secret, unspecified contacts between Mr. Palmer and the trial judge. The other parties on the other hand agreed with the procedure proposed by the order of August 20 asserting a right to be present when Mr. Palmer was

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14/ During the teleconference of August 26, counsel agreed that in order to preclude any taint of Mr. Palmer's testimony he would be deemed sequestered until he testified and that the trial judge would issue a subpoena to be served by Mr. Myers, counsel for the Union.

asked to disclose not only the details of the August 8 contact but the other unspecified contacts.

In its motion to vacate the trial judge's order reopening the record, filed August 30, Nacco, eithout explanation, dropped its charges of other, secret, unspecified ex parte contacts with Mr. Palmer and sought only "a written statement detailing [the trial judge's] conversaton with Bill Palmer."

To afford the other parties the time accorded them under the Commission's rules to respond to Nacco's motion to vacate the order setting the 557(d) hearing for September 11, the trial judge issued an order on September 4 continuing that hearing until further order. To permit the trial judge to better evaluate the necessity for calling Mr. Sikora, this order directed Nacco to furnish "a statement from Mr. Sikora concerning his post-hearing remark to Mr. Palmer". By this time, the trial judge determined that the hearing to explore the alleged contacts with Palmer might also have to explore whether Sikora's alleged threat on August 8 had been made--or whether Sikora had been induced by others to make it--with the knowledge that Palmer would follow the instructions given at the July 19 hearing and call the trial judge. Communication of the threat to the trial judge could then, as it was, be challenged as a prohibited ex parte communication and presented to the Commission as a basis for removal of the trial judge from this proceeding and vacation of his tentative decision. Consequently if the alleged threat to Palmer was, in fact, made or was caused to be made with such knowledge or

purpose, Palmer's call might well constitute an illegal ex parte communication within the meaning of 5 U.S.C. § 557(d)(1)(D), and thus subject that party and/or the individuals responsible to the sanctions provided in 5 U.S.C. § 556(d) and Rule 82(b)(1) of the Commission's rules. Under § 556(d) and Rule 82, if the Commission finds that an attorney was instrumental in causing such a violation it may prohibit that individual from practicing before the agency. Leg. Hist. 233. To help determine whether Sikora's threat to Palmer, if true, was made or caused to be made with the knowledge or purpose described above, the trial judge as part of his September 4 order required Nacco to submit a statement from Sikora in which he addressed his August 8 remarks to Palmer.

At this juncture, Nacco sought the protective assistance of the Commission in quashing any inquiry of Sikora by representing that the hearing which had been set was not for the purpose of exploring a section 557(d) violation but of determining whether there was a section 105(c) violation. 15/ The Commission moved quickly--within one business day--to foreclose any inquiry of Sikora and to direct the matter along lines that, it was thought, boded well to permit the removal of the trial

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15/ To lend a patina of legitimacy to its recourse to the Commission, Nacco resurrected and expanded its claim of other unspecified contacts to include not only Mr. Palmer but "any other ex parte contacts in this case" and coupled it with a request that a "special judge" be assigned to "hold an evidentiary hearing".

judge and vacation of his tentative decision without embarrassing questions to Sikora. 16/

Without ever looking at the public record, the Commission accepted Nacco's bald assertion that contrary to its rules and decisions the trial judge had withheld from the public record a prohibited ex parte contact with Mr. Palmer. To correct this assumed dereliction, the Commission summarily stayed all proceedings before the trial judge and directed him to file a sworn statement "making a full and complete disclosure of all circumstances surrounding the alleged conversation and all details of its substance."

The Commission further ordered that a "similar affidavit shall be submitted by Mr. Palmer" and directed that "the United Mine Workers of America use its best efforts to facilitate Mr. Palmer's compliance with this order." Pending receipt of these statements the Commission reserved action on whether to assign a special judge to hold an evidentiary hearing on the remainder of Nacco's charges.

Thus, on the basis of totally unfounded allegations by Nacco and without even looking at the public record or affording the other parties an opportunity to be heard, the Commission usurped

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16/ Nacco's Notification of Ex Parte Communication was hand-delivered to the offices of the Commission at 4:50 p.m., Friday, September 13, 1985, and served by mail on the other parties and the trial judge. The trial judge's office received Nacco's Notification at 11:03 a.m., Monday, September 16, 1985. Without waiting for service or a response from the other parties, the Commission issued its protective order on Tuesday morning, September 17, 1985.

the authority and jurisdiction granted the trial judge under the Sunshine Act, the APA and its own rules to determine (1) the legality of Mr. Palmer's communication, (2) whether it was disclosed in the public record and (3) whether a "party" "knowingly made or knowingly caused" an illegal contact to be made.

The trial judge believes the Commission must take no further action to lend color to Nacco's obviously frivolous charges or lawless attempt to create a pretext for his removal from this case and the vacation of his tentative decision. If the Commission provides any of the relief implicitly requested by Nacco, it will cause irreparable injury not only to the other parties but to the credibility and integrity of the Commission's decision-making process.

Any action by the Commission that creates an appearance of taint or impropriety in one of its proceedings where none, in fact, occurred would raise grave questions over the even-handed administration of justice by the Commission. The trial judge trusts that on reflection the Commission will see Nacco's action for what it is and will deal with it in an appropriate manner.

In conclusion the trial judge feels compelled to say that he believes the Commission's recent acrimonious campaign of career harrassment and repeated lawless and unwarranted attacks upon the trial judge's adjudicatory independence were largely responsible for inciting the irresponsible action that led to the filing of the Notification of September 13, 1985. Simple justice requires the Commission dissolve its improvident stay of September 17,

1985, and remand this matter to the trial judge for final disposition.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the facts recited in this statement are true and correct. Executed on September 28, 1985.

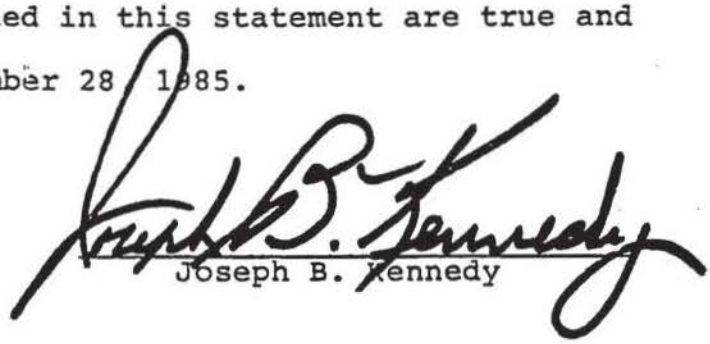

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Exhibit A

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

THE NACCO MINING COMPANY Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 85-87-R Citation No. 2330657; 6/5/85 Modified to Citation No. 2330657-02; 6/24/85
v.	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Powhatan No. 6 Mine

TENTATIVE DECISION

Based on an independent evaluation and de novo review of the circumstances that led to the modification of the 104(a) citation I find:

1. Stanley Sikora, Section Foreman, on the 9 left 2 east section failed his duty and obligation to supervise properly and diligently the work of William Palmer in making a cross-cut between the 3rd and 2nd entries at the 6 plus 94 spad on the first shift on May 30, 1985.

2. The Operator's own engineering drawings show Mr. Sikora was negligent in failing to observe that Mr. Palmer was off the sight lines by approximately 7 feet. The same drawings and measurements also show that had Mr. Sikora exercised the high degree of care imposed on him by the Mine Act he should have known that Mr. Palmer had worked some 20 feet beyond the last permanent roof support.

3. Mr. Sikora, in his haste to complete his pre-shift examination, negligently failed to observe that Mr. Palmer not only holed through into the No. 2 entry, but pushed his coal clear up to the far rib. Had Mr. Sikora exercised the high degree of care imposed on him by the Mine Act, he would have observed and therefore known that Mr. Palmer could not have pushed coal to the far rib except by making a long or deep cut that took him under unsupported roof.

4. Mr. Sikora's negligence is imputable to the Operator, NACCO.

5. Mr. Palmer, the continuous miner operator involved, knew or should have known that he had executed an unlawful long or deep cut. His negligence is attributable to NACCO's failure to supervise and control Mr. Palmer's actions.

6. Mr. Palmer's reckless disregard for his own safety and that of his fellow miners was attributable to the negligent failure of NACCO's management to provide the supervision, training, and control over Mr. Palmer necessary to insure compliance with the high degree of care imposed on the Operator by the Mine Act.

7. NACCO's top management knew or should have known that wide and long cuts were rife in the mine because the sub-district manager and a supervisory inspector had reported these conditions to top management on February 12 and May 23, 1985. During this same period the United Mine Workers of America and members of its safety committee, all representatives of the miners, had complained of these same unsafe mining practices. Despite this first-hand knowledge of the situation, top management took no effective action to insure its cessation.

8. NACCO's management is independently responsible for its failure to provide adequate supervision and control over its work force.

9. Confusion, ambiguity, and ignorance of the standard of care required seems to be pervasive at all management levels in the NACCO Mining Company.

10. For the purpose of this decision I accept the Operator's assertion that its policy is to put safety ahead of production. If that is true, and if the Union's assertions to the same affect are to be believed, a program of progressive discipline should go far toward insuring future compliance by both.

11. Because of its negligent failure to inculcate in Mr. Sikora and Mr. Palmer the habits and practices of safety conscious miners and its past permissiveness with respect to imposing discipline for serious safety violations, I find NACCO's top management must be held accountable for the attitudes, conditions, and practices that led to Mr. Sikora's and Mr. Palmer's actions.

This failure, standing alone and independent of the violation, and negligence imputable from Mr. Sikora and Mr. Palmer fully justified Mr. Reid's actions. It was time he sent a message to management that it could not ignore. That is what Section 104(d) is all about.

I conclude, therefore, that a preponderance of the evidence in the record considered as a whole warranted modification of the 104(a) citation to that of a 104(d)(1) citation.

Accordingly, it is ordered that the contest of the (d)(1) citation be and hereby is, denied, and its validity affirmed.

Joseph B. Kennedy
Trial Judge
7/31/85

dcp

EXHIBIT B

August 8, 1985.

Palmer:

At a meeting in the dinner hole last night Sikora announced that he had to get 550 tons or lose his job and that if he did he was going to take someone with him. ~~Kkxxx~~ Palmer/said further that ~~x~~they changed the helper on me,/greenhorn and toldhim he had to run the miner in everycut except for one. The whole crew heard it. He said he had not filed any complaints with MSHA and was calling me pursuant to my instructions at the hearing.

felt this was a threat against his job and

they put the original helper back the

He lives in Jacobsburg, Ohio; Phone 614/926-1819.

11:35 a.m.

Advised all Counsel in Conference Call at 3:00 p.m. They will take it from here. No Rule 82 problem.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 15, 1985

KENNETH A. WIGGINS	:	
	:	
v.	:	Docket No. WEVA 82-300-D
	:	
EASTERN ASSOCIATED COAL CORPORATION	:	

BEFORE: Acting Chairman Backley; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case involves a complaint of discrimination filed by Kenneth A. Wiggins pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). In his decision on the merits, a Commission administrative law judge concluded that Mr. Wiggins had been illegally discharged by Eastern Associated Coal Corporation ("Eastern") on April 9, 1982, in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 5 FMSHRC 1542 (September 1983)(ALJ). In a separate unpublished decision concerning remedies, the judge granted back pay and other benefits to Wiggins but denied him reinstatement rights. We granted both parties' petitions for discretionary review. For the reasons that follow, we affirm the judge's decisions, except that we conclude that Wiggins is also entitled to recall rights.

At the time of the key events in this case, Wiggins was a miner of 12 years experience, all at Eastern. For the nine years preceding his discharge, he had been a certified foreman working both service and production shifts. He had been rated by Eastern as an acceptable employee. Two series of events are significant in this case, the first of which occurred on March 26, 1982. Wiggins was working the "B" shift, the evening production shift (3:30 p.m. to 11:00 p.m.), at Eastern's Keystone No. 1 underground coal mine. At approximately 9:20 p.m., the No. 1 conveyor belt broke. After verifying the location and severity

of the broken belt by mine telephone, Wiggins proceeded to prepare his crew to assist in the repair. Because of the location and extent of the belt break, Wiggins believed that he would not be able to return to the working face until near the end of the shift. Therefore, he proceeded to "fireboss" the face area -- that is, to carry out required ventilation examinations. In two of the entries in his section, he found that the air velocity was insufficient to turn the blades of his anemometer. Wiggins instructed his roof bolting crew to correct the ventilation problem by repairing a stopping curtain, which had been torn down as a result of a brow fall, before proceeding further with roof bolting. He then took the remainder of his crew to repair the broken belt. 1/

After repairing the belt, Wiggins returned to the face to collect his crew at approximately 11:00 p.m. He again firebossed the area and found that the repair to the stopping curtain had restored sufficient ventilation to the area. Wiggins' roof bolting crew, however, had completed only a portion of the assigned bolting operation after correcting the ventilation problem.

On March 27, 1982, Jackie Jackson, the assistant general mine foreman, met with Wiggins to discuss the roof bolting on the previous day's shift. Wiggins explained his belief that he was required to repair the ventilation problem before proceeding with roof bolting. Jackson admonished him for not completing the roof bolting and stated, "You are never to shut a roof drill down on a continuous mining section; that ... miner's usually waiting on the roof drill." Tr. 83. Jackson prepared a "notice of improper action" concerning this incident. The notice indicated that Wiggins had been asked to report to Jackson on March 27 for "inefficient or unsatisfactory work" because he had "shut bolter down at 9:00 p.m. on evening shift." The notice did not mention Wiggins' concerns regarding ventilation. The notice was signed by Jackson. Jackson did not inform Wiggins of this notice, but placed both

1/ The judge noted that there were conflicts between Wiggins' testimony concerning his actions on March 26 and the daily shift reports, which indicated required methane checks by Wiggins at times during which he testified that he was engaged in other activities. 5 FMSHRC at 1543-44. Wiggins testified that the practice of the foremen at the mine was to record their methane checks at approximate times, in regular intervals, rather than at the exact times the checks had been made. While we agree with the judge that this matter does not materially affect Wiggins' overall testimonial credibility as to the discrimination claim at issue, we note that the asserted practice may violate mandatory testing and recordkeeping requirements in "Subpart D - Ventilation" of 30 C.F.R. Part 75 and cannot be condoned.

his copy and Mr. Wiggins' copy in Eastern's personnel file for Wiggins. 2/ Later during his shift on March 27, Wiggins was informed that he was being transferred to the position of service foreman on the night or "C" shift beginning 24 hours later.

The second significant series of events in this case occurred on April 7 and 8, 1982, as a result of a citation Eastern received from the Department of Labor's Mine Safety and Health Administration ("MSHA") for an extensive coal spillage along a belt conveyor. Eastern was to have abated the violative condition by the start of the day shift on April 8. Wiggins' night crew was assigned to prepare the belt for the MSHA abatement inspection. According to Eastern, Wiggins was told that both he and his crew were to work overtime, if necessary, to finish the cleanup. Eastern asserts that Wiggins lied to management, informing them that the belt was ready, when it was not, in order to avoid having to work overtime. Wiggins testified that near the end of his shift, he notified Jackson that the belt area would not be ready for inspection. Wiggins maintains that he was asked only to try to persuade his crew to work overtime, and that he did so unsuccessfully. Wiggins also testified that he was not ordered to work overtime.

As a result of the events of April 7-8, Jackson apparently believed that Wiggins had lied about the progress of the cleanup. He prepared a second notice of improper action recommending Wiggins' suspension because of the incident. When Wiggins reported to work on April 9, 1982, he was told not to work the third shift but to report to Mine Superintendent Larry Fraley. He reported to Superintendent Fraley, and was informed by Fraley that he was fired because he had lied about the belt being ready for inspection and had refused an order to work overtime. When Wiggins objected to the validity of the charge, Fraley informed him that this was not the first incident involving Wiggins' conduct at work. Fraley referred to Jackson's notice of improper action concerning the shutting down of the roof bolter on March 26, 1982. Wiggins indicated this was his first knowledge that he had been written up for the March 26 incident and explained that there had been insufficient air. Fraley did not believe Wiggins and instructed the mine accountant to prepare the paperwork for the discharge.

Wiggins subsequently filed with MSHA a discrimination complaint alleging that his discharge violated the Mine Act. Following an investigation, MSHA determined that discrimination had not occurred and declined to prosecute a complaint on Wiggins' behalf. 30 U.S.C. § 815(c)(2). Wiggins then initiated his own discrimination complaint before this independent Commission. 30 U.S.C. § 815(c)(3). Hearings before a Commission administrative law judge ensued.

2/ As the judge noted repeatedly, Jackson, seemingly a key witness for Eastern's defense, was not subpoenaed to testify. (He had quit Eastern only a few weeks before the trial.)

In his decision on the merits, the judge found that Wiggins' "failure to live up to expectations" with respect to roof bolting on March 26 was caused by his safety concerns regarding inadequate ventilation and that Jackson's notice of improper action, issued because of this protected activity, was an act of unlawful discrimination. 5 FMSHRC at 1544. The judge concluded that the discriminatory notice prepared by Jackson was in part responsible for Fraley's decision to fire Wiggins on April 9, and that Wiggins therefore had established, under applicable Commission precedent, a prima facie case that his discharge was discriminatory. 5 FMSHRC at 1547. In reaching this conclusion, the judge noted that although Fraley was not aware personally of Wiggins' protected activity prior to reaching his discharge decision, Jackson was, and the decision to fire Wiggins was a "company decision" for which Eastern must bear responsibility. Id. The judge expressed the opinion that Eastern had not attempted to offer any affirmative defense to overcome Wiggins' prima facie case and concluded that the discharge violated section 105(c) of the Mine Act. 5 FMSHRC at 1547-48.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

We turn first to the judge's conclusion that Wiggins established a prima facie case, and examine initially the issue of protected activity. The events of April 7-8, (the dispute over the cleanup of the belt line spill), did not involve any protected activity on Wiggins' part, and he does not contend otherwise on review. Rather, the protected activity

at issue occurred on March 26 when Wiggins instructed the roof bolting crew to cease bolting and to repair the damaged stopping. The judge found that these actions were based on Wiggins' safety concerns regarding the inadequate ventilation that he had detected while firebossing the face area. Eastern does not challenge these findings and concedes that Wiggins was engaged in protected activity. We agree. In appropriate instances, as here, a miner's actions in ceasing a particular task, or changing the normal sequence of work, in order to make what the miner reasonably and in good faith believes is a needed safety repair warrant the Act's protection. 3/ See generally, Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319, 321-24 (March 1985); Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985); Robinette, supra, 3 FMSHRC at 808, 812 (discussing "affirmative self-help").

The judge also found that the March 27 notice of improper action that Jackson prepared concerning Wiggins was based in substantial part, if not completely, on Wiggins' decision to have his bolting crew correct the ventilation problem before proceeding with bolting. Eastern does not seriously contest this determination on review. We affirm the judge's finding that the reasons prompting the issuance of the notice of improper action were discriminatory.

The judge further found and the record unequivocally shows that on April 9 Superintendent Fraley decided to discharge Wiggins for two reasons: (1) his belief that Wiggins had lied about the progress of the belt line cleanup and had refused an order to work overtime during the incidents of April 7-8, and (2) his concerns centering around Wiggins' conduct on March 26 and the notice of improper action regarding that conduct. Fraley reviewed Wiggins' personnel file, including the discriminatory notice of improper action, in reaching his discharge decision. Both Fraley and Wiggins testified that Fraley referred to the March 26 incident and to Jackson's notice in explaining to Wiggins the reasons for his discharge. Although Fraley did not believe Wiggins' explanation that there had been insufficient air that evening, his testimony shows nevertheless that he was concerned about the shutting down of the bolter and relied upon that incident and the write-up in discharging Wiggins. Under our precedent, a prima facie case is established if an adverse action is based in any part on a protected activity. Thus, we agree with the judge that "[i]nasmuch as the notice of improper action issued on March 27, 1982 was in itself an act of illegal discrimination and, inasmuch as that notice and events that brought it about, were in part responsible for Wiggins' discharge, then under the Pasula test Wiggins established a prima facie case...." 5 FMSHRC at 1547.

3/ We note that 30 C.F.R. § 75.302-2 requires that when line brattice or other ventilating devices are damaged to an extent that ventilation of the working face is inadequate, "production activities in the working place shall cease until the necessary repairs are made...."

On review, Eastern's primary objection to the finding of a prima facie case is that the judge "mechanically imputed" to Fraley Jackson's knowledge of the protected activity. 4/ While knowledge of protected activity (whether proven directly or through indirect evidence) is often an important ingredient in the establishment of a prima facie case, "an operator cannot escape liability by pleading ignorance due to the division of company personnel functions." Metric Constructors, supra, 6 FMSHRC at 230 n. 4. In any event, the focus of our present analysis is not so much upon Fraley's knowledge as it is upon the undoubted impact on his decision to fire Wiggins of a separate discriminatory act committed by his assistant, for which Eastern as the employing entity must assume responsibility. See generally, Vinson v. Taylor, 753 F.2d 141, 146-152 (D.C. Cir. 1985), cert. granted, 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985)(No. 84-1979)(general discussion of the federal common law of imputation of discriminatory conduct to an employer even in the absence of direct knowledge).

The finding of a prima facie case does not resolve this proceeding on the merits. Eastern correctly objects to the judge's comments that it had not attempted to advance an affirmative defense. 5/ Eastern clearly contended before the judge, and maintains before us, that Wiggins would have been fired in any event for the April 7-8 belt line cleanup incident alone. There is no question that Fraley was motivated in part by his belief that Wiggins had lied to management regarding the status of the belt line cleanup. Regardless of the accuracy of Fraley's belief (see n. 6 infra), the evidence shows that, as the judge found in discussing other aspects of the case, his belief was bona fide and was a motivating factor in his decision to discipline Wiggins. Thus, Eastern has proved the first element of an affirmative defense -- a partial motivation for discipline not based upon protected activity. However, to prevail on its affirmative defense, Eastern must prove that it would have taken the adverse action of discharge in any event for the unprotected activity alone. We conclude that Eastern failed to meet this burden.

4/ We accept the judge's finding that prior to making the decision to terminate Wiggins, Fraley was not aware of Wiggins' reasons for shutting down the roof bolter on March 26. As noted above, however, during his termination interview on April 9, Wiggins explained that he had shut down the bolter because of insufficient air -- an obvious reference to safety concerns. Even if Fraley discredited this explanation, he was put on notice before the termination was finalized that a safety claim by the miner was implicated in the matter.

5/ The judge's confusion concerning Eastern's affirmative defense may be traceable to his own failure to organize his findings and discussion along the lines of the Pasula analytical framework.

A careful review of the totality of Fraley's testimony, discussed supra, convinces us that the decision to discharge Wiggins was inextricably linked to the earlier protected incident. The judge's findings, advanced in other contexts, are consistent with this conclusion. Thus, Eastern failed to carry its burden of proving that it would have discharged Wiggins in any event solely because of the events of April 7-8. Consequently, we hold that the discharge of Mr. Wiggins violated section 105(c) of the Mine Act. 6/

Issues remain concerning the judge's remedial order. The judge awarded Wiggins back pay and benefits from the date of his unlawful discharge until August 30, 1982, the date upon which the judge found that the "entire third shift, the one on which Wiggins was employed, was laid off. The layoff was for economic reasons and the testimony was that Wiggins would not have been rehired...." Decision Granting Back Pay and Other Benefits (December 19, 1983). The judge concluded, "Mr. Wiggins cannot be restored to a job that does not exist." Id. For this reason, the judge declined to grant Wiggins any future recall rights.

The evidence shows that on August 30, 1982, Eastern decided, for economic reasons (namely, depressed business conditions), to reduce costs by doing away with the service component of the "C" shift and by making other layoffs as well. Eastern argues that the termination of the "C" shift service work meant that Wiggins would have been laid off on August 30, 1982. Wiggins does not challenge the conclusion that he would have been laid off the "C" shift on that date. Rather, he argues that but for discriminatory actions, he would have been working on the "B" shift as a production foreman and would not have been affected by the layoff of the "C" shift. However, Superintendent Fraley testified that even if Wiggins had been on the "B" shift, he would have been laid off rather than either of the other two "B" production foreman who were laid off. Wiggins did not rebut Eastern's evidence that he would have

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6/ The judge analyzed extensively the merits of the April 7-8 dispute concerning whether Wiggins lied to management and refused an order to work overtime. 5 FMSHRC at 1545-47. As emphasized above, no protected activity on Wiggins' part was associated with this incident. Because it is undisputed in this case that the incident was partly involved in the decision to discharge Wiggins, the judge was required to determine whether management's concern over the matter was bona fide rather than pretextual and, if so, whether that concern alone would have led to Wiggins' discharge. Beyond those matters, however, the Commission's jurisdiction ended with respect to an incident which did not involve protected activity. As we have stressed repeatedly, the Commission is not an arbiter of such industrial disputes. See, e.g., Haro, supra, 4 FMSHRC at 1937-38, 1944. Thus, it was not the judge's proper task to opine as to whether Wiggins lied or whether Fraley's otherwise bona fide belief was "right" or "wrong."

been laid off even from the "B" shift on August 30, 1982. Therefore, we conclude that substantial evidence supports the judge's finding that Wiggins would have been laid off, from either the "B" or "C" shift, as of August 30, 1982.

Wiggins also challenges the judge's finding that as a result of the layoffs no job exists to which Wiggins can be returned and that he, therefore, has no future recall rights. The fact that an appropriate position may not have existed at the time of the hearing does not defeat Wiggins' right to reinstatement to an appropriate position should business conditions improve and result in recalls of Eastern's laid-off personnel. The remedial goal of section 105(c) is to restore the victim of illegal discrimination as nearly as possible to the situation he would have occupied, but for the discrimination. See, e.g., Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2049 (December 1983). For this same reason we further hold that Wiggins' recall rights extend to reinstatement to the same, or a substantially equivalent position on the "B" or "C" shift, whichever position first becomes available. 7/

The final issue is Wiggins' contention that the judge erred in not allowing the recovery of funds that Wiggins claims he is due stemming from his sale of stock in Eastern received by him upon his termination. Wiggins argues that he was forced to sell the stock to raise needed funds after being discharged and that the value of the sold shares appreciated after the sale. He seeks the difference between his proceeds and the present value of the shares. We hold that the judge correctly determined that this request is too remote and speculative to be granted. Nolan v. Luck Quarries, Inc., 2 FMSHRC 954, 960 (April 1980)(ALJ) is distinguishable. In Nolan the discriminatee, a stone hauler, was forced to sell his truck, for the amount he owed on it, because of the discrimination. As a result, the judge in that case found that it was clear that an ascertainable amount of equity, represented by prior payments on the note, was lost. Stocks are of a different character. Present stock value is not a function of cost or payments on a note, but of various market forces. Those forces can result in appreciation or depreciation in value. Here, Wiggins received a fair market value for his interests at the time of sale. No "loss" has been established and no further relief in this respect is due.

7/ Eastern objects to Wiggins' request that reinstatement rights also apply to the "B" shift positions. Although Eastern's position is not without some support due to the failure of Wiggins to clearly press this issue at the hearing, in light of our finding of illegal discrimination, section 105(c)'s remedial purpose and the fact that the issue was raised in Wiggins' complaint and addressed by Eastern below, we conclude that Wiggins' reinstatement rights should be broadly framed.

Accordingly, on the foregoing bases, we affirm the decisions of the administrative law judge, except that Wiggins is entitled to future recall rights in accord with the views expressed in this decision. 8/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

8/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 19, 1985

GARY GOFF :
:
v. : Docket No. LAKE 84-86-D
:
YOUGHIOGHENY & OHIO COAL COMPANY :

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises in connection with a discrimination complaint filed by Gary Goff pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"). Prior to any hearing, a Commission administrative law judge granted the operator's motion to dismiss Mr. Goff's complaint for failure to state a cause of action under the Mine Act. 6 FMSHRC 2055 (August 1984)(ALJ). The judge concluded that a discrimination complaint, such as Goff's, based on allegations that the miner was discriminated against because he suffers from Black Lung (pneumoconiosis), can be resolved only under section 428 of the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (1982)("BLBA"). 1/ We granted Goff's petition for discretionary review and permitted the amici curiae participation of the United Mine Workers of America and the Secretary of Labor.

For the reasons that follow, we hold that a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based on the miner's being "the subject of medical evaluations and potential transfer" under 30 C.F.R. Part 90. These provisions contain mandatory health standards governing transfer of miners evidencing the development

1/ Section 428(a) of the BLBA provides:

> No operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis. No person shall cause or attempt to cause an operator to violate this section. For the purposes of this subsection the term "miner" shall not include any person who has been found to be totally disabled.

30 U.S.C. § 938(a). Section 428(b), 30 U.S.C. § 938(b), permits miners who believe that they have been discriminated against in violation of subsection (a) to file a complaint with the Secretary of Labor.

of pneumoconiosis. 2/ We conclude that Goff has pleaded such a cause of action and is entitled to a determination on the merits of his claim. Accordingly, we reverse and remand.

The following summary of the case's factual background is based largely on allegations in Goff's complaint (prepared without assistance of counsel) and on the various documents related to those allegations that he has submitted, without objection by the operator, to the Commission. For purposes of reviewing the judge's grant of a motion to dismiss for failure to state a claim, we will treat the allegations as true. See, e.g., Hughes v. Rowe, 449 U.S. 5, 9-10 (1980).

Goff worked as a labor foreman for the Youghiogheny & Ohio Coal Company ("Y&O") from September 1976 to January 20, 1984, when he was discharged. Goff alleges that in August 1982, he first received an x-ray diagnosis indicating that he suffered from pneumoconiosis. He states that a second x-ray taken in October 1983 confirmed that he had developed pneumoconiosis. Goff further alleges that Y&O was informed of his condition and that he was assigned to outside work at Y&O's Allison Mine.

2/ Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1) (emphasis added).

As a result of the subsequent closing of the Allison Mine, Goff was transferred to an underground job at Y&O's Nelms No. 2 Mine effective January 9, 1984. Goff states that on January 12, 1984, he was too ill to go to work. He went to his physician and was diagnosed as having bronchitis. According to Goff, his doctor advised him not to return to work until January 25, 1984. When Goff informed mine management of this development, an appointment was made for him to see the company's physician on January 13, 1984. Y&O alleges that its doctor found no x-ray evidence of pneumoconiosis or any other health problem preventing Goff from working underground.

On or about January 14, 1984, Goff mailed a letter and x-rays to the Department of Labor's Mine Safety and Health Administration's ("MSHA") Coal Mine Safety and Health Office in Arlington, Virginia. Goff's letter requested a determination of his eligibility for participation in 30 C.F.R.'s Part 90 transfer program. This program was developed pursuant to section 101(a)(7) of the Mine Act, which authorizes the Secretary of Labor to promulgate improved mandatory standards providing for the transfer of miners whose health has been impaired by exposure to a designated hazard. 3/ Under the Part 90 program, a miner who has been

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3/ Section 101(a) of the Mine Act, 30 U.S.C. § 811(a), directs the Secretary of Labor to "develop, promulgate, and revise as may be appropriate improved mandatory health or safety standards...." In relevant part, section 101(a)(7) states:

> [W]here appropriate, [any mandatory health or safety standard promulgated under this subsection] shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to [a] hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based on the new work classification. ...

30 U.S.C. § 811(a)(7). 30 C.F.R. Part 90 implements this statutory mandate by providing for the transfer of miners who, as a result of exposure to the health hazard of respirable dust, have developed pneumoconiosis. The improved Part 90 standards supercede the interim mandatory health standards contained in section 203(b) of the Mine Act, 30 U.S.C. § 843(b), which provided specifically for the transfer of miners with evidence of the development of pneumoconiosis. See 30 U.S.C. § 841(a); 30 C.F.R. § 90.1. The Part 90 standards also guarantee extensive protection against any pay loss related to an authorized transfer. See 30 C.F.R. § 90.103.

determined to have evidence of development of pneumoconiosis may exercise an option to work in a low-dust area of the mine without experiencing a loss in pay. See 30 C.F.R. §§ 90.1 to 90.103. Goff's letter was received by MSHA's Coal Mine Safety and Health Office on January 16, 1984.

During the week of January 16, 1984, Goff met with two of Y&O's managers at the Nelms Mine and was told that if he did not return to work on January 20, 1984, he would be terminated. Goff states that because his physician advised him not to return to work until January 25, 1984, he did not report on January 20, 1984, as ordered by Y&O. The next day, he received a letter from Y&O dated January 20, informing him that he was discharged for failure to report to work. The letter stated that Goff's "allegation of not being able to work has not been documented by medical certification." The letter also noted that the results of Goff's examination by Y&O's physician on January 13 did not indicate any reason that would have prevented Goff from working underground.

Following Goff's discharge, and while his Part 90 application was pending with the Department of Labor, he initiated discrimination proceedings against Y&O pursuant to section 105(c) of the Mine Act by timely filing a discrimination complaint with MSHA on March 19, 1984. This complaint apparently asserted that he had been discharged discriminatorily because of his alleged pneumoconiosis. Attached to Goff's brief on review is a photocopy of a statement that Goff appears to have given to an MSHA special investigator on March 28, 1984. In his statement, Goff referred to his belief that he had pneumoconiosis and to the Part 90 application that he had made shortly before his discharge. After completing its investigation of Goff's complaint, MSHA determined administratively that a violation of section 105(c) had not occurred and declined to file a complaint on Goff's behalf. 30 U.S.C. § 815(c)(2). In the MSHA letter dated June 6, 1984, informing Goff of this determination, no mention was made of any right that Goff may have had to pursue a pneumoconiosis-related discrimination claim under the BLBA. 4/ Goff then filed his own complaint with this independent Commission on July 6, 1984, alleging that his discharge violated the Mine Act. 30 U.S.C. § 815(c)(3).

4/ The Department of Labor is charged with the duty under both the Mine Act and the BLBA to investigate pneumoconiosis-related discrimination complaints. Accordingly, the Department of Labor's MSHA and its Employment Standards Administration (ESA) have entered into a Memorandum of Understanding to coordinate their investigations. 44 Fed. Reg. 75952 (Dec. 21, 1979). We note that the record evidences the Department's failure to follow its announced procedures in the processing of Goff's complaint. Although MSHA determined that a complaint did not lie under the Mine Act, the matter was not further processed by ESA. Only after issuance of the Commission's order granting Goff's petition for review was Goff's case referred to ESA. An examination by the Department of the implementation of its MOU may be appropriate.

Meanwhile, Goff's Part 90 application filed with the Department of Labor had been acted upon. By letter dated July 2, 1984, an official within the Department of Health and Human Services, which is authorized to determine whether a miner has evidence of pneumoconiosis (30 C.F.R. § 90.3(a)), notified MSHA that an x-ray taken of Mr. Goff had been interpreted to indicate evidence of pneumoconiosis. By letter also dated July 2, 1984, MSHA informed Goff that because of this diagnosis he was eligible to participate in the Part 90 transfer program and to exercise an option to work in a low-dust area of the mine. Goff responded that he would exercise this option, but on August 8, 1984, MSHA rescinded its transfer authorization after being informed by Y&O that Goff had been discharged in January 1984.

With respect to Goff's pending section 105(c) discrimination complaint before the Commission, Y&O filed a motion to dismiss asserting that Goff had failed to state a claim cognizable under the Mine Act. This motion was granted by the Commission's administrative law judge on August 24, 1984.

The judge relied on the Commission's decision in John Matala v. Consolidation Coal Company, 1 FMSHRC 1 (April 1979). In Matala, which arose under the anti-discrimination provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977) ("1969 Coal Act"), the Commission held that discrimination complaints based on allegations that the miner suffers from pneumoconiosis were to be filed and resolved under section 428 of the BLBA, which specifically covers discrimination based on pneumoconiosis, rather than under the more general provisions of the 1969 Coal Act. 1 FMSHRC at 3. The judge in the present case, while acknowledging that the anti-discrimination provisions of section 105(c) of the Mine Act are broader than the comparable provisions of the 1969 Coal Act, held that "the rationale [in Matala] for having discrimination complaints based on allegations that the miner suffers from pneumoconiosis resolved under the specific statutory provisions set forth in the [BLBA] has continuing validity." 6 FMSHRC at 2057.

We conclude that the judge erred. As discussed below, the effect of the judge's decision would be to remove from section 105(c)(1) its protection for miners who are "the subject of medical evaluations and potential transfer" under the Part 90 standards. We find no warrant for this result in either the text or legislative history of the Mine Act. We address first the judge's reliance on Matala and the language of the 1969 Coal Act.

Former section 110(b) of the 1969 Coal Act, 30 U.S.C. § 820(b) (1976), protected miners from certain specified forms of discrimination but contained no language shielding them from retaliation based on their medical evaluation or transfer. In comparison, section 105(c) of the Mine Act granted miners broader protection and relief for a wider range of discriminatory actions and was intended by Congress to

be interpreted expansively. See, e.g., Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 134 n. 15 (February 1982). Most importantly, Congress included in section 105(c) specific protection from discrimination for miners who were the subject of medical evaluation and potential transfer. The legislative history states:

> The legislation protects a miner from discrimination because he "is the subject of medical evaluation and potential transfer under a standard published pursuant to section 10[1]." Under section 10[1] standards promulgated by the Secretary must provide[,] as appropriate, that where it is determined as a result of a physical examination that a miner may suffer material impairment of health or functional capacity by reason of his exposure to a hazard covered by a standard, the miner shall be moved from such exposure and reassigned.... The Committee intends section 10[5](c) to bar, as discriminatory, the termination or laying-off of a miner in such circumstances, or his transfer to another position with compensation at less than the regular rate of pay for the classification held by the miner prior to transfer.

S. Rep. No. 181, 95th Cong., 1st Sess. 35 (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 623 (1978). Congress was aware of the existence of section 428 of the BLBA when it enacted the medical evaluation and transfer clause of section 105(c). Congress must have intended for both provisions to be administered, applied, and interpreted harmoniously. Therefore, Matala is not controlling and, indeed, possesses only limited relevance to the construction of section 105(c). 5/

We have no difficulty concluding that Goff has pleaded a cause of action under the medical evaluation and transfer clause of section 105(c)(1). The Part 90 standards, promulgated pursuant to section 101(a)(7) of the Act, are clearly the kind of standards to which that clause applies. This case does not require us to articulate the full extent of the protection afforded Part 90 miners by section 105(c) or to identify every form of discrimination that may arise in this context. Certainly, however, a miner is protected from adverse personnel actions

5/ The Commission has emphasized previously that precedent arising under section 110(b) of the 1969 Coal Act is to be "applied carefully" in interpreting section 105(c). Dunmire and Estle, supra, 4 FMSHRC at 134 n. 15.

based on his medical evaluation or potential transfer pursuant to Part 90 at least as early as the date on which he files his application for Part 90 status. In the instant proceeding, Goff has presented sufficient allegations to plead a cause of action. Several days prior to his discharge, he applied for classification as a Part 90 miner. This application made him "the subject of medical evaluation and potential transfer" within the meaning of section 105(c)(1). In addition, Goff also appears to allege that Y&O had knowledge of his possible pneumoconiosis and his intent to file under Part 90 prior to the mailing of his application. In either case, we interpret Goff's pleadings and documentation to present a claim cognizable under the Mine Act that he was discharged because he was "the subject of medical evaluation and potential transfer" under Part 90. Accordingly, he is entitled to a determination on the merits.

Therefore, we vacate the judge's decision and remand this matter for appropriate proceedings on the merits. We also direct the Secretary to advise the judge as to whether he stands by his denial of representation of Mr. Goff in this case or whether he will reconsider in light of his amicus brief to us and this decision.

Accordingly, on the bases discussed above, the judge's decision is vacated and remanded for proceedings consistent with this decision. 6/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

6/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 21, 1985

DILIP K. PAUL	:	
	:	
v.	:	Docket No. CENT 83-42-DM
	:	
P.B. - K.B.B., INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case is before us on interlocutory review. It involves a complaint of discrimination filed by Dilip Kumar Paul against P.B. - K.B.B., Inc. ("PB-KBB"). The complaint alleges that PB-KBB discharged Paul, a mining engineer, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), because Paul reported to PB-KBB that a preliminary, exploratory shaft design violated certain mandatory ventilation standards for underground nonmetal mines. PB-KBB filed a motion to dismiss Paul's complaint for lack of jurisdiction. A Commission administrative law judge denied the motion and held that PB-KBB's Houston, Texas office was a "mine" within the meaning of section 3(h)(1)(C) of the Mine Act, and that Paul was a "miner" within the meaning of section 3(g) of the Act because he worked in the Houston office. 1/ Order Denying Respondent's Motion to

1/ Section 3(h)(1), 30 U.S.C. § 802(h)(1), defines "coal or other mine" as:

> (A) an area of land from which minerals are extracted in modified form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments,

(footnote 1 continued)

Dismiss (April 24, 1984) (unpublished). For the following reasons, we find that the judge erred in concluding that Paul is a miner and has standing to sue under the Mine Act, and we dismiss the complaint of discrimination.

PB-KBB, Inc. is a joint venture between two engineering firms -- Parsons, Brikerhoff, Quade and Douglas of New York and Kavernen Bau-Und Betriebs - Gambh of West Germany. In 1981, the United States government, through the Department of Energy ("Department"), undertook an experimental program for the underground storage of toxic waste, particularly nuclear waste. The Department hired the Battelle Corporation of Columbus, Ohio to be the government's agent to oversee this program. After receiving the contract from the Department, Battelle set about soliciting bids for a project known as the Exploratory Shaft Facility. This project entails the planning, construction, and the experimental operation of a shaft and tunnels in salt formations for the long term storage of nuclear waste.

In order to respond to Battelle's bid request, PB-KBB entered into another joint venture with Parsons, Brinkerhoff, Quade and Douglas. 2/ PB-KBB bid on and won the right to plan and design the Exploratory Shaft Facility. The contract between PB-KBB and Battelle calls upon PB-KBB to furnish all qualified personnel, equipment and materials necessary to implement the contract. The contract requires PB-KBB to provide professional engineering services to prepare designs for the construction of an experimental storage facility, as well as to provide managerial, administrative, and other services to support the design activities. The contract prohibits PB-KBB from engaging in any construction or supervision of the construction of any shaft and tunnels that may ultimately be sunk.

Paul was a mining engineer with 22 years experience. He was hired by PB-KBB on May 11, 1981. On June 18, 1982, he was assigned to work on

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Footnote 1 end

> retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

Section 3(g) of the Mine Act, 30 U.S.C. § 802(g), defines a "miner" as "any individual working in a coal or other mine."

2/ This second joint venture is also named PB-KBB, Inc. It is the respondent in this proceeding.

the Exploratory Shaft Facility project. The work was done at PB-KBB's Houston office. During the course of this assignment Paul performed a study in connection with the creation of a ventilation plan for the proposed shaft. While performing the study, Paul consulted the mandatory safety and health standards for underground metal and nonmetal mines promulgated by the Secretary of Labor through the Mine Safety and Health Administration ("MSHA"). 30 C.F.R. Part 57. Paul became concerned that the shaft, as designed, could not comply with a number of ventilation standards. He reported his concerns to his supervisors orally and in writing. As a result of these reports, Paul was discharged on July 29, 1982. After his discharge, Paul was rehired and assigned to work on other projects. On August 6, 1982, Paul wrote a memorandum to his supervisors concerning his view of the Exploratory Shaft Facility project's noncompliance with the MSHA ventilation standards. On August 16, 1982, he was discharged again.

After Paul was discharged the second time, he filed a complaint of discrimination with the Secretary of Labor ("Secretary") claiming that he was fired because of his safety complaints in contravention of section 105(c)(1) of the Mine Act. 3/ The Secretary investigated Paul's complaint and concluded that Paul's discharge did not violate section 105(c)(1). The Secretary notified Paul of his determination but advised Paul that Paul could bring a complaint of discrimination on his own behalf before the Commission. Thereafter, pursuant to section 105(c)(3) of the Mine

3/ Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any ... mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ... or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Act Paul initiated this action. 4/ PB-KBB then filed its motion to dismiss for lack of subject matter jurisdiction and following the judge's denial of that motion this matter came before us.

In denying PB-KBB's motion, the judge found that the office where Paul worked and where the alleged protected activity occurred was "a 'facility' that contained 'other property' ... including 'equipment, machines, tools' and other scientific devices and data common to the practice of the profession of civil engineering," and that "this 'facility' and 'other property' ... were 'to be used' and, in fact 'were used' by [Paul] and other mining engineers ... to produce an engineering design ... that 'was to be used in the work of extracting minerals from their natural deposits.'" The judge concluded therefore that PB-KBB's Houston office was a mine within the literal meaning of section 3(h)(1)(C) of the Mine Act and that because Paul met the stautory definition of a miner, i.e., "any individual working in a coal or other mine," he was entitled to maintain the action.

While we have recognized that the definition of "coal or other mine" provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly, Oliver M. Elam, 4 FMSHRC 5, 6 (January 1982), the inclusive nature of the Act's coverage is not without bounds. Accordingly, given the facts in this case we conclude that PB-KBB's Houston office during the period relevant to Paul's complaint was not a "mine".

It may well be, as our concurring colleague suggests, that the exploratory shaft being designed would, even when completed, not fall within the Mine Act's definition of a mine. We are not prepared to premise our reasoning here on that conclusion, particularly because a more fundamental and immediate reason requires us to reach the conclusion that no mine, as defined by the Act, was in existence at the time of Paul's discharge. Put most simply - no mine, no miner, no Mine Act coverage.

In this regard, PB-KBB's Houston office contained equipment and other property which was used in producing only a preliminary engineering design for the construction of a shaft and tunnels for storing nuclear waste. The design never left the drawing board. It was never implemented.

4/ Section 105(c)(3), 30 U.S.C. § 815(c), provides in part:

> Within 90 days of the receipt of a complaint ... the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complinant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission....

Indeed, a site at which to construct the shaft was not selected, and even if a site had been chosen, PB-KBB was barred by contract from participating in construction of the facility. Moreover, the work of Paul in drafting a preliminary engineering design for the experimental nuclear storage facility clearly is not the type of activity that Congress intended to be regulated by the Mine Act. See Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) ("Legis. Hist.") at 1316.

In sum, the facilities and equipment of the subject engineering firm designing a storage facility for nuclear waste are not entities "in use in connection with mining activities." Legis. Hist., id. The design work that was performed by Paul at PB-KBB's Houston office on an exploratory project is simply too far removed from what reasonably can be regarded as mining activity in order to qualify for Mine Act coverage.

Accordingly, we hold that Paul was not working in a "mine" as that word is defined in section 3(h)(1) and, consequently, that he was not a "miner" as that word is defined by section 3(g) of the Mine Act. Paul's discrimination complaint fails for lack of jurisdiction. The judge's decision is reversed and the complaint is dismissed. 5/

Richard V. Backley, Acting Chairman

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Lastowka, Commissioner, concurring:

I agree with my colleagues that the judge erred in denying respondent's motion to dismiss. I believe, however, that they err by basing their dismissal on too broad a basis. I would limit dismissal to the most narrow, fundamental ground available and leave for a case in which it is squarely raised consideration of the novel question that they prematurely address.

If I read my colleagues' opinion correctly, they are not as concerned with the type of facility being designed as they are with the fact that the facility was in the "design stage." My emphasis is precisely the opposite and I need only quote from complainant Paul's brief to demonstrate why he has no claim under the Mine Act. He states:

> These exploratory shafts were designed for the immediate purpose of allowing scientific tests of the suitability of salt deposits as a medium for storage of highly radioactive nuclear waste, with the ultimate purpose being utilization as a repository for such waste. The exploratory shafts were to be from 2200 feet to 3000 feet in depth, with tunnels and various underground workshops. Following the testing phase, the selected site was to be enlarged by the extraction of five million cubic feet of salt over a period of several years. The extracted mineral might be stored or sold, as there are no legal prohibitions against the government selling its salt.
>
> Following enlargement, the repository would begin to receive the nuclear waste, utilizing underground workers for handling and storage functions, for approximately twenty five years or for so long as there was a capability or a need to store such material.

Complainant's Brief on Interlocutory Review at 3.

Does the foregoing passage describe a "mine"? The administrative law judge believed so because complainant was working to produce a design that "was to be used in the work of extracting minerals from their natural deposits." Order of Administrative Law Judge at 4. Under this same rationale, however, every construction project involving excavation of minerals from the earth, be it construction of downtown office buildings, subways, or tunnels would constitute "mining" subject to the Mine Act and persons designing such projects would be "miners". Needless to say, in enacting the Mine Act Congress evidenced no intent to regulate these types of construction activities.

In order to avoid unintended results that can flow from a literal reading of the Mine Act's broad definition of "mine," the Commission previously has recognized that "inherent in the determination of whether an operation properly is classified as mining is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities." Oliver M. Elam, Jr. Co., 4 FMSHRC 5, 7 (January 1982) (emphasis in original). Compare Elam with Alexander Bros., Inc., 4 FMSHRC 541 (April 1982).

An examination of the nature of the operation described by complainant, i.e., the construction of a nuclear waste storage facility for the U.S. Department of Energy, compels the conclusion that a "mine" within the meaning of the Mine Act is not and will not be present. It may very well be that various types of underground excavation and tunneling projects pose safety concerns similar to those encountered in underground mining. For this reason safe engineering and design practice would dictate consideration of pertinent federal mine safety and health regulations. In fact, this was required by the contract under which complainant was working. Nevertheless, the mandatory federal safety standards governing such underground construction activities most likely would be those promulgated pursuant to the more broadly applicable Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., rather than the Mine Act. See, e.g., 29 C.F.R. Subpart S, § 1926.800, Tunnels and shafts.

Because the project on which complainant was performing design work would not, when and if brought to fruition, be subject to the Mine Act, on that basis alone I rest my conclusion that Paul's complaint under the Mine Act must be dismissed. As my colleagues state, "no mine, no miner, no Mine Act coverage." Slip. op. at 4.

Having stated the basis of my conclusion, I will briefly explain why I am troubled by that of my colleagues. They apparently attach controlling weight to the fact that the project at issue was in only a preliminary design stage with no actual construction having yet been undertaken. 1/ It may very well be that because at such a preliminary

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1/ This consideration apparently also was controlling in the view of MSHA. In advising complainant of its refusal to investigate his complaint, it was explained:

> .... MSHA has no authority in this case to regulate the design stage of facility construction. MSHA's regulatory authority with respect to the planned exploratory shafts would commence, if at all, with actual physical construction. Accordingly, even if the firm did order you to design a facility or structure in such a way that the facility or structure would not comply with MSHA standards, this does not constitute a violation of those standards or the Mine Act.

Letter from Associate Solicitor for Mine Safety and Health to complainant, November 24, 1982.

stage the products or operations of a mine are not yet entering or affecting commerce, the minimal jurisdictional threshold set forth in Section 4 of the Mine Act could not be met. 30 U.S.C. § 803. There are, however, several well-established countervailing considerations to be weighed: the avowed remedial purpose of the Mine Act; the mandate that section 105(c)'s protections against retaliation for safety-related activities be broadly construed; and the fact that section 105(c)'s proscriptions apply to "persons", not just "operators". Given these considerations, I am not willing, before any factual investigation by the Secretary of Labor or hearing before the Commission, to rule out the possibility that a cause of action may arise under the Mine Act when a person alleges that he has voiced safety concerns over the design of a structure or facility to be used in mining and further alleges that he has been retaliated against simply because those safety concerns were raised. That issue warrants further consideration in an appropriate case.

James A. Lastowka
Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
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November 1, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-64 A.C. No. 42-01697-03520
v.	:	Bear Canyon #1
CO-OP MINING COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Co-op Mining Company, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah on November 15, 1984.

The parties waived their right to file post-trial briefs.

Issues

The issues are what penalties are appropriate for the violations.

Stipulation

At the commencement of the hearing the parties stipulated that the company's size was 196,112 production tons and the mine's size was 86,905 production tons. Further, the parties agreed that there was no contest as to the violation. In addition, coverage under the Act was admitted (Tr. 4).

Citation 2336728

This citation alleges respondent violated 30 C.F.R. § 75.512 which provides:

> § 75.512 Electric equipment; examination, testing and maintenance.
>
> [Statutory Provision]
>
> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Summary of the Evidence

John R. Turner, a MSHA inspector experienced in mining, initially inspected Bear Creek Canyon on October 5, 1982. On that occasion he issued a citation. He again inspected respondent on November 15, 1983. He then issued Citation 2336728 under Section 104(d) of the Act. The citation was almost identical to the one issued in the previous year (Tr. 18-22).

The instant citation was issued because Kevin Peterson, the section boss, could not produce the book documenting the electrical inspections. Such examinations must be made and recorded weekly but there was no record of such inspections for a period of three months (Tr. 21, 22).

The company had a number of books to log inspections. This was the only book that was missing (Tr. 26, 27).

The inspector did not check any of the electrical equipment itself. In addition, he was not aware of any fatality or injury at respondent's mine (Tr. 28, 29).

The hazard here involves electrical equipment, one of the top three causes of underground fatalities (Tr. 23). The violative condition was abated within 24 hours by an inspection of all of the electrical equipment (Tr. 25, 31-32).

The company manager, Bill Stoddard, testified that Davies Clark inspected the electrical equipment for the company. Clark had custody and control of the inspection book from August to November 1983 (Tr. 48-50). Normally the book would be in a metal desk with all other such books (Tr. 51).

Davies quit on November 4, 1983, just prior to the instant inspection. After an extensive search the book could not be located (Tr. 51-54).

In January 1984, the book was found under other documents in a filing cabinet (Tr. 56-58). Stoddard testified that Davies had previously bragged he would play "tricks" on the company's management (Tr. 59).

The inspection book itself indicated that no inspections were recorded for 5 of the 14 weeks encompassed by the book (Tr. 62-76; Exhibit R1). Stoddard stated that possibly these entries were not made every week because the State of Utah had closed the mine (Tr. 68).

Discussion

The stipulation of the parties and the facts clearly establish that the respondent violated § 75.512. The citation should be affirmed. The facts adduced by respondent address the appropriateness of a civil penalty, discussed infra.

Citation 2337193

This citation alleges respondent violated 30 C.F.R. § 40.4, which provides:

> § 40.4 Posting at mine.
>
> A copy of the information provided the operator pursuant to § 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

Summary of the Evidence

Robert L. Baker, an MSHA inspector experienced in mining, visited respondent's Bear Canyon No. 1 mine on December 8, 1983 (Tr. 6, 7).

The company was cited for failing to post the names and addresses of the representatives of the miners on the company bulletin board. In the previous week the inspector had discussed this condition with company officials (Tr. 7, 8).

The company manager, Bill Stoddard, had been given until 8 a.m. on the following day to abate this violation. The following day the violation was unabated and the inspector issued Citation 2337193.

Bill Stoddard, respondent's manager, was familiar with this citation (Tr. 41, 42).

The company had rebuilt its bulletin board and on the day of the inspection it was locked. Stoddard agreed to post the necessary information on the board the following morning but he was called out of town. Hence, he was not present when the inspector issued the Secretary's 104(a) citation (Tr. 42, 47).

The 20 to 30 miners at the mine site are represented by Ron Mattingly who also lives on the mine property. About eighty percent of the miners also live on company property. The workers know Mattingly, where he lives and they also know he has a mine phone in his home (Tr. 45, 46).

Ron Mattingly confirmed Stoddard's testimony (Tr. 80-99). Further, Mattingly felt that the only time any problems might arise when a miner was attempting to contact him was when he would not be available (Tr. 83).

Discussion

The admission of liability and the facts establish that respondent violated § 40.4.

The evidence adduced by respondent seeks to mitigate the proposed civil penalties, discussed infra.

Civil Penalties

The Secretary's proposed civil penalties are $650, (electrical inspection book), and $180 (failure to post information).

In his proposed special assessment (for the lack of an electrical book) the Secretary believed that no weekly inspections were being performed at the mine. In addition, he considered that the mine's management was negligent since it was their duty to take appropriate action to remedy this violative condition.

The record here does not support the Secretary's conclusion that no electrical inspections were recorded at the mine for a period of three months. To the contrary, inspections were recorded for August 18, August 26, September 1, September 15, September 28, October 6, October 20 and November 4, 1983 (Exhibit R1). While the inspections were not precisely as required by the regulation they were, nevertheless, duly recorded.

In its defense the operator sought to establish that the inspections were not weekly as required by § 75.512 because the mine had, from time to time, been closed by the State of Utah. Respondent failed to offer sufficient facts to prove this defense.

In connection with respondent's failure to post certain information on its bulletin board the Secretary states that his usual penalty would be $20. But he claims that $180, as proposed, is minimal particularly since it involved respondent's failure to abate (Tr. 101-103).

The Secretary's proposed penalties are not binding on the Commission. Sellersburg Stone Company v. FMSHRC, 736 F.2d 1147. Congress mandated the criteria in 30 U.S.C. § 820(i). It provides, in part, as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering the above factors it appears that respondent has a relatively adverse history of 20 violations from December 8, 1981 to December 7, 1983 (Tr. 33, 34; Exhibit P1). The stipulation establishes that respondent is a small operator. Further, assessment of a penalty here should not affect the operator's ability to continue in business. Respondent was negligent in both instances as it should have rectified these violative conditions. Respondent's statutory good faith was established by abating the electrical violation. However, no such good faith should be allowed for the posting violation.

On balance, I deem that penalties of $300 and $75 are appropriate for these citations.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. The citations should be affirmed and civil penalties should be assessed for the violation of 30 C.F.R. § 75.512 and 30 C.F.R. § 40.4.

ORDER

Based on the foregoing findings of facts and conclusions of law I enter the following order:

1. Citation 2336728 is affirmed and a penalty of $300 is assessed.

2. Citation 2337193 is affirmed and a penalty of $75 is assessed.

3. Respondent is ordered to pay the sum of $375 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 4, 1985

WAYNE R. HOWARD, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 85-48-D MSHA CASE NO. CD 85-1
DOUBLE D & T COAL CO., INC., AND LITTLE ROBIN COAL CO., INC., Respondents	:	Hickory Lick Run No. 1 Mine

DECISION

Appearances: Wayne R. Howard, Mill Creek, West Virginia, pro se;
J. Fred Queen, Esq., Elkins, West Virginia, for Respondents

Before: Judge Melick

This case is before me upon the complaint of Wayne R. Howard, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" alleging that he was discharged by Double D & T Coal Company, Inc., (D & T) on July 8, 1984, in violation of section 105(c)(1) of the Act.[1]

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity

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[1]Section 105(c)(1) of the Act provides in part as follows: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Howard asserts that he complained to D & T president and part owner Robert Thompson upon his discovery that someone had inserted the power cable to the roof bolter he was operating into a "tagged out" and defective circuit breaker. This complaint was made on the completion of Howard's shift on July 5, 1984. There is no dispute that the power cable was in fact connected to a defective circuit breaker that had been tagged out of service by electrician Charles Cogar. It is further undisputed that operating the roof bolter under that condition constituted a serious threat to the life of the roof bolter operator, in this case Mr. Howard.

At the end of his shift on July 5, Mr. Howard saw that the roof bolter he had been operating was connected to the defective circuit breaker. Howard was admittedly agitated because his father had only a few days before suffered severe electrical shock and burns at this mine while "troubleshooting" a power box in which the circuit breakers had similarly been "jumpered out". Howard went immediately to the office trailer and confronted Thompson, another part owner John Dotson, and Foreman Kyle Anderson. Howard told them that they "hadn't learned anything," apparently in reference to his father's accident and stated that he would not operate the roof bolter until it was fixed. I construe these statements to be protected safety complaints under the Act. fn 1, supra.

On the next day, July 6, 1984, Howard was not asked to operate the roof bolter and was told to perform other work. The circuit breaker had apparently not been repaired but the roof bolter was neither needed nor used that day. On the following day, July 7, 1984, Howard asked for and was given the day off to visit his father recovering from his injuries in a Pittsburgh hospital. Upon his return that evening, Howard was given a "cut off" or unemployment slip indicating that he was laid off. Cecil Dotson, the third part owner indicated to Howard that the lay-off was just temporary and

that he would be recalled as soon possible. Howard subsequently returned several times seeking reemployment but was turned down and has never returned to work with either D & T or its successor, Little Robin Coal Company, Inc., (Little Robin).

Double D & T president and stockholder, Robert Thompson acknowledged the meeting on July 5 at which Mr. Howard reported his safety complaint. Thompson had just that day purchased the part necessary for repairing the circuit breaker and intended to have the breaker repaired that evening or the next day. Thompson testified at hearings on August 27, 1985, that Cecil Dotson unilaterally decided that Mr. Howard would be laid-off and that he, Thompson had nothing to do with that decision. According to this testimony Cecil Dotson was solely responsible for miners on that shift. Thompson further testified that another employee, Dusty Carpenter, was also laid-off the same day as Howard and that additional employees were laid-off the following week. All of the lay-offs were the result of low production.

At continued hearings on October 8, 1985, Thompson acknowledged that he controlled the financing of D & T and conceded, contrary to his previous testimony, that it was therefore his decision as to who would be laid-off. He further testified that he had discussed the possiblity of lay-offs with Cecil Dotson several weeks before Howard's lay-off because of low production, poor quality coal and continued financial losses. Thompson also acknowledged that the final decision to discharge Howard was made on the day of his actual discharge, two days after Howard's protected safety complaint about the defective circuit breaker. Thompson testified at the continued hearings that in deciding to lay-off Howard he considered that Howard had been missing a lot of work and showed up an average of only 3 days a week. This evidence is not disputed.

Cecil Dotson also testified at the continued hearings. At the time of Howard's lay-off D & T had purportedly been sold to Little Robin Coal Company, Inc., (Little Robin) but Dotson was continuing to manage the mine at the request of Little Robin's owners. Dotson, his brother John Dotson, and Robert Thompson, met three weeks before Howard's lay-off to discuss the possiblity of laying workers off. Production was down and they were producing "bad coal". The final decision to specifically lay off Howard and another employee, Gary Cockran, was not made however until right before that action was taken. Cecil Dotson testified that he was not aware,

until the date of the hearing, that Mr. Howard had made the safety complaint at issue. According to Cecil, Howard and Cockran were selected for lay-off because they were among the last men hired and had been hired as "extra men".

Forest Friel, the "bridge operator" at the time of Howard's lay-off, testified that Thompson gave him the lay-off slip for Howard and said that two other employees had been laid-off. According to Friel three additional employees were laid-off only two days later. Friel agreed that coal production was then down because they had been running "dirty coal" and nobody was buying it.

Within the above framework of evidence it is clear that Mr. Howard did indeed make a protected safety complaint on July 5, 1985 to Robert Thompson, John Dotson, and Foreman Kyle Anderson. It is also clear that Howard was laid-off only two days later--a coincidence in timing from which an inference of unlawful motivation might ordinarily be drawn. Consideration of the totality of the evidence does not however support such an inference.

It is not disputed for example that at the time of Howard's safety complaint Mr. Thompson had in hand the part needed for repair of the admittedly deficient circuit breaker and that it was anticipated at that time that the breaker would have been repaired the next day. It is also undisputed that another electrical outlet was then functioning and available at the "feed-through box" within range of the roof bolter power cable. it is further acknowledged that the roof bolter was not needed for work the day following Howard's complaint and in fact was not used by anyone that day. Under these circumstances Mr. Howard's complaint did not cause any production delays nor interfere in any way with mining operations. Retaliation against Mr. Howard would therefore have been unlikely. Morever since Howard did not report the safety hazard to any federal or state agency it is unlikely that the mine operator would have been particularly vindictive.

The existence of a facially valid business justification for the lay-off of Mr. Howard and the fact that five other miners were also laid-off, all within a period of a few days gives further credence to the operator's contention that it did not rely upon Mr. Howard's safety complaint in its decision to lay him off. In addition it is not disputed that Mr. Howard had not been appearing for work on a regular basis and had been the most recently hired employee. Thus when a

decision was made to lay off employees it was not unreasonable based solely on non-protected business grounds, to have included Mr. Howard among the first. The undisputed testimony that the mine had been unable to sell its coal because of poor quality and that the mine continued to suffer financial losses underscores the business necessity for the lay-offs.

Under the circumstances I do not find that Mr. Howard has met his burden of proving that his lay off from D & T and/or Little Robin Coal Company, Inc. was motivated in any part by his protected activity. Pasula, supra. In any event there is ample credible evidence in this case from which I could find that Respondent's would have laid-off Howard for nonprotected business reasons alone. Pasula, supra. Under the circumstances I cannot find that Mr. Howard was discharged in violation of section 105(c)(1) of the Act and this case must therefore be dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Mr. Wayne R. Howard, Route 1, Box 44, Mill Creek, WV 26280 (Certified Mail)

J. Fred Queen, Esq., QBG Mini Mall, P.O. Box 2388, Elkins, WV 26241 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 4, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. KENT 84-236 A.C. No. 15-13881-03534
PYRO MINING COMPANY, Respondent	:	Pyro No. 9 Slope William Station Mine
	:	Docket No. KENT 85-25 A.C. No. 15-13920-03525
	:	Docket No. KENT 85-27 A.C. No. 15-13920-03527
	:	Docket No. KENT 85-54 A.C. No. 15-13920-03530
	:	Docket No. KENT 85-88 A.C. No. 15-13920-03536
	:	Docket No. KENT 85-113 A.C. No. 15-13920-03543
	:	Pyro No. 9 Wheatcroft Mine
	:	Docket No. KENT 85-52 A. C. No. 15-14492-03504
	:	Palco Mine

AMENDED DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner; William Craft, Safety Manager, Pryo Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Melick

The decision in these cases issued October 25, 1985, is hereby amended as follows:

The total amount of civil penalties to be paid is corrected to read $7,671.

Wherefore the Pyro Mining Company is ordered to pay civil penalties of $7,671 within 30 days of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. William Craft, Safety Manager, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 6, 1985

HOBET MINING & CONSTRUCTION COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 84-113-R Order No. 2272702; 12/22/83
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 84-114-R Citation No. 2272703; 12/22/83 No. 21 Surface Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 84-209 A.C. No. 46-04670-03520
v.	:	No. 21 Surface Mine
HOBET MINING & CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: Deborah A. Persico, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor; Laura E. Beverage, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Hobet Mining and Construction Co.

Before: Judge Broderick

STATEMENT OF THE CASE

On December 22, 1983, Federal Coal Mine Inspector James E. Davis issued an order of withdrawal to Hobet Mining & Construction Company (Hobet) under section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act), and a citation under section 104(a) of the Act charging a significant and

substantial violation of 30 C.F.R. § 77.1303(h). The order and citation were issued as a result of an investigation of a blasting accident on December 19, 1983 in which a miner was seriously injured. Both the order and the citation charged that:

> . . . a practice prevailed of the blasting crew being permitted to position themselves in the open blasting area and not under suitable blasting shelters to protect the miners endangered from flyrock. Also, the blasting area from which the blasting was detonated, ranged in distances from approximately 700 to 1115 feet from the material to be blasted and on numerous occasions the fly-rock extended to the area where the blast was detonated and beyond.

The order prohibited all blasting operations in the Numbers 2 and 4 pits. The order was modified 3-1/2 hours later to permit the resumption of blasting operations so that a new blasting procedure could be evaluated. The order was terminated on January 10, 1984 after additional safety training for blasting personnel was completed and a new blasting procedure was implemented.

Hobet filed an Application for Review of the withdrawal order and a Notice of Contest of the citation. It denied that it had violated 30 C.F.R. § 77.1303(h) and denied that an imminent danger existed as alleged in the withdrawal order. Thereafter the Secretary filed a Petition for the Assessment of a Civil Penalty for the alleged violation.

Pursuant to notice, the case was heard in Charleston, West Virginia, on May 7 and 8 and May 23 and 24, 1985. At the commencement of the hearing I ordered the three dockets consolidated for the prupose of hearing and decision since they all grew out of the same incident on December 19, 1983.

James E. Davis, Curtis Chandler, Bart B. Lay, Danny Lee Smith, Jackie Dell Collins, and Joseph Fiedorek testified on behalf of the Secretary; David Pauley and James D. Ludwiczak testified on behalf of Hobet. Both parties have filed post--hearing briefs. I have carefully considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

Hobet is the owner and operator of a surface mine in Boone County, West Virginia known as the No. 21 Surface mine.

Hobet is a large operator. The subject mine employs approximately 200 persons. Its history of prior violations -- 98 in the 24 months prior to the contested order and citation -- is not such that a penalty otherwise appropriate should be increased because of it. There is no evidence that the assessment of a civil penalty will affect Hobet's ability to continue in business.

At the subject mine, coal was extracted from two pits after the "overburden" and "innerburden" covering the coal seams were removed by blasting. The No. 2 pit had a 50 foot overburden (the mountain top) which covered the 5 block coal seam. Under that seam there was an innerburden, 86 feet thick, covering the upper stockton coal seam. Under that seam was ten feet of innerburden covering the middle stockton seam. As of December 19, 1983, the overburden, the 5 block coal, the first innerburden and the upper stockton coal had been removed. It remained to remove the 10 feet of innerburden to uncover the middle stockton seam. The blasting to remove this innerburden was called a "bottom shot."

HOBET'S PRACTICE IN BLASTING INNERBURDEN

Prior to December 19, 1983, Hobet blasted the innerburden to uncover the middle stockton coal seam in essentially the following manner: On the shift prior to the blasting operation, the drilling crew would drill holes in the innerburden down to the coal seam. When the blasting crew arrived at the pit, the blasting crew foreman would ascertain the number of holes which had been drilled and their depth, and inform the certified blaster. The holes generally varied in depth. It was Hobet's practice to measure the depth of approximately half of the holes before they were loaded. The blaster then would proceed to the cap house to obtain the necessary explosives and caps, and lay out the caps and primers next to each hole. The blasting crew would then place the caps and primers in each of the holes. The holes were then loaded with ammonium nitrate (ANFO), an explosive agent. Ordinarily, the ANFO is loaded through a chute into each hole from a truck with an 11 ton tank (the bulk truck). The amount put in the hole is determined by the blaster. If the holes are wet, the ANFO is loaded in prepackaged "wet bags" rather than from the bulk truck -- to keep water from the explosive. The wet bags come in various sizes -- from 15 to 50 pounds, from 5-1/2 inches to 9 inches in diameter, and from 14 to 30 inches long. After the holes are loaded with ANFO, they are "stemmed," that is, filled with dirt and drill cuttings in order to confine the explosion within the hole to the extent possible. The wires from the caps in each hole are tied together and to a lead wire on a roll or drum. The operators

of mobile equipment are then directed to move their vehicles from the pit area, generally by a hand signal from the blasting crew. The lead wire is then "run out" away from the pit to where the shot is expected to be detonated. There was no general rule as to the how far from the pit the crew should remove itself before detonating the shot. It was the practice to run out the remainder of the roll of lead wire plus an additional complete roll. A full roll contains 500 feet of wire. The distance was generally determined by the blasting crew member who was running out the wire. The average distance from the pit to where the shot was detonated was about 700 feet. The crew, or at least the blaster and the one setting off the shot, were generally in the open when detonating so that they could have "eye contact" with the shot. The mobile equipment which was moved from the pit area, was generally in the vicinity from which the shot was detonated. The equipment operators were never told where to place their equipment during blasting, nor how far to remove it from the pit area. The operators usually remained in the cabs of their vehicles when the shots were detonated.

Flyrock, meaning rock being propelled through the air outside of the immediate blast site, was common when bottom shots were blasted. In the two months prior to December 19, 1983, flyrock occurred in about 90 percent of the shots. On many occasions, it travelled in excess of 1000 feet from the site of the blast. Most of these instances involved shots of 150 holes or more. On a few occasions flyrock was propelled beyond the blasting crew into the woods, approximately 1400 or 1500 feet from the pit. These incidents also involved shots of 150 holes or more.

When the crew saw flyrock coming, it was their practice to jump or dive under the equipment parked in the area. There was no standard procedure made known to the employees as to where they should go when flyrock was observed.

THE BLASTING ACCIDENT DECEMBER 19, 1983

On December 19, 1983, the regular blasting foreman on the day shift, Eddie Hutton, was off. His replacement was Danny Smith who was normally the purchasing agent for the mine, but who had replaced the blasting foreman on other occasions. Prior to the beginning of the shift, Smith went to the pit and talked to the driller. He learned that there were approximately 50 to 100 holes, varying in depth from 3-1/2 feet to 12 feet. He reported this information to the blasting crew who loaded the holes. In fact there were 91 holes 7-7/8 inches in diameter, spaced on 14 foot centers in the shot. The holes were loaded under the direction of the certified

blaster, David Pauley. Pauley had been a blaster since early 1982 after working on the blasting crew from December, 1979.

Only a few of the holes were actually measured by the blasting crew. After the caps and primers were placed in the holes, they were loaded with wet bags of ANFO because the bulk truck had broken down. The bags used that day were of 2 sizes -- one weighing 15 pounds, about 14 to 16 inches long and 5-1/2 inches in diameter; the other weighed 40 pounds was 32 to 33 inches long and 6-1/2 inches in diameter. The larger bags were put in the deeper holes which were in the "back" of the shot pit and the smaller ones in the 3-1/2 foot holes. The holes were then "stemmed," that is, rock and dirt and cuttings were shovelled into the holes. The strata being shot was largely slate. The wires from the caps were tied together and to a lead wire on a roll. the mobile equipment was directed out of the pit area. The lead wire was run out a distance of 500 feet (the length of the roll). The end was then spliced to another 500 foot roll in order "to get back to where the rest of the guys were so we could drink coffee and talk all together." (Tr. II, 38) The decision to go out 1000 feet was made by Bart Lay. Lay was employed as a shooter/loader, and had a total of about 4 or 5 months experience on the blasting crew, 2 or 3 months in 1982, and from about November 1983 to December 19, 1983. He was not directed as to the distance to "run out" from the pit by the acting foreman or the blaster. The mobile equipment operators were not directed where to park their vehicles during the blast.

The crew then told acting foreman Smith that they were ready to shoot. Bart Lay and David Pauley stood in front of the endloader, out in the open. The other members of the crew were nearby, also out in the open. The acting foreman was in his pickup truck approximately 80 feet away. David Pauley detonated the shot and when the crew saw flyrock, they ran toward the equipment, trying to get between the endloader and the rock truck which were less than 2 feet apart. Bart Lay was struck by a piece of flyrock. He was approximately 1115 feet from the blasting pit. He sustained serious injuries and is paralyzed from the chest down. He has not worked since the injury.

REGULATORY PROVISIONS

30 C.F.R. § 77.1303(h) provides in part:

All persons shall be cleared and removed from the blasting area unless suitable blasting shelters

are provided to protect men endangered by concussion or flyrock from blasting.

30 C.F.R. § 77.2(f) defines "blasting area" as:

The area near blasting operations in which concussion or flying material can reasonably be expected to cause injury.

ISSUES

1. Whether the conditions and practice described in the withdrawal order existed and constituted an imminent danger?

2. Whether the evidence establishes that a practice prevailed at Hobet of not clearing and removing all persons from the blasting area or providing such persons with suitable shelter?

3. If such a practice did prevail, whether the violation was significant and substantial?

4. If a violation is found, what is the appropriate penalty?

CONCLUSIONS OF LAW

At all times pertinent to these proceedings, Hobet was subject to the provisions of the Act. I have jurisdiction over the parties and subject matter of the proceedings.

I. IMMINENT DANGER

Section 3(j) of the Act defines imminent danger as "the existence of any condition or practice in a . . . mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The contested order issued under section 107(a) of the Act charged that "a practice prevailed of the blasting crew being permitted to position themselves in the open blasting area and not under suitable blasting shelters to protect miners endangered from flyrock. Also, the blasting area from which the blasting was detonated, ranged in distances from approximately 700 to 1115 feet from the material to be blasted and on numerous occasions, the flyrock extended to the area where the blast was detonated and beyond." The order is thus based on an alleged violation of 30 C.F.R. § 77.1303(h) quoted above. I conclude that if the described conditions and practices existed, and a violation of the mandatory standard is established, an imminently dangerous condition or practice is

thereby shown. Such a condition or practice if it existed could reasonably be expected to cause death or serious physical harm before it could be abated. Therefore, I will turn to the question of the alleged violation.

II. 30 C.F.R. § 77. 1303(h)

A. The Blasting Area

The critical issue in this case is whether there was a practice at Hobet of blasting from an open area where flyrock could reasonably be expected to cause injury. I have found that the blasting crew or some members of the crew were commonly in the open and not under cover when the shot was detonated. I have further found that flyrock was common in the case of bottom shots. I have found that flyrock on many occasions travelled more than 1000 feet from the site of the blast, and that the average distance the crew withdrew from the site of the blast was about 700 feet. Can it be concluded from these facts that Hobet followed a practice of blasting from an open area where flyrock could reasonably be expected to cause injury?

Joseph Fiedorek, a mining engineer with substantial experience in explosives, testified on behalf of MSHA that based on prior instances involving flyrock and the fact that the shot was being fired from in front of the open face, flyrock distance cannot safely be predicted and the shot should always be fired from under protective equipment. Based on the past history of flyrock, it was Fiedorek's expert opinion that no one should have been permitted in the open area when the shot was fired.

James D. Ludwiczak, President of a private concern involved in blasting and mining consultation, testified on behalf of Hobet that information concerning the distance that flyrock has travelled in the past would not in itself permit a determination of the blasting area, but the type of shot, the number of holes, and the blaster in charge would be important factors. He also testified that it is important to watch a shot being detonated.

I conclude that the evidence of many prior bottom shots throwing flyrock in excess of 1000 feet establishes a blasting area -- that is, an area in which flying material could reasonably be expected to cause injury -- in excess of 1000 feet. I further conclude that Hobet did not clear or remove all persons from the blasting area before detonating shots. It is true that the size of the shot (number of holes), and the shot pattern may affect the size and location of the blasting area,

and that these factors played some part in determining where the miners positioned themselves before detonation. However, the evidence clearly establishes that Hobet followed a practice of blasting from an area where flyrock frequently occurred. It did not have or follow a plan which would ensure the removal of miners from areas where flyrock could reasonably be expected.

B. The December 19, 1983 incident

Mr. Fiedorek was of the opinion that in the blast of December 19, 1983 some of the boreholes lacked adequate stemming and that this increased the likelihood of flyrock. He also testified that the use of ANFO cartridges 6 or 6-1/2 inches in diameter caused a void between the AFO and the walls of the boreholes (7-7/8 inches in diameter), and could result in "blown out shots" and flyrock.

Mr. Ludwiczak disagreed and felt the stemming in the holes on December 19, 1983 was adequate and the burden in the 3-1/2 foot holes was not too great. Based on the information given him, he stated that he would expect flyrock to be propelled about 300 feet from the December 19 shot. He was not able to account for the flyrock actually travelling 1115 feet, but "guessed" that it may have resulted from a wet hole or a crack in the strata or an upheaval of the rock. Since the order and citation here charge a violation and danger related to a practice, and are not limited to the December 19, 1983 incident, a resolution of the issue is important only insofar as it may be evidence of a practice. I conclude that some of the holes were inadequately stemmed on December 19, 1983, and that this may have caused or contributed to flyrock being propelled 1115 feet when the shot was detonated. I also conclude that the place from which the shot was detonated was not chosen on the basis that it was outside the blasting area.

C. Suitable Shelters

As I previously found, it was the practice at Hobet to detonate shots from the open area. They were generally fired from an area in which mobile equipment was present, but there were no guidelines as to how the equipment might be used to shelter the men from flyrock. I conclude that under the circumstances suitable blasting shelter was not provided. The fact that equipment is available to dive under when flyrock is seen does not meet the requirement that suitable shelter be provided.

D. The Austin Powder and Rockville Mining cases.

The case of Secretary v. Rockville Mining Company, Inc., 4 FMSHRC 1590 (1982) (ALJ) and Secretary v. Austin Powder Company, 5 FMSHRC 81 (1983) (ALJ) both involve alleged violations of 30 C.F.R. § 77.1303(h) where the Respondent was charged with failing to remove all persons from the blasting area. These cases involved alleged single incident violations and not a violative practice. Judge Koutras found as a fact that the blaster removed himself and his crew to a safe distance under the circumstances of the cases before him. He further held that the fact that a crew member was in fact struck with flyrock did not in itself show a violation. The case before me is distinguishable in that it involves a practice which I have found violative of the section. The decision of the Circuit Court of Kanawa County, Hobet Mining and Construction Company v. Walter Miller, Civil Action No. 85-C-AP-3, brought under the state of West Virginia mining regulations, cited in Hobet's brief, relies on Austin Powder, and is not determinative of the issues before me.

I conclude that the evidence establishes a practice at Hobet's mine of permitting the blasting crew to be in the blasting area and not under suitable shelter when the shots were detonated. I conclude that this practice was an imminent danger and was a violation of 30 C.F.R. § 77.1303(h).

III. CIVIL PENALTY

The violation established is a very serious one. It was likely to and actually did result in serious injury to a miner. The practice resulted from Hobet's negligence, since it was aware or should have been aware of the violation and its danger. Under the National Gypsum test the violation was significant and substantial, that is, there was a reasonable likelihood that the hazard contributed to would result in serious injury. The violation was abated promptly and in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $5000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. The Order of Withdrawal No. 2272702 issued December 22, 1983 is AFFIRMED.

2. The Citation No. 2272703 issued December 22, 1983, is AFFIRMED as issued.

3. Hobet shall within 30 days of the date of this decision pay the sum of $5000 as a civil penalty for the violation found herein.

James A. Broderick

James A. Broderick
Administratiave Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 8, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DENNIS C. JONES, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-299-D
	:	MORG CD 85-4
	:	Martinka No. 1 Mine
v.	:	
SOUTHERN OHIO COAL CO., Respondent	:	

ORDER

Before: Judge Kennedy

Inasmuch as the complaint in the captioned matter fails to comply with Rule 42 of the Commission's rules, it is ORDERED that the matter be, and hereby is, DISMISSED unless on or before Wednesday, November 20, 1985, the Solicitor files an appropriate amended complaint.

Joseph B. Kennedy
Administrative Law Judge
(703) 756-6210

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 12, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 85-28 A. C. No. 46-03092-03569
v.	:	Beckley Coal Mining Company
BECKLEY COAL MINING COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

In response to an Order to Show Cause issued by this Commission, the operator advises it paid the penalty in full. Accordingly, it does not want a hearing. The matter appears ripe for dismissal. However, operator's counsel is in error in asserting that its payment herein cannot be considered in any administrative forum. This payment constitutes part of its prior history, Old Ben Coal Company, 4 IBMA 198 (June 1975), Peggs Run Coal Co., Inc., 6 IBMA 212 (June 1976).

In light of the foregoing, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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Mr. Eugene Brown, P. O. Box 145, Beckley Coal Mining Company, Glen Daniel, WV 25844 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 13, 1985

JIMMY R. MULLINS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 83-268-D
BETH-ELKHORN COAL CORPORATION, Respondent	:	MSHA Case No. PIKE CD-83-08
	:	No. 26 Mine
LOCAL 1468, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, AND INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, 1/ Respondents	:	

DECISION

Appearances: Mary Bruce Cook, Esq., Hartford, Kentucky, for Complainant;
Michael T. Heenan, Esq., Smith, Heenan & Althen, Washington, D. C., for Respondent Beth-Elkhorn Coal Corporation;
Gregory Ward, Esq., Pikeville, Kentucky, for Respondent Local 1468, District 30, United Mine Workers of America. 2/

Before: Judge Steffey

The Parties' Stipulations

An order was issued on June 21, 1984, in this proceeding in which I noted that all of the questions raised by the complaint appeared to be legal in nature and that complainant had provided sufficient documents with his complaint to support the preparation by me of 13 proposed findings of fact which I

1/ In an order issued June 21, 1984, in this proceeding, I noted that I would state in my final decision in this case that the arbitrator should be eliminated as a respondent in this action. He had been named as a respondent in the complaint filed by Mullins with MSHA under section 105(c)(2) of the Act, but his counsel properly excluded him as a respondent when she filed the amended complaint. Thomas v. Consolidation Coal Co., 380 F.2d 69 (4th Cir. 1967), cert. denied, 389 U.S. 1004.
2/ Earl R. Pfeffer, Esq., did not enter an appearance at the hearing, but filed initial and reply briefs on behalf of the International Union, United Mine Workers of America.

requested counsel for the parties to consider in determining whether all issues could be decided either on the basis of my proposed stipulations or on the basis of modifications of my proposed stipulations agreed upon by counsel.

Counsel for the parties thereafter participated in several discussions and arrived at 20 proposed stipulations which were presented to complainant's counsel for final approval, but complainant stated that he could not agree to some of the stipulations and requested that he be afforded a hearing at which he could testify as to the events which resulted in his filing the complaint in this proceeding. His request was granted and a hearing was held on March 19, 1985, in Prestonsburg, Kentucky, pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3), of the Federal Mine Safety and Health Act of 1977.

Before any testimony was received, the parties agreed that the issues could still be decided primarily on the basis of the 20 proposed stipulations, subject to any modifications which I might find necessary to make in the stipulations to cause them to conform with the testimony of the witnesses. I have carefully reviewed all of the stipulations and I find that they are supported by the preponderance of the evidence, including the witnesses' testimony and the 28 exhibits which were received in evidence by stipulation. The hearing was greatly shortened by the parties' efforts to agree upon stipulations of fact. My job was also made easier than it would have been by Mr. Heenan's having prepared, for each party, in advance of the hearing, a notebook containing all 28 exhibits arranged in tabulated form.

I have made a few changes in the spelling and punctuation in some of the stipulations either to make the language conform with the GPO Style Manual or to make the language conform with the facts given in the exhibits cited in support of the stipulations. The major change I have made is in Stipulation No. 14 which has been changed to quote the <u>two</u> options referred to in Exhibit 19, rather than leave the erroneous impression that only one option was given, as was the case with the language of Stipulation No. 14 as it was originally submitted by the parties. I have also added references to some exhibits in some places to increase the evidentiary support of some of the stipulations.

I did not renumber the stipulations so as to delete the designation of "17A" given to one of the stipulations because the parties would not have had the renumbered stipulations in their possession when they prepared their briefs and a renumbering in my decision could create some confusion in identification of a particular stipulation when and if my decision is reviewed by the Commission. It was also necessary to delete three lines between Stipulation No. 17A and No. 18 because those three lines constituted surplusage which was inadvertently not stricken when the stipulations were prepared in final form.

The parties' stipulations are given below as the primary factual basis for my decision in this proceeding. At the end of the stipulations, there appears a discussion of complainant's objection to Stipulation No. 16. That discussion shows why Stipulation No. 16 is supported by the preponderance of the evidence and explains why I have rejected complainant's objections to Stipulation No. 16.

Stipulations

1. Beth-Elkhorn Coal Corporation is engaged in the operation of the No. 26 Mine in Pike County, Kentucky. It produces coal which enters commerce or affects commerce and is subject to the provisions of the Federal Mine Safety and Health Act and the regulations promulgated thereunder.

2. Jimmy R. Mullins, the complainant in this proceeding, has worked for Beth-Elkhorn at the No. 26 Mine since November 30, 1970. The representative of miners at the No. 26 Mine is Local Union 1468, District 30, United Mine Workers of America.

3. Mullins was first examined for the National Study of Coal Workers' Pneumoconiosis when a chest x ray was made on February 28, 1974, at which time he was notified that there was no evidence of pneumoconiosis. A second chest x ray was made on May 9, 1980, and examination of that x ray indicated that Mullins had a sufficient degree of pneumoconiosis to be eligible to exercise rights under 30 C.F.R., Part 90 (Exhibits 1 through 3).

4. Beth-Elkhorn was notified by MSHA in a letter dated August 29, 1980, that Mullins had elected to transfer to a less dusty area of the mine pursuant to 30 C.F.R. § 90.3 and the letter requested Beth-Elkhorn to notify MSHA, in writing, of the date on which the transfer was accomplished. In a letter dated September 29, 1980, Beth-Elkhorn notified MSHA that Mullins was working as a repairman first class on a maintenance or nonproducing shift, and that the mine atmosphere in which he was then working did not exceed the allowable 1.0 milligram of respirable dust in which Mullins was permitted to work. For that reason, Beth-Elkhorn elected not to transfer Mullins, but indicated that it would begin collecting one sample of the air in his working environment every 90 days.

5. Mullins, on February 3, 1981, by exercising his mine seniority rights, rather than his Part 90 rights, obtained the job of electrician first class on the second shift which was a nonproducing shift. Beth-Elkhorn notified MSHA on

June 22, 1981, that Mullins' job as electrician did not expose him to more than 1.0 milligram of respirable dust. Beth-Elkhorn again notified MSHA on August 31, 1981, that the mine atmosphere in which Mullins was working as an electrician was within the 1.0 milligram of respirable dust permitted for a Part 90 miner.

6. MSHA sampled the atmosphere in which Mullins was working on September 15, 1981, and thereafter notified Beth-Elkhorn that he was working in a mine atmosphere having 3.0 milligrams of respirable dust and MSHA issued a citation at that time for Beth-Elkhorn's failure to maintain the atmosphere in which Mullins was working to 1.0 milligram or less of respirable dust. Although Beth-Elkhorn offered to transfer Mullins to a less dusty area, he elected to waive his Part 90 right to transfer to a less dusty area. Based on Mullins' waiver, MSHA terminated the aforementioned citation on October 27, 1981 (Exhibit 7).

7. Nearly a year after the aforementioned citation was terminated, Mullins, by letter of September 17, 1982, informed MSHA that he wished to reexercise his Part 90 rights in order to obtain the job of dispatcher on the second shift at the No. 26 Mine. He further stated: "If I can not obtain this job as dispatcher, then I do not wish to re-exercise my rights as a Part 90 miner" (Exhibit 9).

8. By letter of September 27, 1982, Mullins informed Beth-Elkhorn that he had written to MSHA, reexercising his Part 90 rights (Exhibit 10).

9. By letter of November 8, 1982, MSHA informed Beth-Elkhorn that Mullins had exercised his option "to work in a low dust area", and that "by the 21st calendar day after receipt of this notification, the miner [Mullins] must be working in an environment which meets the [1.0] respirable dust standard" (Exhibit 11).

10. In addition to reexercising his Part 90 option, Mullins had also bid on the job of dispatcher pursuant to the procedures established under article XVII of the National Bituminous Coal Wage Agreement of 1981 (NBCWA; Exhibit 27). Another miner at the No. 26 Mine, Norman Caudill, who had a mine seniority date of October 17, 1967, also bid on the dispatcher's job (Exhibits 12 and 18).

11. Despite the fact that Mullins did not have the greatest amount of mine seniority of any bidder for the dispatcher's job, he was awarded the job on the basis of superseniority

pursuant to article XVII, section (i), paragraph (10), 3/ of the NBCWA, which provides for the one-time exercise of superseniority by production crew members who have received a letter from the U.S. Department of Labor pursuant to Part 90 of Title 30 of the Code of Federal Regulations (Exhibits 18, p. 15, and 27).

12. Caudill thereafter filed a grievance stating that he was the senior qualified bidder for the dispatcher's job and challenging the award of the dispatcher's job to Mullins (Exhibit 17).

13. The grievance filed by Caudill proceeded to arbitration. In an award issued April 15, 1983, Arbitrator Samuel Spencer Stone upheld the grievance. The arbitrator ruled that Mullins was not eligible for superseniority pursuant to article XVII, section (i), paragraph (10), of the NBCWA, since Mullins had not been employed on a "production crew" at the time he bid on the dispatcher's job, as required by that provision. The arbitrator, therefore, ordered Beth-Elkhorn to award the job of dispatcher on the second shift to Norman Caudill (Exhibit 18).

14. On April 29, 1983, a meeting was held between Mullins and representatives of Beth-Elkhorn and the union. Mullins was informed that the company would comply with the arbitrator's ruling by awarding the dispatcher's job to Caudill, and that Mullins had "two options and they are: (1) go back to the electrician's job or (2) go to a repairman's job. Our understanding is that if you go back to the electrician's job then you waive your rights as a Part 90 miner" (Exhibit 19).

3/ (10) If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of this Article shall not apply if one of the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U.S. Department of Health and Human Services informing him that he has contracted black lung disease and that he has the option to transfer to a less dusty area of the mine. In such event, the job in the less dusty area must be awarded to the letterholder on any production crew who has the greatest mine seniority. Having once exercsied his option, the letterholder shall thereafter be subject to all provisions of this Article pertaining to seniority and job bidding. This section is not intended to limit in any way or infringe upon the transfer rights which letterholders may otherwise be entitled to under the Act.

15. The repairman's job offered to Mullins was on the same shift, carried the same hourly rate of pay, and Respondent Beth-Elkhorn is of the opinion and belief that this job complied with the 1.0 dust standard (Exhibit 20).

16. The repairman's job was also classified as an "inside" job and was regularly scheduled to pay the employee holding the job for 8 hours per shift, pursuant to article IV(b)(1) of the NBCWA (Exhibits 20 and 27).

17. Mullins declined the offer of the repairman's job and elected to return to the electrician's job he had formerly occupied (Exhibit 20). The reason that Mullins declined the repairman's job is that he is of the opinion and belief that it was not just a shop job. He further is of the opinion and belief that the job involved working 25 percent of the time in the shop and 75 percent of the time in the mine and that the working conditions associated with the repairman's job expose him to a dust concentration above the 1.0 limitation. Mullins is also of the opinion and belief that the man [Charlie Noble] who accepted the job of repairman works inside the mine for 90 percent of the time (Tr. 70; 116).

17A. In offering Mullins a repairman's job on a non-coal-producing shift, the company was offering a job which in its opinion and belief met the Part 90 dust standard and it was prepared to monitor complainant's dust exposure level as required by 30 C.F.R. §§ 90.100 and 90.208, had he accepted the repairman's job.

18. On May 4, 1983, Mullins filed a complaint with MSHA in Docket No. PIKE CD-83-08, against Bill Looney, UMWA District 30 Field Representative. Mullins alleged in his complaint that UMWA had discriminated against him in violation of section 105(c)(1) of the Act by preventing him from exercising his Part 90 rights to obtain the job of dispatcher with the result that he had been forced to return to the job of electrician which exposed him to a mine atmosphere having a concentration of 3 milligrams of respirable dust, instead of allowing him to retain the job of dispatcher which did not expose him to more than 1 milligram of respirable dust permitted by section 90.3(a) of the Department of Labor's Regulations. Mullins thereafter amended his complaint filed with MSHA on May 9, 1983, and on May 12, 1983, to name Beth-Elkhorn and Arbitrator Samuel Spencer Stone, respectively, as respondents on the ground that they had participated, along with UMWA, in discriminating against him in violation of section 105(c)(1) of the Act.

19. Mullins received a letter from Ronald J. Schell, Chief of MSHA's Office of Technical Compliance and Investigation, dated July 11, 1983, stating that MSHA's investigation

of his complaint had resulted in a finding that no violation of section 105(c)(1) had occurred.

20. On July 27, 1983, Mullins filed, without benefit of counsel, a letter with the Commission in which he stated that he was appealing MSHA's finding in the letter of July 11, 1983, that no violation of section 105(c)(1) had occurred when UMWA obtained an arbitration decision awarding Caudill the job of dispatcher and requiring Mullins to return to the job of electrician, thereby exposing him to a mine atmosphere of 3 milligrams of respirable dust in violation of his rights as a Part 90 miner to be exposed to no more than 1 milligram of respirable dust (Pro se complaint).

The Parties' Briefs

At the conclusion of the hearing, dates were set for the filing of initial and reply briefs. Subsequently I granted two requests for extensions of time for the filing of briefs. The briefs were received over a relatively long period of time because counsel for District 30 filed his initial brief 1 day before the date originally set for the filing of briefs. The other parties timely filed their briefs within the deadlines fixed in the extensions of time. Counsel for District 30 filed his initial and reply briefs on May 6, 1985, and July 24, 1985, respectively. Counsel for Beth-Elkhorn filed their initial and reply briefs on June 25, 1985, and July 25, 1985, respectively. Counsel for the International Union filed his initial and reply briefs on July 11 and 24, 1985, respectively. Counsel for complainant filed her initial brief on July 15, 1985, and did not elect to file a reply brief.

Issues

All of the parties' briefs contain headings to highlight the arguments which are made, but only the International Union's and complainant's briefs specifically articulate the issues which they believe have been raised in this proceeding. Since this will be a lengthy decision, I shall hereinafter abbreviate the names of the parties as follows: Complainant will be called by his actual name of "Mullins". Respondent District 30 will be referred to as "D30". Respondent International Union will be referred to as "UMWA". Beth-Elkhorn will be referred to as "B-E".

UMWA's initial brief (p. 2) gives the issues as follows:

(1) When Mr. Mullins invoked the superseniority provision of the 1981 NBCWA, was he engaging in the protected activity of exercising his Part 90 rights? This issue is discussed on pages 32-36 below.

(2) Do the limited job-bidding rights provided to letter-holders under article XVII(i)(10) of the 1981 NBCWA interfere with the Part 90 rights of nonproduction coal miners? This issue is discussed on pages 36-43 below.

Mullins' brief (pp. iv and v) poses seven additional issues as follows:

(3) Is Mullins precluded from exercising his Part 90 status to obtain the job of dispatcher because of his having waived his Part 90 rights in order to retain the job of electrician first class when he was first advised that the atmosphere in his working environment was 3 milligrams of respirable dust per cubic meter of air? This issue is discussed on pages 17-22 below.

(4) Is Mullins precluded from exercising his Part 90 rights to obtain the job of dispatcher simply because that job happened to be a choice job which pays more than the job of electrician which he held at the time he first exercised his Part 90 rights? This issue is discussed on pages 22-23 below.

(5) Since section 101(a)(7) of the Act and section 90.102(a) of the Regulations provide that a miner transferred to a less dusty area "shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer", did B-E comply with the spirit of the Act when it offered Mullins a job in a less dusty area which would have required him to take a reduction in pay even though the pay cut would result from a reduction in working hours rather than in the "rate of pay"? This issue is discussed on pages 9-17 below.

(6) Inasmuch as section 90.3(e) of the Regulations permits a miner to exercise his transfer rights as many times as his working conditions warrant exercise of such rights, should article XVII(i)(10) of the NBCWA be declared null and void because of its provisions that only a miner on a production shift may exercise superseniority? This issue is discussed on pages 26-27 below.

(7) Did UMWA discriminate against Mullins in violation of section 105(c)(1) of the Act by insisting that B-E's awarding of the dispatcher's job to Mullins because of the exercise of his Part 90 rights be made the subject of an arbitration action which resulted in Mullins' being required to give up his job of dispatcher because of the arbitrator's ruling that Mullins could not exercise his Part 90 rights in view of the fact that Mullins was working on a maintenance or nonproducing shift, rather than on a production shift? This issue is discussed on pages 27-32 below.

(8) Did B-E discriminate against Mullins in violation of section 105(c)(1) of the Act by complying with the arbitrator's decision instead of insisting that it was precluded by the provisions of section 101(a)(7) of the Act and Part 90 of the Regulations from complying with the arbitrator's decision? This issue is discussed on pages 50-55 below.

(9) May UMWA be made a respondent in a discrimination case filed pursuant to section 105(c)(3) of the Act when the groundwork is properly laid by naming UMWA as a respondent in the complaint filed by a miner under section 105(c)(2) of the Act and when it is considered that UMWA comes within the definition of a "person" as that term is defined in section 3(f) of the Act and in view of the fact that UMWA may properly be assessed a civil penalty for a violation of section 105(c)(1) of the Act because UMWA comes within the definition of an "operator" of a coal mine because of its having reserved the right in the NBCWA to perform services as an independent contractor pursuant to section 3(d) of the Act? [Note: I have modified the wording of the last issue to conform with the position which is implicit in the arguments made by Mullins on pages 9 and 10 of his initial brief to the effect that UMWA should really be considered to be an "operator" of a coal mine.] This issue is discussed on pages 23-26 below.

The Issue of Whether Mullins Was Offered a Job in No More Than 1.0 Milligram of Respirable Dust Which Would Have Paid Him Less Than His Electrician's Job

As indicated above under the heading of "The Parties' Stipulations", I believe that the first issue which should be considered in my decision is the question of whether B-E actually offered to transfer Mullins to a surface or "outside" job which would pay him less than the underground or "inside" electrician's job which he was holding prior to B-E's offer to transfer him. The job offered was a repairman's job working out of the shop which was located on the surface of the mine. Surface jobs normally pay for only 7-1/4 hours per shift pursuant to article IV(b)(2) of the NBCWA, whereas underground or "inside" jobs pay for 8 hours per shift pursuant to article IV(b)(1) of the NBCWA (Exh. 27). Stipulation No. 16 states that the repairman's job offered to Mullins was an inside job which would have paid the employee holding the job for 8 hours per shift.

As I shall hereinafter demonstrate from the record, I believe that Mullins knew that he was being offered a job which did pay for 8 hours of work per shift and I find that the issue pertaining to Mullins' claim that he was offered a job which would pay him less than the electrician's job which

he held when it was found that he was being exposed to more than 1.0 milligram of respirable dust is an issue which cannot be raised in this proceeding when that question is considered in light of the preponderance of the evidence.

When he testified at the hearing, Mullins emphasized that the "law" [section 101(a)(7) of the Act and section 90.103(b) of the Regulations] refers to the "rate of pay", rather than to the total pay earned per shift. For that reason, he claimed that since the repairman's job on the surface presumably paid for only 7-1/4 hours per shift, as opposed to the 8 hours per shift paid by his electrician's job, he would lose money on a daily basis even if B-E continued to pay him at the same "rate of pay" after the transfer which he was receiving before B-E made the offer to transfer (Tr. 53; 72).

I believe that B-E's management is aware of the fact that it cannot offer a job to a Part 90 miner in no more than 1.0 milligram of dust which pays on a daily basis less than the amount the miner was making on the job from which he is transferred pursuant to section 90.103(b) of the Regulations (Tr. 164). Mullins' brief (pp. 2-3) relies upon interpretations of the pay provisions set forth in section 203(b) of the Act by the courts in Higgins v. Marshall, 584 F.2d 1035 (D.C. Cir. 1978), and Matala v. Consolidation Coal Co., 647 F.2d 427 (4th Cir. 1981), but the explanatory discussion in MSHA's rulemaking proceeding explains that:

> This new rule is an improved mandatory health program promulgated under section 101 of the Act and as such supersedes provisions contained in section 203(b). Neither the Higgins nor Matala holdings are applicable to the pay provisions specified under this new Part 90 as the issue in both of those cases involves the statutory interpretation of section 203(b) of the Act.

45 Fed. Reg. 80767 (1980).

MSHA's rulemaking comments on page 80767 also refer to the legislative history and quote language from the Conference Committee Report to the effect that Congress anticipated that miners transferred because of evidence of pneumoconiosis would suffer no "immediate financial disadvantage" as a result of the transfer. Obviously, a reduction in working hours, even if the "rate of pay" remained the same as the miner was receiving prior to the transfer, would result in an "immediate financial disadvantage" and would be in conflict with the clear intent expressed by Congress when MSHA was authorized to issue improved mandatory standards pursuant to section 101(a)(7) of the Act.

Mullins testified that he disagrees with Stipulation No. 16 and with Exhibits 19 and 20 which are relied upon in support of the allegation in that stipulation that Mullins was offered a repairman's job paying for 8 hours per shift when the dispatcher's job was awarded to Caudill by the arbitrator (Tr. 60). Stipulation No. 16, as indicated above, states that Mullins was offered an inside job which would have paid him for 8 hours of work per shift. The parties rely on Exhibit 19 to support the allegation that the repairman's job was one which would have paid Mullins for working 8 hours per shift, whereas Mullins has always contended that the repairman's job offered to him was located in the shop where equipment is repaired and that he understood it to be an "outside" job under article IV(b)(2) of the NBCWA which meant that he would be paid for only 7 hours and 15 minutes per shift (Exh. 27).

Exhibit 19 is a memorandum which purports to show what each of the parties attending a meeting on April 29, 1983, said about the job which Mullins would have to accept in lieu of the dispatcher's job which had been awarded to Caudill. The memorandum indicates that the meeting lasted 15 minutes, but the statements attributed to the persons attending the meeting are transcribed on less than 1-1/2 pages and cannot possibly constitute a complete description of all that was said at a 15-minute meeting. The <u>only</u> description of the repairman's job is contained in a statement attributed to J. Bellamy who explained to Mullins that Mullins had two options, one being his returning to the electrician's job which he had held prior to his having obtained the dispatcher's job and the other one being his going "to a repairman's job". Therefore, the parties' reliance on Exhibit 19 in support of their claim that Mullins was offered an "inside" job which paid 8 hours per shift is futile because Exhibit 19 does not in any way explain where the repairman's job was located or provide any information whatsoever as to its classification as an "inside" or "outside" job under the NBCWA. The thrust of Exhibit 19 is directed almost entirely to showing the concern of B-E's management that Mullins take into consideration the fact that if they allowed him to return to the electrician's job, he would have to waive his Part 90 rights because the respirable-dust samples taken in the mine atmosphere breathed by Mullins when he held the electrician's job showed that he had been exposed to at least 3.0 milligrams of respirable dust per cubic meter of air. The memorandum indicates that Mullins at first denied that going back to the electrician's job would require him to waive his Part 90 rights, but on page two of the memorandum, Mullins is quoted as having said that "[i]nitially, I waived my rights for this [electrician's] job". My review of Exhibit 19 shows that the parties may not rely upon that exhibit for their allegation that the repairman's job offered to Mullins was an "inside" job which would pay him for 8 hours per shift.

The parties also rely upon Exhibit 20 for their allegation that Mullins was offered a repairman's job which would pay 8 hours per shift. Exhibit 20 is a copy of a letter from B-E's mine superintendent dated May 2, 1983, to the District Manager of MSHA's Pikeville Office explaining that an arbitrator had ruled that Mullins' job as dispatcher would have to be awarded to another miner and that Mullins had elected to return to his prior position of electrician despite the fact that he would be waiving his Part 90 rights in returning to that position. The letter states that "[t]he other position [offered to Mullins] was a Repairman (104) working out of the shop and going underground wherever he would be needed". Exhibit 20 agrees with Mullins' understanding of the repairman's job offered to him at least to the extent of showing that it was a shop-oriented job, but neither Exhibit 20 nor Exhibit 19 shows that Mullins was aware of the fact that the shop-oriented job would require the holder of that position to work underground "wherever he would be needed".

The parties also cite Exhibit 27, or the NBCWA, in support of their claim that Mullins was offered a repairman's job which was an "inside" job requiring that he be paid for 8 hours per shift. While article IV(b) of Exhibit 27 defines the meaning of "inside" and "outside" employees, and lists the classifications of "repairmen" in Appendix B, there is nothing in Exhibit 27 which would guide Mullins in determining that the repairman's job "working out of the shop" would necessarily involve his having to work "inside" the mine and thereby require B-E to pay him for 8 hours per shift.

B-E's superintendent, Frederick Mac Collier, testified that B-E has never had a repairman's job on the second shift which involved only outside work and he stated that if the repairman's job offered to Mullins had involved paying the holder of that position for only 7-1/4 hours per shift, the job would have to have been posted as an outside job. Moreover, he testified that if the repairman's job had been posted as an "outside" job, it would not have been possible for B-E to assign the holder of the job any work which involved his going inside the mine (Tr. 151; 162).

Mullins' testimony and letters written with respect to the repairman's job are inconsistent. In his testimony, he claimed that other miners were highly critical of his having rejected the offer of the repairman's job because they understood that he would be working in the shop 100 percent of the time and would never have to work underground (Tr. 60). Later, Mullins testified that Charlie Noble, the miner who acquired Mullins' job as electrician when Mullins was initially given the dispatcher's job, came to him the night before

Mullins was slated to resume working underground and asked Mullins to take the electrician's job so that Noble could obtain the repairman's job in the shop which had been offered to Mullins (Tr. 70). Mullins had already decided to return to the electrician's job before Noble talked to him, but the implication in Mullins' testimony is that Noble thought the optional job of repairman offered to Mullins would involve working only on the surface. Mullins' subsequent testimony shows that if Noble thought the repairman's job involved only surface work, he was sadly mistaken because Mullins said that it ultimately turned out that the repairman's job required Noble to work underground for 90 percent of the time (Tr. 116).

At various points in his testimony, Mullins stated that he declined to take the repairman's job because it would pay only 7-1/4 hours per shift and that he could not afford to accept a reduction in salary because of the obligations he felt for providing for his family's economic needs (Tr. 47; 53; 98; 113). At another time, Mullins stated that he believed that the repairman's job would require him to work underground where he would be exposed to having to clean coal dust from around conveyor belt components and that the repairman's job would expose him to more respirable dust than the electrician's job (Tr. 50). Although it is not necessarily inconsistent for Mullins to claim that he thought the repairman's job was purely an outside job paying only 7-1/4 hours per shift and simultaneously contend that he would be working underground where he would be exposed to more than 1.0 milligram of respirable dust, he has a background of having worked as recording secretary of the mine committee and on the Board of Directors of the Eastern Kentucky Concentrated Employment Program and he contended at the hearing that he was intimately acquainted with the various positions which had been awarded to other Part 90 miners at the No. 26 Mine (Tr. 55), so that it is difficult to accept his claims that he did not know what kind of repairman's job he had been offered when B-E was required to relieve him of the dispatcher's job in order to comply with the arbitrator's ruling.

The record shows that when Mullins was first advised of the fact that his x rays revealed sufficient evidence of pneumoconiosis to make him a Part 90 miner, B-E sampled the mine atmosphere in which he worked as a repairman at that time and found that the respirable-dust concentration did not exceed 1.0 milligram per cubic meter of air. Therefore, it was unnecessary for B-E to transfer Mullins to any position in a less dusty area than the repairman's job which he then held (Stipulation No. 4). Mullins has always believed, however, that the repairman's job he held when he was first advised that he had pneumoconiosis exposed him to more than 1.0 milligram of respirable dust. In support of that contention, Mullins testified

that B-E excessively watered the area where he was working as a repairman each time he was scheduled to wear a dust-sampling device in order to assure that the results of the sample would not show more than 1.0 milligram of respirable dust (Tr. 41-42). Mullins stated that B-E did not bother to apply water in any appreciable amount at any time except when he was given a dust-sampling device (Tr. 43; 66-67; 84).

Ultimately, Mullins answered my questions regarding the repairman's job in the shop, offered to him when he was relieved of the dispatcher's job, as follows (Tr. 115):

> Q Do you think that Mr. Collier knew that you were turning down the repairman's job [in the shop] because of this underground part of it? Three fourths [working underground] part of it?
>
> A No, sir, I told him I was going to appeal the [arbitration] case.
>
> Q He had no reason at that time to assure you that he would pay you for eight hours?
>
> A No, sir.
>
> Q Or that he would assure you that you would not work underground?
>
> A No, sir.
>
> Q Those two points just didn't arise?
>
> A No, sir.

Mullins made some unclear statements in the letters he wrote to MSHA and B-E for the purpose of reexercising his Part 90 rights to obtain the job of dispatcher (Exhs. 9 and 10). In both of those letters he alleges that he has not previously exercised his Part 90 rights because there was no job available at the time he became a Part 90 miner. MSHA does not require a Part 90 miner to be transferred to another position if respirable-dust samples taken in the atmosphere in which he is working at the time he becomes a Part 90 miner show exposure to no more than 1.0 milligram per cubic meter of air. Since MSHA's and B-E's samples taken in the atmosphere to which Mullins was exposed as a repairman after Mullins became a Part 90 miner did not show more than 1.0 milligram, B-E did not offer to transfer Mullins to another position at the time he was notified that he was a Part 90 miner. Therefore, the record provides no explanation as to why Mullins stated in his letters that he had failed to exercise his Part 90 rights because no job was available.

The record contains as Exhibit 15 a letter dated March 25, 1983, written by Mullins to Congressman Perkins. The letter was inadvertently given a date 3 weeks before the arbitrator had issued his decision finding that Mullins was not entitled to the dispatcher's job under article XVII(i)(10) of the NBCWA. Regardless of the date, Mullins' letter asserts that he has already been advised by B-E that he is not entitled to the dispatcher's job and that B-E is going to reassign him to the electrician's job where he will be exposed to more respirable dust than is allowed for Part 90 miners. The letter also alleges that MSHA advised him to reexercise his Part 90 rights, that he followed MSHA's advice and reexercised his Part 90 rights, that a job [of dispatcher] thereafter became vacant, that MSHA advised him to bid on the dispatcher's job, that he again followed MSHA's advice by bidding on the job, and that he was awarded the job, but that B-E thereafter advised him that because he was not working on a production crew, he was not entitled to bid on the job and that B-E was going to reassign him to the position of electrician which would require him to work in a greater concentration of respirable dust than is permissible for a Part 90 miner to work.

The allegations made by Mullins in the letter to Congressman Perkins are contrary to his testimony in this proceeding, as well as contrary to the testimony of B-E's superintendent, Collier. Mullins testified that MSHA did not know anything about a Part 90 miner's rights and that he was never able to get any helpful advice from MSHA (Tr. 52; 59; 64; 94). Collier testified that he awarded Mullins the job of dispatcher under the impression that Mullins had a right to bid on the job under article XVII(i)(10) of the NBCWA and that the company took the position before the arbitrator that Mullins was entitled to retain the job when B-E's award of the job to Mullins was challenged by Caudill in the arbitration proceeding. Collier further testified that the company did not give the reference to "a production crew" in article XVII(i)(10) the importance placed on that language by the arbitrator (Tr. 133-134).

Congressman Perkins sent Mullins' letter to Ford B. Ford, Assistant Secretary of Mine Safety and Health, and asked him to investigate Mullins' allegations (Exh. 16). Mr. Ford thereafter provided the Congressman with a report which correctly states what actually happened with respect to Mullins' having held the job of repairman when he was notified of his Part 90 status and about Mullins having waived his Part 90 rights in order to continue working as an electrician after MSHA's respirable-dust samples showed that Mullins was working in a concentration of at least 3 milligrams of dust. Mr. Ford's letter also noted that Mullins' right to the dispatcher's job had been challenged under the NBCWA and that those procedures were not within the scope of MSHA's jurisdiction (Exh. 17).

Mullins filed discrimination complaints against UMWA (Exh. 21) and against B-E (Exh. 23). The facts stated in the first 10 paragraphs of the complaint filed against B-E are substantially correct in summarizing the jobs which Mullins held after he was first notified on August 5, 1980 (Exh. 4) that he was a Part 90 miner. Paragraph 11 of the complaint is incorrect because it states that B-E relieved him of the dispatcher's job in compliance with the arbitrator's decision and "ordered" him to "resume my former job duties as electrician" (Exh. 23, p. 2). Mullins' testimony in this proceeding shows, on the contrary, that B-E offered Mullins a repairman's job and warned him that he would be waiving his rights as a Part 90 miner if he returned to his former position of electrician (Tr. 49; 113-114).

Counsel for D30 asked Mullins at the hearing if he would be willing to settle this case if B-E would give him a job on the second shift paying him for 8 hours of work per shift and exposing him to no more than 1.0 milligram of respirable dust (Tr. 86). Mullins replied "No, sir" and explained that he had filed this discrimination case because he wanted to prove that a Part 90 miner on a nonproducing shift has some rights. Mullins further stated that if he is going to die in 5 to 10 years from black lung, that he would like to retain the electrician's job so as to make as much money for his family as he can. He said that he enjoys the work of an electrician and would not want to be forced to return to the repairman's job which he does not like (Tr. 86-87). Mullins stated that he thinks he has "done pretty good" in working himself up to the electrician's job and that he likes to perform the duties of an electrician despite the fact that he works with from 240 to 7,200 volts and can be alive 1 day and dead the next if he makes a mistake in the way he performs his job (Tr. 97).

The above discussion of Mullins' testimony and the letters he has written to various people about his Part 90 rights shows that Mullins just did not like performing the work of a repairman and that he would have declined B-E's offer of that job regardless of whether he was aware of the fact that the job offered to him would have paid him for 8 hours of work per shift and would have involved his having to work underground most of the time. I conclude that the preponderance of the evidence supports a finding that Mullins was well aware of the types of duties he would have to perform if he accepted the repairman's job "working out of the shop and going underground wherever he would be needed" (Exh. 20; Tr. 50).

I believe that the inconsistent statements made by Mullins in testimony and letters resulted from Mullins' fear that some tribunal would reach a conclusion that his declining to

accept the repairman's job would somehow be used to hold that he had waived his Part 90 rights for all purposes, instead of allowing him, pursuant to section 90.3(e) of the Regulations, to reexercise his Part 90 rights any time he wishes to do so. For all of the foregoing reasons, I find that paragraph 16 of the stipulations correctly states that "[t]he repairman's job [offered to Mullins] was also classified as an "inside" job and was regularly scheduled to pay the employee holding the job for 8 hours per shift, pursuant to article IV(b)(1) of the NBCWA."

The Issue of Whether Mullins' Waiver of His Part 90 Rights Precluded Him from Reexercising Those Rights

B-E's answer filed in this proceeding raised the defense that Mullins had waived his Part 90 rights. B-E's initial brief (pp. 3-4; 8-11) does not exactly argue that Mullins' waiver of his Part 90 rights in order to hold the position of electrician precluded him from reexercising his rights to obtain the dispatcher's job, but B-E presents the fact that Mullins did waive his Part 90 rights in as unfavorable a light as possible to make it appear that there is something offensive about his having done so. D30's initial brief (p. 9) devotes a page to noting that B-E offered Mullins the job of repairman before and after he was removed from the dispatcher's job. In each instance, D30 states that Mullins waived his Part 90 rights in order to retain the job of electrician. D30 does not explain, however, why Mullins should be precluded from bidding on the dispatcher's job under section XVII(i)(10) of the NBCWA simply because he had previously waived his Part 90 rights. It is clear that MSHA did not intend for a miner to be prejudiced in procuring a position in no more than 1.0 milligram of dust simply because he may have waived his Part 90 rights on one or more previous occasions. The pertinent provisions are sections 90.104(b) and (c) which read:

> (b) If rights under Part 90 are waived, the miner gives up all rights under Part 90 until the miner re-exercises the option in accordance with §90.3(e).
>
> (c) If rights under Part 90 are waived, the miner may re-exercise the option under this part in accordance with §90.3(e).

Section 90.3(e), referred to above, merely states that a miner may reexercise his Part 90 rights by sending a written request to the Chief, Division of Health, at his address in Arlington, Virginia.

MSHA's rulemaking comments explained the waiver and re-exercise of Part 90 rights as follows:

> The right to re-exercise the option to work in a low dust area of a mine was welcomed by some commenters as a means to encourage voluntary participation in efforts to prevent further development of pneumoconiosis. However, others expressed opposition to this provision because they felt it could be a source of possible abuse creating personnel problems at a mine. In this rulemaking process, MSHA has fully considered the pros and cons both of retaining the more limited right to re-exercise the option as it existed under the old section 203(b) program and of providing miners with the broader right to re-exercise the option as adopted under this new Part 90. Under the old 203(b) program, the option could be re-exercised only when a 203(b) miner left one mine and began employment at another mine or when another X-ray taken of the miner showed evidence of the development of pneumoconiosis.
>
> MSHA does not believe that the policy under the old section 203(b) program provided adequate health protection for affected miners. A miner who once waived the option should not have to wait, perhaps several years, before another X-ray re-establishes the miner's eligibility for the option. The subsequent X-ray does nothing more than confirm the previous diagnosis of irreversible and frequently progressive pulmonary impairment. MSHA believes that once a miner has been identified as having evidence of pneumoconiosis and an increased risk of sustaining progressive and permanent pulmonary impairment, that miner should be afforded the opportunity at any time to protect his or her health by re-exercising the Part 90 option.
>
> Several commenters expressed concern that personnel problems would be increased by eligible miners re-exercising their option and moving from job to job until employed in the most desirable jobs. For several reasons, MSHA believes that it is unlikely that this practice of "jockeying" will occur. A miner who already has evidence of lung impairment should regard his or her health as an urgent priority. Increased health risks for this miner are associated with working in areas of a mine where the respirable dust levels exceed 1.0 mg/m3 of air. The miner's concern in preventing progression of pneumoconiosis and in prolonging his or her productive life, whether at work or at home, should minimize any incentive to

> jockey between positions. Moreover, it may often be the case that an eligible miner is working in a high paying job before the option is exercised. Once the option is exercised, the right to retain the previous rate of pay combined with limited job and shift protections under this final rule should encourage the miner to stay in the low dust position at the mine.

45 Fed. Reg. at 80767-77.

MSHA's rulemaking comments show that Mullins was entitled to reexercise his Part 90 rights when he made a bid for the dispatcher's job. Respondents fail to recognize the importance of Mullins' reexercise of his Part 90 rights when he made the bid for the dispatcher's job under article XVII(i)(10) of the NBCWA. It is clear from section 90.104(b), quoted above, that Mullins gave "up all rights under Part 90 until" such time as he reexercised those rights. Inasmuch as the sole purpose of article XVII(i)(10) is to provide jobs in no more than 1.0 milligram of dust to Part 90 miners, or letterholders, Mullins would not have been entitled to bid for the job of dispatcher under article XVII(i)(10) if he had not reexercised his Part 90 rights prior to bidding on the dispatcher's job. Therefore, it is incorrect for respondents to argue that reexercise of Part 90 rights has nothing whatsoever to do with the award of a job in no more than 1.0 milligram of dust under article XVII(i)(10) of the NBCWA.

D30's initial brief (p. 10) also argues that the comments in MSHA's rulemaking proceeding show that it is inconsistent with the purpose of Part 90 for a miner to "jockey" for the best job at the mine. If one reads all of the comments quoted above, it will be realized that MSHA did not say that jockeying for the best position in low dust was inconsistent with the purpose of Part 90. MSHA simply stated that it did not think that jockeying would occur because a miner's concern for his health would cause him to elect to take a job in no more than 1.0 milligram of respirable dust, rather than continue working in more than 1.0 milligram of dust until a vacancy occurred in a choice job located in a low-dust area. Moreover, if a miner is able to perform a "choice" job in a low-dust area, I can think of no reason why he should not be given that job because he has already sacrificed his health by having worked for his employer in a hazardous environment.

A miner is not entitled to exercise his Part 90 rights unless he is working in an atmosphere which has a concentration of more than 1.0 milligram of respirable dust. That is why Caudill argued in his grievance that Mullins' job as an electrician did not expose him to more than 1.0 milligram of respirable dust because his job had not been sampled in his "entire work area" (Exh. 18, p. 2). That contention was

made despite the fact that section 90.3(a) requires that a Part 90 miner's working environment be "continuously maintained at or below 1.0 milligrams per cubic meter of air." B-E was cited for a violation of section 90.100 because samples taken by MSHA showed that Mullins had been exposed to an average of 3.0 milligrams (Tr. 47; Exh. 7). Moreover, B-E had notified MSHA, long before Caudill's grievance was filed, that B-E would be unable to reduce the dust in Mullins' working environment in his job of electrician to no more than 1.0 milligram so as to make the electrician's job comply with the provisions of section 90.3(a) (Exh. 8).

Respondents try to justify the differential in treatment of Part 90 miners on a production crew from those on a nonproduction crew by claiming that miners on a production crew are exposed to more dust than miners on a nonproducing crew (Initial briefs of UMWA, p. 9, and of B-E, p. 13). They make that argument despite the fact that section 70.100 requires operators to reduce the respirable dust at the working face, or on a production crew, to no more than 2.0 milligrams of respirable dust, whereas Mullins had been exposed to at least 3.0 milligrams of respirable dust while working on a nonproduction crew (Tr. 47; Exh. 7).

Another weakness in respondents' arguments which try to justify the preferential treatment given to Part 90 miners on producing crews, as compared with Part 90 miners on nonproducing crews, is that respondents fail to recognize that if it were true, as they allege, that miners on a producing crew are always exposed to more respirable dust than miners on a nonproducing crew, any Part 90 miner working on a producing crew who could bid for a low-dust job under article XVII(i)(10) of the NBCWA would have had to have waived his Part 90 rights, just as Mullins did, in order to have been working in an environment of more than 1.0 milligram of respirable dust so as to have been eligible to bid on a low-dust job pursuant to article XVII(i)(10) when one became available. In other words, the only Part 90 miner working on a production crew at the time the dispatcher's job became vacant, who would not already have waived his Part 90 rights in order to be still working in an environment of more than 1.0 milligram of dust, would be a miner who just happened to have received his letter or Part 90 notification from MSHA on the day that B-E posted the notice of a vacancy in the dispatcher's job.

It is obvious from the discussion above that D30's initial brief (p. 6) incorrectly states that "no one ever dreamed that Part 90 would entitle Mullins to ask for a particular job over a more senior person." The following comments in the Part 90 rulemaking proceeding show that MSHA may not only

have "dreamed" of that possibility, but specifically stated its expectations that such an event would occur:

> While praising job and shift protections, some commenters urged MSHA to limit reassignment of Part 90 miners only to existing jobs which are vacant. It was argued that the rule should not allow the operator to "bump" a non-Part 90 miner out of his or her job and, perhaps, his or her shift in order to assign a Part 90 miner to the same position. According to such advocates, a sacrifice on the part of non-Part 90 miners would create animosity toward the Part 90 program. One commenter also suggested that in the event that no vacant existing position was available on the same shift as previously worked, the operator should temporarily assign the affected miner to a newly-created job on the same shift until a vacancy occurs in an existing position.
>
> The final rule does not incorporate either of these suggestions. In some cases, it is presumed that if a vacant position exists which satisfies the requirements of the respirable dust standard and this section, the operator will assign the Part 90 miner to this available job. To do otherwise may create a chain reaction, whereby the "bumped" non-Part 90 miner will have to be reassigned and trained, and so will the miner who is replaced by this non-Part 90 miner, and so on. Therefore, obvious advantages will probably encourage the operator to assign the Part 90 miner to a vacant existing position. However, there will be occasions where an operator will reassign a Part 90 miner to a position currently held by a non-Part 90 miner. Moreover, if MSHA required the position to be vacant before assignment of a Part 90 miner could occur, the potential number of positions to which an operator could move a Part 90 miner would be significantly reduced. In concluding that Part 90 miners need job and shift protections to encourage participation, MSHA believes it is important to afford the operator ample opportunity to provide these new protections to affected miners.

45 Fed. Reg. 80766.

The above discussion shows that Mullins was entitled to reexercise his Part 90 rights in order to bid on the job of dispatcher and the fact that he had previously waived his Part 90 rights in order to continue working as an electrician cannot be used as a valid reason to claim that he had no right to bid for the job under Part 90 and article XVII(i)(10) of the NBCWA.

The Issue of Whether Mullins Should Be Precluded from Obtaining the Dispatcher's Job Because It Is a Choice Job Paying More per Shift Than the Electrician's Job

Only Mullins' brief (pp. 1-2) discusses the issue as to whether the fact that the dispatcher's job pays more per shift than his job of electrician should be considered as a bar to Mullins' being able to obtain the job under Part 90 and article XVII(i)(10) of the NBCWA. It is clear from MSHA's comments in the rulemaking proceeding that MSHA places great emphasis on any encouragement that can be given by operators to motivate miners to participate in the program implementing the Part 90 standards which are "intended to prevent the progression of pneumoconiosis among miners in the nation's coal mines" (45 Fed. Reg. at 80760). Since a miner would be encouraged to participate in a program which might provide him with a higher income than he was receiving before becoming a Part 90 miner, it is certain that there is no impediment in Part 90 or in the Act which would suggest that a Part 90 miner should not be transferred to a job which might pay him more per shift than he was making on the job he held prior to his transfer.

As a matter of fact, the dispatcher's job was a Grade 4 job under the NBCWA while both the repairman's and electrician's jobs were Grade 5 jobs (Tr. 163; 166). Consequently, the dispatcher's job would have paid Mullins less than the electrician's job if it had not been for the fact that the dispatcher was required to work 45 minutes more than 8 hours per shift. Therefore, it was the fact that Mullins worked more than 8 hours per shift at a Grade 4 level that enabled him to earn more money as a dispatcher than he earned as an electrician or repairman (Tr. 166).

The additional per-shift income associated with the dispatcher's job and the fact that it was on the surface or outside the mine caused it to be one of the most "sought after" jobs at the mine, according to B-E's superintendent (Tr. 160). The desirability of the dispatcher's job accounts for the mine superintendent's statement that he would not have awarded the job to Mullins under Part 90 by itself because other miners wanted the job and it would have been hard to justify awarding the job to Mullins in the first instance if he had not been able to point to a provision in the NBCWA which showed that he was complying with the contract and that it was a fair decision, at least when he first awarded the job to Mullins (Tr. 143; 160).

In any event, there is nothing in the Act or in Part 90 which indicates that a Part 90 miner should be denied a transfer to any job performed in an atmosphere of no more than 1.0 milligram of respirable dust simply because the job sought by the Part 90 miner might pay a few dollars more per shift

than the job the Part 90 miner may be holding prior to his exercising of his Part 90 rights.

The Issue of Whether UMWA May Be a Respondent in a Discrimination Proceeding and Be Required to Pay a Civil Penalty

In the answer to the amended complaint filed on July 2, 1984, by UMWA and in the answer to the amended complaint filed on July 9, 1984, by D30, both respondents took the position that they cannot be made respondents to an action filed by a miner pursuant to section 105(c)(3) of the Act. Neither respondent, however, denies in its initial brief that UMWA and D30 were improperly made parties to this proceeding. D30's reply brief (p. 2) does state that it is "patently ridiculous" for Mullins to claim in his brief (p. 10) that UMWA should be considered to be an "operator" as that term is defined in the Act.

Inasmuch as UMWA and D30 initially took the position that they should not be made respondents in this proceeding, and since D30 still thinks that it is "patently ridiculous" to argue that UMWA may be considered to be an "operator", it appears that I should consider this issue fully in order that there will be no doubt as to which respondents are parties to this proceeding.

When the amended complaint was filed, counsel for Mullins inadvertently omitted Local 1468 from the list of respondents. Subsequently, she filed a motion requesting that she be permitted to supplement the amended complaint to include Local 1468 as a respondent. That motion is hereinafter granted because it is clear from the complaints filed by Mullins with MSHA that he intended to include Local 1468 as a respondent from the very beginning of his action against the UMWA. When the initial brief was filed by counsel for D30, he stated on page one of the brief that he was filing it on behalf of District 30 and Local 1468.

The starting point, in considering whether UMWA, including Local 1468 and District 30, may be named as respondents in an action by a miner pursuant to section 105(c)(3), is an examination of section 105(c)(1) of the Act which reads as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint

notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

"Person" is defined in section 3(f) of the Act as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." That definition is certainly broad enough to include UMWA as the term "person" is used in section 105(c)(1) of the Act. There can be no doubt but that Congress intended for an organization like UMWA to be included within the definition of a "person" who is barred from discriminating against miners. Senate Report No. 95-181, 95th Cong., 1st Sess. 35-36 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977. at 623-624 (1978) 4/ states that miners "must be protected against any possible discrimination" and that "[i]t should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved." Therefore, it is obvious that UMWA may be included as a respondent in an action brought by a miner pursuant to section 105(c)(3) of the Act because UMWA, under the Act, is a "person" who is prohibited from discriminating against a miner.

Section 105(c)(3) ends with the sentence: "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)". Section 110(a) states that "[t]he operator of a coal or other mine * * * who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which shall not be more than $10,000 for each such violation." The term "operator" is defined in section 3(d) of the Act as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine <u>or any independent contractor performing services</u> or construction at such mine." [Emphasis supplied.]

4/ All subsequent references to the legislative history will simply refer to the page number of the volume in which the history was reprinted. Unless otherwise indicated, all references will be to the history of the 1977 Act.

Article 1A, sections (g), (h), and (i) of the NBCWA deal with B-E's right to contract out to persons other than UMWA such work as transportation of coal, repair and maintenance work, rough grading and mine reclamation work, leasing or subleasing of coal lands, and construction work, including the erection of mine tipples and sinking of mine shafts or slopes. Those provisions prohibit B-E from contracting to others such work "unless all [UMWA] Employees with necessary skills to perform the work are working no less than 5 days per week" and provided such contracting out is "consistent with the prior practice and custom of the Employer at the mine." The UMWA, therefore, by restricting B-E's right to contract out construction and other work at the mine, makes itself an "independent contractor performing services" at the mine and makes UMWA an "operator" within the meaning of section 3(d) of the Act. Since UMWA is an operator, it may, of course, be assessed a civil penalty under section 105(c)(3) of the Act if a violation of section 105(c)(1) is found to have occurred in this proceeding. 5/

Although, as indicated above, D30's reply brief (p. 2) claims that it is "patently ridiculous" for Mullins to claim that UMWA is an "operator" under the Act, D30 does not give any reason for making that assertion. My holding that UMWA is an operator under the Act is perfectly consistent with the definition of "operator" in section 3(d) of the Act. My holding is supported by United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 547 (1980) because, in that case, the union filed a grievance to protest the fact that the employer had laid off 19 union employees who were no longer needed after the employer began to contract to other companies certain maintenance work which had formerly been done by union employees. B-E's mine involved in this proceeding was closed for economic reasons from October 1984 to January 2, 1985 (Tr. 80). It is not idle speculation to believe that UMWA would resist any attempt on the part of B-E to lay off any union employees so that construction or other types of work could be contracted to other parties.

5/ The court issued its decision in Old Dominion Power Co. v. Raymond Donovan and FMSHRC, _____ F.2d _____, 6th Cir. No. 84-1942, on September 18, 1985, after I had completed this portion of my decision. The court excluded Old Dominion from coverage under the Act because it did not have a "continuing presence at the mine" so as to come within the Act's definition of an "operator" since Old Dominion's "only presence on the [mine] site is to read the meter once a month and to provide occasional equipment servicing" (slip opinion, p. 12). UMWA has a "continuing presence at the mine" and is therefore not excluded by the holding of the court in Old Dominion from coverage as an "operator" under the Act.

For the reasons given above, I find that UMWA, including Local 1468 and District 30, were properly made respondents in this proceeding and that UMWA may be assessed a civil penalty for a violation of section 105(c)(1).

The Issue of Whether Article XVII(i)(10) of the NBCWA Should Be Declared Null and Void as Being Contrary to Public Policy and Part 90 and Section 105(c)(1) of the Act

Before I rule on the issue of whether article XVII(i)(10) of the NBCWA should be declared null and void, I should note that my authority is only that which is given to me by the Act and the Commission. The only issue which I am authorized to consider in this proceeding is whether respondents discriminated against Mullins in violation of section 105(c)(1) of the Act. In Local Union No. 781 v. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1179 (1981), the Commission noted that it does not "unnecessarily thrust [itself] into resolution of labor or collective bargaining disputes" but that it is "occasionally obligated to examine the parties' collective bargaining agreement" in order to determine the issues raised in a particular case. Mullins' complaint in this proceeding necessarily requires me to examine article XVII(i)(10) of the NBCWA because UMWA's interpretation of that provision caused Mullins to lose his job as dispatcher and precipitated the filing of the complaint which is now before me (Stipulation Nos. 10 through 13).

The Supreme Court held in W. R. Grace & Co. v. Local 759, 461 U.S. 757 (1983), that a court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract is better than the arbitrator's, but the Court also stated that a court may not enforce a collective-bargaining agreement which is contrary to public policy. In Hurd v. Hodge, 334 U.S. 24 (1948), the Court stated:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

334 U.S. at 34-35. Since, as I hereinafter shall demonstrate, article XVII(i)(10) discriminates against miners who work on a nonproducing crew and otherwise restricts the application

of Part 90, all in violation of section 105(c)(1) of the Act, I believe that a federal court would have the power to declare article XVII(i)(10) null and void as being contrary to public policy which, in this case, is a Federal statute.

Inasmuch as I do not have the authority to declare article XVII(i)(10) to be null and void, I shall briefly note at this time only that article XVII(i)(10), by its very terms, is in violation of section 105(c)(1) of the Act, because, among other things, it permits a miner to exercise his Part 90 rights only once to ask for a job which is vacant, whereas Part 90 allows a miner to reexercise his Part 90 rights as many times as he may wish to do so. Article XVII(i)(10) also discriminates against Part 90 miners by distinguishing miners having pneumoconiosis on a producing crew from miners having pneumoconiosis on a nonproducing crew and by affording the former a preferential right to obtain jobs which the latter are prohibited from obtaining--all in violation of section 105(c)(1) which specifically states that "no person shall * * * in any manner discriminate against * * * any miner * * * because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101". Article XVII(i)(10) even recognizes in its last sentence that it discriminates against Part 90 miners by stating that "[t]his section is not intended to limit in any way or infringe upon the transfer rights which [Part 90] miners may otherwise be entitled to under the Act." [Emphasis supplied.]

The Issue of Whether UMWA and D30 Discriminated Against Mullins by Maintaining in an Arbitration Proceeding that B-E's Giving the Dispatcher's Job to Mullins Was Contrary to the Provisions of Article XVII(i)(10)

Section 105(c)(1) of the Act provides, in pertinent part, that "[n]o person shall * * * in any manner discriminate against * * * or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101." Mullins is "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101" because 30 C.F.R. § 90.1 specifically states that "[t]his Part 90 is promulgated pursuant to section 101 of the Act and supersedes section 203(b) of the Act." It is undisputed that Mullins was notified by MSHA on August 5, 1980, that he had "enough pneumoconiosis to be eligible for transfer under the [Act] to a less dusty job in the mine (where the concentration of respirable dust is not more than 1.0 milligram per cubic meter of air, or

to an area with the lowest concentration attainable below 2.0) if you are not already working in such area" (Exh. 4).

It is also undisputed that MSHA notified B-E on August 29, 1980, that Mullins was required to be transferred to a position in an atmosphere of no more than 1 milligram unless the position which he then held was within 1 milligram or less (Exh. 5). On September 29, 1980, B-E notified MSHA that it was unnecessary to transfer Mullins because the position of repairman first class which he then held did not expose him to more than 1 milligram (Exh. 6).

After Mullins had subsequently obtained the position of electrician first class through application of his normal seniority rights under the NBCWA, an MSHA inspector issued Citation No. 952288 on September 15, 1981, alleging a violation of section 90.100 because the inspector had taken respirable dust samples which showed that Mullins' position of electrician first class was exposing him to a respirable dust concentration of 3.0 milligrams (Exh. 7). B-E wrote MSHA a letter on August 15, 1981, stating that it was of the opinion that the position of electrician first class could not be reduced to 1 milligram or less and that B-E had offered to transfer Mullins to a position having no more than 1.0 milligram of dust, but that Mullins had declined the offer, stating that he preferred to remain in the position of electrician first class. The letter further advised MSHA that a meeting had been held with Mullins on October 14, 1981, and that Mullins had stated that he recognized that he would be waiving his Part 90 rights by declining to accept B-E's offer to transfer him to a position having no more than 1 milligram of respirable dust (Exh. 8). The inspector terminated Citation No. 952288 on October 27, 1981, on the ground that Mullins had waived his Part 90 rights in order to continue working in the position of electrician first class (Exh. 23; p. 2).

Mullins continued working for B-E in the position of electrician first class until September 17, 1982, when he notified MSHA that he wished to reexercise his Part 90 rights to obtain the job of dispatcher (Exh. 9). Mullins also notified B-E that he was exercising his rights as a Part 90 miner to bid for the job of dispatcher (Exh. 10). B-E notified MSHA in a letter dated December 1, 1982, that Mullins had reexercised his Part 90 rights to bid for the position of dispatcher and that Norman Caudill, another union worker, had filed a grievance to protest B-E's having awarded the job to Mullins and that B-E could not at that time predict the outcome of the challenge (Exh. 12).

Mullins had obtained the position of dispatcher by relying upon Part 90 and article XVII, section (i), paragraph (10), of the NBCWA (Exh. 27) which has been quoted in full in footnote 3 on page 5 above. B-E's awarding the dispatcher's job to Mullins under paragraph (10) was challenged by Caudill who was another union worker but who did not have a letter from MSHA stating that he had pneumoconiosis. The winning argument advanced by Caudill and D30 before the arbitrator was that paragraph (10) allows only letterholders or Part 90 miners "on a production crew" to obtain a job over other miners who would, except for the provisions of article XVII(i)(10) and Part 90, be entitled to the job by application of normal seniority rules. Since Mullins' job of electrician first class was performed on the evening shift which was not a producing shift at B-E's mine, Mullins was not "on a production crew" and therefore D30 argued that Caudill ought to be awarded the job through application of normal rules of seniority because Caudill admittedly had about 3 more years of service than Mullins.

The arbitrator's ruling on the parties' arguments is contained in the last three paragraphs of the decision (Exh. 18, pp. 15-16):

> Notwithstanding the above, however, in my judgment the National Agreement allows only a "letterholder on any production crew" to exercise his letterholder privilege. The evidence indicated that Mullins was an electrician first class on the second shift and that the second shift was a maintenance shift and not a production shift. Consequently, Mullins could not exercise his letterholder privilege under the facts in this case. Although it might be argued that the parties did not intend for "production crew" to have such a restricted meaning, I must assume the parties included the language "letterholder on any production crew" for some specific purpose. This is especially true since Arbitration Review Board Decision 78-61 applies a restricted meaning to the term "produce."
>
> The fact that Mullins may have a separate remedy under the Federal Coal Mine Health and Safety Act of 1969 does not affect his remedy under the National Agreement. Although Mullins may have a legal right to be assigned to a job in a "less dusty area" under the aforesaid law, that right is recognized by the National Agreement i[n] a restricted fashion. While Mullins

> may have a continuing right to work in a less dusty area under the Federal Coal Mine Health and Safety Act of 1969, the National Agreement does not recognize such right under the facts in this case and my jurisdiction is limited by the four corners of the National Agreement.
>
> DECISION:
>
> For the reasons set forth in the foregoing discussion, it is my opinion that the grievance of Norman Caudill is well taken and, accordingly, the grievance is sustained. The Employer is hereby ordered to award the job of dispatcher on the second shift to the grievant.

It would be difficult to find a provision which is any more discriminatory than article XVII, section (i), paragraph (10), of the NBCWA. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "discriminate" as making "a difference in treatment or favor on a class or categorical basis in disregard of individual merit." It is obvious that article XVII (i)(10) of the NBCWA, as interpreted by the arbitrator, makes "a difference in treatment" by allowing only letterholders or Part 90 miners on producing crews to obtain jobs which are associated with no more than 1.0 milligram of respirable dust. It can be argued, as respondents do, that a miner on a production crew is a distinction based on individual merit because such a miner is considered to be working in a face area where respirable dust concentrations are greater than they are on nonproducing crews who work on maintenance shifts as Mullins does. In this case, however, "individual merit" would seem to be determinable only on the basis of which miner has the worst case of pneumoconiosis. If that is used as the basis for determining "individual merit", it is certain that mere segregation into producing and nonproducing crews would not be a justifiable way to determine merit because only a physician is qualified to examine x rays for the purpose of determining which miner has the most advanced case of pneumoconiosis. There is no indication that the arbitrator was a physician and even if he was, his expertise would have been useless in this case, because he awarded the job to Caudill who is not a Part 90 miner or letterholder.

Moreover, if production-crew Part 90 miners are to be given a preference because of a presumption that they are exposed to more respirable dust than Part 90 miners on a nonproduction crew, the facts in this proceeding rebut that presumption by showing that Mullins was exposed to at least

3.0 milligrams of respirable dust on a nonproduction crew, whereas section 70.100 of the Regulations requires respirable dust on a production crew to be maintained at not more than 2.0 milligrams. Consequently, not one of the reasons advanced by respondents to justify the discrimination against Mullins has any validity.

The first sentence of article XVII(i)(10) states that the normal seniority provisions do not apply if the job which is posted involves work in a "less dusty area" and one of the bidders is a letterholder or Part 90 miner. That sentence removed the dispatcher's job from a category open to bidding by Caudill because he is not a letterholder. If there had been a bidder for the job who was also a "letterholder on any production crew", the job would then have had to be awarded to him under the provisions of the second sentence of article XVII(i)(10). However, since there was not a "letterholder on any production crew" bidding for the job, the dispatcher's job was correctly awarded to Mullins because he was the only letterholder bidding for the job and that fact necessarily removed the job from normal seniority bidding provisions and made Caudill ineligible for making a bid for the job or challenging the award to Mullins. The second sentence of article XVII(i)(10) mandates that the position be given to the senior letterholder on a production crew only if such a Part 90 miner has made a bid for the job in the first instance. Therefore, D30 especially discriminated against Mullins in this proceeding by taking to arbitration a grievance filed by a non-Part 90 miner who was not entitled to bid for the job at all under article XVII(i)(10) of the NBCWA.

Section 105(c)(1) of the Act provides that "no person shall * * * interfere with the exercise of the statutory rights of any miner." Mullins notified both MSHA and B-E that he was reexercising his Part 90 rights to bid on the job of dispatcher. Respondents have argued at great length in this proceeding that Mullins was not entitled to the job of dispatcher under Part 90 because Part 90 only entitles a miner to work in an area of no more than 1.0 milligram of respirable dust and that Part 90 fails to give him a right to bid for a specific position. That contention has already been rejected in this decision by showing from MSHA's comments in the Part 90 rulemaking proceeding that a Part 90 miner should be able to seek a specific vacancy for any job which is to be performed in no more than 1.0 milligram of respirable dust.

Therefore, respondents are striving to obtain a ruling in this proceeding which is contrary to the intention of Congress when it inserted the provision in the Act granting miners having pneumoconiosis the right to transfer to a

position which does not expose them to more than 1.0 milligram of respirable dust. Congress provided for miners having pneumoconiosis to get out of excessive respirable dust with knowledge that it would affect application of normal rules of seniority for obtaining jobs (Part I of 1969 Leg. History, p. 1303). The 1977 history shows that Congress even changed the name of the branch of the agency which would be administering the 1977 Act from "Mining Enforcement and Safety Administration" to "Mine Safety and Health Administration" for the purpose of emphasizing that the Act was intended to safeguard miners' health as well as their safety (Leg. History, pp. 1316; 1365; 1368).

Article XVII(i)(10) of the NBCWA begins by purporting to be providing all Part 90 miners with the right to obtain jobs located in no more than 1 milligram of respirable dust and suspends normal seniority bidding for those positions if any Part 90 miner or letterholder bids for such a position. Then article XVII(i)(10) interferes with exercise of the Part 90 miners' statutory rights by reapplying seniority to exclude any qualified letterholder or Part 90 miner from obtaining a specific low-dust job if he is working on a nonproducing crew. It is the height of discrimination or interference with Part 90 miners' rights for article XVII(i)(10) to restrict the exercise of those rights only by miners "on any production crew". The Act makes no such distinction, Part 90 makes no such distinction, and section 105(c)(1) of the Act specifically prohibits the making of such a distinction.

Therefore, I find that UMWA, D30, and Local 1468 discriminated against Mullins in violation of section 105(c)(1) of the Act when they brought a grievance to arbitration and succeeded in obtaining an interpretation of article XVII (i)(10) of the NBCWA which resulted in an award of a job performed in no more than 1.0 milligram of respirable dust to a miner who did not have any Part 90 rights at all.

The Issue of Whether Mullins Was Engaged in the Protected Activity of Exercising His Part 90 Rights When He Invoked the Superseniority Provisions of Article XVII(i)(10) of the NBCWA

UMWA's initial brief (pp. 3-7), by arguing that Mullins was not engaged in a protected activity when he obtained the job of dispatcher, is considering one of the tests which the Commission has established for determining whether a discrimination complaint should be granted. In Jack E. Gravely v. Ranger Fuel Corp., 6 FMSHRC 799, 802 (1984), the Commission restated those principles as follows:

> Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

UMWA's initial brief (p. 3) begins its argument by incorrectly stating that the issue in this proceeding is "whether or not the superseniority provision in the 1981 NBCWA interfered with Mr. Mullins' exercise of his statutory rights under 30 C.F.R. Part 90". Congress specifically pointed out when it provided for the transfer of miners having pneumoconiosis to a position exposing the miners to no more than 1.0 milligram of dust that it had specifically included in section 105(c)(1) of the Act a provision prohibiting discrimination against miners who are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101" (Leg. History, pp. 611; 624). UMWA may not pick and choose which miners, who are the subject of medical evaluations and potential transfer, will be permitted to obtain jobs which will expose them to no more than 1.0 milligram of dust. Any Part 90 miner has a right to request that he be given a position in no more than 1.0 milligram of respirable dust.

It is wholly incorrect for UMWA to argue on page four of its initial brief that Mullins obtained the job of dispatcher under article XVII(i)(10) of the NBCWA rather than by exercising his Part 90 rights. As I have already made clear in this

decision, Mullins had a right to reexercise his Part 90 rights any time he wished to obtain a job which would expose him to no more than 1.0 milligram of respirable dust. The record contains copies of the letters which Mullins wrote advising MSHA and B-E that he was reexercising his Part 90 rights to bid for the job of dispatcher (Exhs. 9 and 10). It is incorrect for UMWA and the other respondents in this proceeding to argue that Mullins did not rely upon his Part 90 rights to obtain the job of dispatcher. As I have previously noted, article XVII(i)(10) has no application at all unless a bid is filed for a job in no more than 1.0 milligram of dust by a letterholder or Part 90 miner.

UMWA's initial brief (p. 7) attempts to justify the discrimination in article XVII(i)(10) against Part 90 miners on nonproducing crews by arguing that it could not obtain a provision in the NBCWA for all the Part 90 miners and had to settle for a provision giving the right to bid on jobs in low dust only to Part 90 miners on a producing crew. I shall note below some reasons for doubting the validity of that argument, but the reason that article XVII(i)(10) was written to discriminate against Part 90 miners on nonproducing crews is irrelevant in determining whether there was a violation of section 105(c)(1).

UMWA's initial brief (p. 6) claims that Mullins and B-E were unaware that article XVII(i)(10) is inapplicable to Part 90 miners working on a nonproducing crew until the arbitrator made a ruling to that effect in his decision issued April 15, 1983 (Exh. 18). B-E was one of the parties who signed the NBCWA. The credibility of UMWA's claim that it could only obtain a provision in the NBCWA favoring Part 90 miners on a production crew is severely weakened by its contention that B-E did not know that article XVII(i)(10) applies only to Part 90 miners on a production crew until the artibrator explained the meaning of that article to it. Presumably, the mine owners are the parties to the contract who resisted making article XVII(i)(10) applicable to all Part 90 miners. It is, therefore, strange indeed that B-E awarded the dispatcher's job to Mullins, a Part 90 miner on a nonproduction crew, without realizing that it had interpreted the NBCWA to permit the very type of transfer which the mine owners had allegedly resisted providing for in the first instance when the NBCWA was originally negotiated.

UMWA's initial brief (p. 6) makes a peculiar use of the facts in this proceeding by arguing that if Mullins had really exercised his Part 90 rights when he sought the dispatcher's job, he would have accepted the alternate job of repairman which was offered to him by B-E when Caudill was awarded the job of dispatcher by the arbitrator. Part 90, as I have

previously shown, permits a miner to waive his Part 90 rights if the job offered to him is not suitable. Mullins believed that the repairman's job would expose him to more respirable dust than the electrician's job (Tr. 50). After all, Mullins contracted pneumoconiosis while working on a nonproducing section because he did not have pneumoconiosis when evaluated for that condition in 1974 (Exh. 1). He did not work on a producing section between 1974 and 1980 (Tr. 38-39). Nevertheless, he was advised in 1980 that he had contracted pneumoconiosis (Exhs. 3 and 5). He had been a repairman during that period and had developed pneumoconiosis while holding that position. Therefore, it is not surprising that he was reluctant to return to the very position which he believed to be responsible for the lung disease which he feels is deteriorating with time (Tr. 116).

An MSHA printout of "selected samples" filed by B-E on August 21, 1985, shows that Mullins was exposed to 3.0 milligrams of respirable dust on May 7, 1975, while working as a repairman, but that is the only sample out of 19 which indicates that Mullins' job as a repairman exposed him to more than 1.0 milligram of respirable dust. On the other hand, no one disputed Mullins' assertion that the area where he worked as a repairman was watered excessively only on the days when he was wearing a respirable-dust sampling device (Tr. 41; 66).

The first sentence of article XVII(i)(10) states that (Exh. 27):

> If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of this Article shall not apply if one of the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U. S. Department of Health and Human Services informing him that he has contracted black lung disease and that he has the option to transfer to a less dusty area of the mine.

There is not a single word in the first sentence of article XVII(i)(10) which requires the Part 90 miner bidding on a specific job to be a Part 90 miner working on a <u>production crew</u>. Mullins was the <u>only</u> Part 90 miner who made a bid for the dispatcher's job. Therefore, I find that Mullins was engaged in a protected activity when he reexercised his Part 90 rights and made a bid for the dispatcher's job in accordance with section 90.3(e) of the Regulations and the first

sentence of article XVII(i)(10) of the NBCWA. I also find that Mullins met the first part of the test given by the Commission in its Gravely decision for proving a prima facie case of discrimination by showing that he was engaged in a protected activity when he requested that he be given the dispatcher's job because he was the only Part 90 miner who made a bid for the job.

The Issue of Whether Article XVII(i)(10) Interferes with Part 90 Rights of Nonproducing Miners

UMWA's initial brief (p. 8) makes an extension of its arguments previously discussed in the preceding portion of this decision. In none of the briefs filed by UMWA, D30, and B-E do they ever directly discuss the second part of the test given by the Commission in the Gravely case for determining whether a complainant has proven a prima facie case of discrimination. The second part of the test is that the complainant prove by the preponderance of the evidence that some adverse action against him was motivated in any part by that protected activity. Inasmuch as the preponderance of the evidence shows beyond any doubt that Mullins was removed from the dispatcher's job solely as a result of his having reexercised his Part 90 rights in order to get the job, there can be no finding other than that Mullins has proven a prima facie case of discrimination by UMWA, D30, and Local 1468 in this proceeding. In its Gravely decision, the Commission stated that if a complainant succeeds in proving a prima facie case, the respondent may defend by affirmatively proving that the complainant would have been subject to the adverse action in any event because of his unprotected conduct alone. The respondents have not attempted to make an affirmative defense by showing that Mullins would have been removed from his dispatcher's job in any event because of some unprotected activity because Mullins did not engage in any activity that is unprotected, especially of the kind that is normally relied upon by respondents in discrimination cases, such as refusal of a miner to obey an order to perform some nonhazardous type of work, or failure of a miner to report for work without being able to give a satisfactory reason for his absenteeism.

In fact, Mullins seems to be a very conscientious employee in every way and no one challenged his statement that (Tr. 96-97):

> I'm not a trouble maker, don't get me wrong. The company has been good to me. I started work--I had never been in the mines before. The length of time I've been with the company I think I've done pretty

> good. I worked myself up until I'm an electrician and I don't think nobody's got too many complaints about my work. And I think Mr. Collier [the mine superintendent] would verify that my job is pretty dangerous that I do. And my only argument was that I wanted fair treatment. * * *

The sole defense which all respondents raise to Mullins' complaint boils down to a claim that UMWA and the Coal Operators can agree to give a Part 90 miner on a producing section more benefits than a Part 90 miner on a nonproducing section and that such a contractual provision may not be held to be discriminatory because it does not take anything away from Part 90 miners on a nonproducing crew because they still have the same rights they always had before the contractual provision in article XVII(i)(10) favoring Part 90 miners on producing crews was negotiated. Specifically, as UMWA states in its initial brief (p. 11), the Part 90 miner on a nonproducing shift still is "entitled to transfer to an area of the mine where the average concentration of respirable dust is continuously maintained at or below 1.0 mg. per cubic meter of air."

The absurdity of the aforesaid argument--that article XVII(i)(10)'s giving Part 90 miners only on a producing crew the right to transfer to a specific job, while suspending normal seniority rights which might entitle non-Part 90 miners to bid for the job, does not discriminate against Part 90 miners on a nonproducing crew because the Part 90 miners on a nonproducing crew still have all the rights they always have had--may be illustrated if one recalls the gas-rationing days of a few years ago when there were long lines of motorists waiting for gas at most of the gasoline stations. In order to reduce the length of the lines on any given day, a rule was imposed in some areas that motorists with license numbers ending in an even number would be able to purchase gas on Mondays, Wednesdays, and Fridays, and that motorists having license numbers ending in odd numbers would be able to purchase gas on Tuesdays, Thursdays, and Saturdays. Most stations were closed on Sundays because they had no gas to sell and saw no need to be open. The aforesaid procedure caused no great complaint from the public and the lines at the gas stations were shortened as a result of the ruling.

A contrary situation would have prevailed, however, if the gas-rationing authorities had declared that only those motorists whose license numbers ended in even numbers would henceforth be permitted to purchase gas on any day and if they had also declared that the rule would not discriminate against motorists whose license numbers ended in odd numbers

because they would still be in the same position they were in before the rule was passed because they would still have all the gas in their tanks which they had before the rule was passed and that the rule in no way discriminated against them because it did not take away from them anything which they had at the time the ruling was made.

UMWA's initial brief (p. 11) states that "[t]he superseniority right accorded production crew miners by [article XVII(i)(10)] benefits those miners who have lost the greatest amount of respiratory function in the course of their labor." As I have previously noted, there is not one word of testimony in this proceeding which shows that miners' lungs on a producing crew are in worse condition than the lungs of miners on a nonproducing crew. MSHA's comments in its rulemaking proceeding stated that pneumoconiosis is irreversible (45 Fed. Reg. at 80763). Also as I have previously noted, a Part 90 miner would not be on a producing crew where dust is greater than 1.0 milligram and would not be in a position to bid for a job pursuant to article XVII(i)(10) unless he had done the same thing Mullins did, that is, waive his Part 90 rights in order to remain in a job which pays well but which would continue to expose him to respirable dust in the concentration of 2.0 milligrams permitted on a producing section. It should be recalled that Mullins was exposed to more than 3.0 milligrams of dust while working on a nonproduction crew (Tr. 47; Exh. 7). Consequently, there is absolutely no record support for UMWA's argument that the preferential treatment given to miners on a producing crew by article XVII(i)(10) is justified because miners on a producing crew "have lost the greatest amount of respiratory function in the course of their labor" (UMWA's brief, p. 11).

Mullins' initial brief cites several cases which show that miners on nonproducing crews contracted pneumoconiosis while performing jobs which were not on producing crews and which were, in fact, performed entirely in surface areas of mines. In Skipper v. Mathews, 448 F.Supp. 300 (M.D. Pa. 1977), a miner was awarded black-lung benefits in factual circumstances showing that he had contracted pneumoconiosis from working in a shop to repair mine equipment "covered with coal dust". In Roberts v. Weinberger, 527 F.2d 600 (4th Cir. 1975), a miner was awarded black-lung benefits in a factual situation showing that he had worked as a truck driver hauling coal from a strip mine to a tipple. In Adelsberger v. Mathews, 543 F.2d 82 (7th Cir. 1976), a miner was awarded black-lung benefits in factual circumstances showing that she worked as a clerical employee who went beneath the tipple to direct the switching of grates and railroad cars. She also was responsible for weighing all the coal. In doing that kind of work, it was said that she was exposed to as much dust as the men who were working in the tipple.

All of respondents' initial briefs (D30, pp. 6-7; B-E, pp. 8-12; UMWA, pp. 4-5) fallaciously argue that a Part 90 miner may not bid on a specific job, but as I have previously stated, there is nothing whatsoever in the Act or Part 90 which restricts a miner from exercising or reexercising his Part 90 rights to get out of respirable dust in excess of 1.0 milligram by transferring to jobs located in less than 1.0 milligram only if those jobs which he or she seeks are unwanted by miners having more seniority than the miner with pneumoconiosis. Part 90 establishes certain minimum prerequisites which the operator must provide for the working environment of Part 90 miners, the primary one being that the miners' working environment may not exceed 1.0 milligram of respirable dust, but Part 90 at no place states that if a Part 90 miner asks that he be allowed to fill a vacancy in a particularly desirable job having the 1.0 milligram or less criterion, that the mine operator should deny that request just because some other miner with more seniority than the Part 90 miner has, wants that particular job.

One of the objections voiced by Congressman Erlenborn to the provision in section 203(b) of the 1969 Act [now Part 90] which requires that miners with evidence of pneumoconiosis be transferred to an area having no more than 1.0 milligram of dust, was that Congress did "not know what mischief we are playing with seniority rights in the unions when we give a man an option as to the place where he can work" (Part 1 of 1969 History, p. 1303). Therefore, Congress enacted section 203(b) with full knowledge that it might adversely affect seniority rights. Congressman Erlenborn also made it perfectly clear that miners other than those on production shifts are included among those who are exposed to excessive amounts of respirable dust when he stated as follows:

> One of the things that this report pointed out was a thing that apparently had not been recognized before, namely, that not all dust is generated at the working face of the mine. The ventilation air coming in behind the miner, in the passageway, in the halls, where the already mined coal is being taken out of the mine, picks up dust and brings it in to the working face, so that there is dust already present in the ventilation air that reaches the working face of the mine. Up until now most of us had the conception that all of the dust was created at the working face and all we had to do was get it away from the miner, but the very air that comes in to the working face, we understand now, has such a concentration of dust.

Part 1, 1969 Legislative History, p. 1303. Congressman Erlenborn's statement is supported by the testimony of both Mullins and Collier in this proceeding because Mullins believed that he was exposed to more than 1.0 milligram of respirable dust when he worked as a repairman on a nonproducing shift because he had to dig around in the dust when replacing parts along conveyor belts (Tr. 50). Collier similarly testified that the electrician's job on a nonproducing shift could not be reduced below 1.0 milligram of dust because of the practice of having the electricians blow coal dust out of electrical boxes (Tr. 132).

D30's reply brief (p. 4) states:

> My clients need no lectures from some attorney on their responsibilities to black lung victims. The United Mine Workers of America have fought for safer working conditions in this country for nearly a century. The UMWA lobbied for these federal mine safety laws that Mullins has abused. [Emphasis in original.]
>
> Mullins' Part 90 rights or health and safety are not issues in this case. Beth-Elkhorn offered to move Mullins to a less dusty job. Mullins' frivolous complaint has cost the UMWA, Beth-Elkhorn and the federal government money and resources that would have been better spent in efforts to remedy actual hazards to the health and safety of working miners.

It has not been my intention in this decision to be critical of UMWA for its efforts to bring about improved working conditions in coal mines, but I have no alternative but to show that article XVII(i)(10) of the NBCWA discriminates against Part 90 miners on nonproducing crews. Mullins had a right to take the action he did in filing the discrimination case in this proceeding and his doing so should not be categorized as an abuse of the mine safety laws.

At least one Congressman was critical of the role which UMWA played in obtaining black-lung benefits to miners at the time the 1969 Act was passed. Specifically, Congressman Heckler said:

> I am frank to state that one of the major reasons I became disenchanted with the top leadership of the United Mine Workers of America was the fact that down through the years they have exerted very little initiative and pressure toward improving the safety laws or regulations. Furthermore, even after the

> Farmington disaster, the top leadership of the United Mine Workers of America bluntly stated that in their judgment it would not be possible to enact any health protection or coal dust standard for the miners this year. Later, they took the same timid approach toward the enactment of compensation for victims of black lung. For a long time, they clung to the obviously gapping loophole provided by the Federal Coal Mine Safety Board of Review. These facts are a matter of record. * * *

Part 1, 1969 Legislative History, p. 1582. D30 should bear in mind that section 105(c)(1) also prohibits discrimination against a miner for having "filed or made a complaint under or related to this Act" or because he "has testified or is about to testify in any such proceeding."

Section 101(a)(7) of the Act provides that "where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned." [Emphasis supplied.] The use of the words "shall be" probably accounts for the following statement in MSHA's rulemaking proceeding:

> MSHA considered the appropriateness of providing for the mandatory transfer of miners who have evidence of pneumoconiosis. However, MSHA received several comments from labor and industry representatives expressing unanimous opposition to any mandatory transfer provisions. Commenters felt that a mandatory transfer program would create severe enforcement problems; create hostility towards the program, resulting in possible work stoppages; create distrust of MSHA; violate the confidentiality of the X-ray program by revealing information about a miner's medical condition; and decrease participation in the NIOSH medical surveillance program, depriving the miners of information about their health and depriving NIOSH of important epidemological data. In view of the possible problems with a mandatory transfer provision, the rule retains the option to exercise Part 90 rights and is intended to encourage more miners to exercise the option. However, MSHA will monitor participation rates over the next three years, and if the number of miners exercising the Part 90 option does not substantially increase, MSHA will reconsider the appropriateness of a mandatory transfer program.

45 Fed. Reg. at 80763-80764.

It is rather obvious that giving the miners the right to waive their Part 90 rights so as to remain working in an atmosphere which has more than 1.0 milligram of respirable dust is causing miners, such as Mullins, to avoid a transfer out of dust because of a dislike of the job which is offered to them or because they distrust the sampling methods which are being used to assure that they are not exposed in existing positions, or in positions to which they may be transferred, to more than 1.0 milligram of dust. If they were compelled to transfer to a job in an atmosphere of not more than 1.0 milligram of dust, they would not continue to work, as Mullins has done, in an atmosphere which may be exposing them to as much as 3.0 milligrams of dust.

MSHA may not be doing all that it should in connection with sampling the working environment of Part 90 miners because Mullins testified that he expressed to MSHA's inspectors his belief that B-E was excessively watering his working environment only on the days when he was wearing a respirable-dust sampler (Tr. 41; 66). Mullins stated that one of the inspectors agreed with him (Tr. 67). Mullins also made the allegation about excessive watering in his letter to Congressman Perkins (Exh. 15), but Mr. Ford answered the Congressman's letter by stating, among other things, that MSHA could take no action pertaining to Mullins' complaint about excessive watering because that was one of the ways that respirable dust may legally be reduced (Exh. 17).

On the other hand, section 90.300(a) requires the operator to submit a revised respirable-dust control plan if he changes his dust-control procedures in order to reduce the respirable dust in a Part 90 miner's working environment. In this proceeding, if an inspector agreed that Mullins' working environment was being maintained at no more than 1.0 milligram by excessively watering Mullins' working place only on the days when Mullins was wearing a respirable-dust sampler, then the inspector should have examined B-E's dust-control plan to determine whether the plan provided for the extensive watering that was being done when Mullins' working place was sampled. If the dust-control plan did not provide for the amount of watering which was being done when Mullins' working place was sampled, it would seem to be appropriate in such a case for MSHA to require that B-E submit a revision to its dust-control plan requiring extensive watering, and should have made certain that the revised plan was continually used on a daily basis so that Mullins would never have been exposed to more than 1.0 milligram of dust, as required by section 90.3(a) of the Regulations.

The discussion above is not meant to be critical of MSHA for its administration of the respirable-dust program because I am sure it is a very difficult aspect of the mine

health laws to regulate. It is also possible that MSHA performed the very acts which have been suggested above and that Mullins just failed to mention that in his testimony. Still, Mullins testified that he did not trust MSHA's administration of the Part 90 program (Tr. 57) and that may indicate that MSHA needs to devote more attention to the way the Part 90 program is being conducted than has been given to its efforts up to the present time.

The Court Cases Cited by Respondents Do Not Support Their Claims of Nondiscrimination in This Proceeding

D30's initial brief (pp. 11-12) argues that it was B-E's obligation to comply with the law by providing Mullins with a job in no more than 1.0 milligram of dust and to comply with the bargaining agreement by awarding the dispatcher's job to Caudill. D30 cites W. R. Grace & Co. v. Local 759, 461 U.S. 757 (1983), in support of the aforesaid contention, noting that the Supreme Court refused in that case to allow Grace to lay off senior employees in violation of a collective-bargaining agreement in order to hire minority workers to comply with Title VII of the Civil Rights Act. D30's reliance on the Grace case is misplaced because the result in Grace rested entirely on the fact that EEOC and Grace had entered into a conciliation agreement which was in conflict with the collective-bargaining agreement and the union, though invited, had declined to participate in the formation of the conciliation agreement. In such circumstances, the Court held that an arbitral award made pursuant to a collective-bargaining agreement ought to be honored and enforced by the courts. The Court, however, made it clear that collective-bargaining agreements need not be enforced when they are contrary to public policy by conflicting with a discrimination provision in a Federal statute, as article XVII(i)(10) of the NBCWA involved in this proceeding does. Hurd v. Hodge, 334 U.S. 24, 34-35 (1948).

UMWA's initial brief (p. 9) cites Goodin v. Clinchfield Railroad Co., 125 F.Supp. 441 (E.D. Tenn. 1954), aff'd, 229 F.2d 578 (6th Cir. 1956), cert. denied, 351 U.S. 953 (1956), in support of an allegation that article XVII(i)(10) can be considered to be unlawful discrimination against Part 90 miners on nonproduction crews only if that provision has been "crafted as a means of penalizing non-production crew members". Insofar as the issue of discrimination is concerned, the collective-bargaining agreement in Goodin pertained to a provision which required all conductors and trainmen to forfeit all seniority and retire from service upon attaining age 70. The court quoted from another judge's decision and stated that:

> compulsory retirement is not discriminatory in the sense that it affects only certain employees and not others. The compulsory retirement age of seventy years affects all employees alike in its ultimate results, since all employees, who live and remain with the carrier long enough, will some day reach the retirement age and will be obliged to leave their employment. True, some will feel its effectiveness immediately, whereas others will not feel its touch until some future, but ascertainable, time. That fact, however, does not militate against its present universal applicability.

125 F.Supp. at 446. The question in this proceeding is whether article XVII(i)(10) of the NBCWA is discriminatory under section 105(c)(1) of the Act. As I have already shown at great length above, article XVII(i)(10) does not affect all miners equally, as did the compulsory retirement provision in the Goodin case; therefore, Goodin has no application in this proceeding.

UMWA's initial brief (p. 9) cites Williams v. Pacific Maritime Association, 617 F.2d 1321 (9th Cir. 1980), in support of its statement that a union "may negotiate for and agree upon contract provisions involving disparate treatment of distinct classes of workers * * * so long as such conduct is not arbitrary or taken in bad faith." The two groups of employees involved in the Williams case were all longshoremen with different qualifications who were to be promoted on the basis of four specific standards which were required to be applied uniformly and with no exceptions. In this proceeding, article XVII(i)(10) of the NBCWA grants preferences to miners on production crews but there is no difference whatsoever in their qualifications. They are all Part 90 miners who have been notified that they have pneumoconiosis and are entitled to work in an area exposing them to no more than 1.0 milligram of respirable dust. Moreover, Caudill was awarded the dispatcher's job in low dust even though he was not a Part 90 miner on either a producing or nonproducing crew.

Mullins' brief (p. 5) refers to Steele v. Louisville & Nashville R. R. Co., 323 U.S. 192 (1944). In that case, the Court described a provision which was to be inserted in a collective-bargaining agreement which would have the effect of hiring only "promotable" firemen. By practice, only white firemen could be promoted to the job of engineer. As a result, all black firemen would ultimately have been excluded from service. The Court stated:

> Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is

> enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discrimination not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representatives to make such discriminations.

323 U.S. at 203. UMWA did not provide for relevant differences in preferring Part 90 miners on producing crews over Part 90 miners on nonproducing crews. Just as in favoring white firemen over black firemen, it is not possible to determine which Part 90 miner should be allowed to obtain a job in a low-dust area simply by classifying him as one who works on a producing shift instead of a nonproducing shift.

The case of Automotive, Petroleum & Allied Ind. v. Gelco Corp., 584 F.Supp. 514 (E.D. Mo. 1984), cited on page seven of Mullins' brief, shows how UMWA and D30 discriminated against Mullins in this proceeding. In the Automotive case, the court granted a motion for summary judgment filed by an intervening miner who had been awarded a partsman's job on the basis of his qualification of having had 5 years of experience working in a parts department, whereas the union wanted to force the employer to arbitrate another employee's grievance in circumstances showing that the grievant had greater seniority than the employee who had been awarded the partsman's job, but who had had only 3 months of experience in a parts department. The court held that the union's decision to take the position of the grievant was irrational because it was not based on an "informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement." 584 F.Supp. at 516.

In this proceeding, D30 took Caudill's position without engaging in a reasoned judgment regarding the merits of Caudill's claims. Caudill's grievance initially challenged the accuracy of B-E's belief that Mullins' job could not be lowered to 1.0 milligram or less of respirable dust and also challenged the accuracy of MSHA's dust samples showing that Mullins was exposed to 3.0 milligrams of dust by arguing that Mullins' entire work place had not been sampled (Exh. 18, p. 2). In making that argument, Caudill made a collateral attack on the accuracy of MSHA's respirable-dust program because MSHA had issued a citation based on two samples showing that Mullins was exposed to an average of 3.0 milligrams of respirable dust (Exh. 7). B-E did not contest the accuracy of the citation.

As I have previously noted, the first sentence of article XVII(i)(10) suspends the normal seniority provisions for bidding on jobs located in no more than 1.0 milligram of dust if any Part 90 miner or letterholder on a producing or nonproducing shift bids for the job. Since Mullins was the only Part 90 miner bidding on the dispatcher's job, he was entitled to it, and seniority should not have been considered at all unless another Part 90 miner on a producing shift had made a bid for the job. Since Caudill was not a Part 90 miner or letterholder, he was not entitled to file a grievance for the job under the collective-bargaining agreement and UMWA discriminated against Mullins by taking Caudill's grievance to arbitration so that a miner who did not have pneumoconiosis at all could be awarded a job which had already been properly awarded to Mullins as the only Part 90 miner bidding for the job.

Indeed, it appears that the Supreme Court's statement in Vaca v. Sipes, 386 U.S. 171 (1967), is fully applicable to D30's and UMWA's action in this proceeding, that is, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

UMWA's reply brief (pp. 3-4) attempts to justify its discriminatory treatment of Mullins in this proceeding by arguing that it has been given a "wide range of reasonableness" in negotiating collective-bargaining agreements as opposed to administering them. UMWA cited Ford v. Huffman, 345 U.S. 330 (1952), in support of that claim, but that case in no way supports UMWA's having negotiated the discriminatory article XVII(i)(10) involved in this proceeding. In the Huffman case, the collective-bargaining agreement required Ford to credit seniority for the time of employees who served in the armed forces subsequent to June 21, 1941, regardless of whether they had been employed by Ford prior to that time. Such crediting gave employees hired after June 21, 1941, but who entered the armed services during WWII and then returned to Ford, less seniority than persons who were hired after WWII but who had not previously worked for Ford at all. The Court noted that the Veterans' Preference Act of 1944 required the crediting of time served in the armed forces. The Court states that it:

> is not necessary to define here the limits to which a collective-bargaining representative may go in accepting proposals to promote the long-range social or economic welfare of those it represents. Nothing in the National Labor Relations Act, as amended, so limits the vision and

> action of a bargaining representative that it must disregard public policy and national security. Nor does anything in that Act compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees.

345 U.S. at 342.

As I have already shown in this decision, UMWA, not B-E, is the party to the NBCWA which insisted on interpreting article XVII(i)(10) so as to exclude a Part 90 miner on a nonproducing crew from bidding on a job located in no more than 1.0 milligram of dust. Therefore, UMWA's claim that it could not negotiate a contract provision which would extend the right to bid on jobs in low dust to all Part 90 miners is not supported by the facts in this proceeding. In any event, UMWA in this proceeding, cannot rely upon the Huffman case in support of its having negotiated a discriminatory collective-bargaining agreement because UMWA was hardly promoting the "long-range social" welfare of Part 90 miners when it negotiated a provision which was designed to assist only Part 90 miners on a producing crew to get out of the dust which is gradually killing them, particularly when it is considered that Part 90 miners on a producing crew have to waive their Part 90 rights, just as Mullins did, in order to continue working on a producing crew where they are legally exposed to a working environment of up to 2.0 milligrams of respirable dust.

UMWA's reply brief (pp. 2-3) also relies upon Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980), in support of its claim that it was fairly balancing the collective and individual rights of all the miners when it negotiated the NBCWA. UMWA's reliance on the Hussman case is misplaced because in that case, the court did find that the union had breached its duty of fair representation with respect to grievances arising under a modified seniority clause in a collective-bargaining agreement. The court stated that:

> The union's choice to process all grievances based on seniority discriminated against employees receiving promotions on the basis of merit. This conduct may be viewed as a perfunctory dismissal of the interests and rights of plaintiffs. The union simply failed to represent them in any way. The modified seniority clause specifically required balancing the interests of merit and seniority

> whenever Hussman deemed that the position warranted selection on the basis of merit.

619 F.2d at 1239. The court made a statement which is especially pertinent in this proceeding when it is considered that D30 supported Caudill's claim based entirely on his argument that he had been working for B-E for about 3 years longer than Mullins had.

> While we do not suggest that a union must hold internal hearings to investigate the merits of every grievance brought to it, in certain situations it may be inappropriate for a union to tie its own hands by blind adherence to a policy of favoring employees with seniority in order to avoid disputes between employees.

619 F.2d at 1240.

It is true, as D30 argues in its reply brief (pp. 3-4), that some disputes are properly resolved on the basis of seniority, but D30 incorrectly argues in its reply brief (p. 3) that Mullins tried to discriminate against his fellow workers who had more seniority than he did by trying to use article XVII(i)(10) of the NBCWA to get a job to which miners having more seniority than Mullins has were entitled. Even though D30 persuaded the arbitrator that Mullins was not entitled to the dispatcher's job under article XVII(i)(10), it is incorrect that Mullins tried to use that provision to discriminate against other miners with more seniority than he had. D30 has refused to face up to the plain facts in this proceeding, namely, that Mullins was a Part 90 miner who clearly was entitled to bid on the dispatcher's job under the first sentence of article XVII(i)(10).

If article XVII(i)(10) could not reasonably have been interpreted as B-E's superintendent did, so as to award the job to Mullins, this case would never have existed in the first instance. Moreover, as I have already noted in this decision, Congress knew that providing Part 90 miners with jobs in no more than 1.0 milligram of dust would necessarily interfere with the normal application of seniority to award jobs to employees with the greatest lengths of service. Under the arbitrator's decision, if Mullins had been a miner on a production crew, he would have been allowed to retain the job despite the fact that Caudill had 3 more years of service than Mullins. The discrimination, as D30 well knows, came from its insistence that seniority has to give ground only to Part 90 miners working on a producing crew. D30 and Caudill clearly discriminated against Mullins by invoking seniority to defeat the transfer to a

low-dust area of a Part 90 miner as was intended by Congress when it provided for such transfers in section 101(a)(7) of the Act.

B-E's reply brief (p. 4) cites United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 547 (1980), in support of its claim that B-E's action of removing Mullins from the dispatcher's job and awarding it to Caudill, in compliance with the arbitrator's decision, should be upheld because there is a strong Federal policy of promoting industrial stability through arbitration of labor disputes. The Supreme Court required the employer in the Warrior and Gulf case to arbitrate a provision in a collective-bargaining agreement despite the fact that the employer considered the dispute to involve a function of management. While it is true, as a general principle, that there is a Federal policy to the effect that industrial stability is promoted by arbitration of labor disputes, that stability should not be accomplished, as it was in this proceeding, by violating another Federal policy which requires that miners with pneumoconiosis be allowed to fill vacancies in jobs which are located in no more than 1.0 milligram of respirable dust.

B-E's reply brief (p. 5) cites Wynn v. North American Systems, 608 F.Supp. 30 (N.D. Ohio 1984), in support of its argument that B-E should not be required to defend its action of awarding the dispatcher's job to Caudill, instead of Mullins, because B-E was complying with an arbitral decision. In the Wynn case, a white and a black employee were both discharged for fighting on an assembly line. The discharge was made the subject of an arbitration proceeding and the arbitrator reinstated the white employee with full seniority but without any back pay or other benefits, but he upheld the discharge of the black employee on a credibility determination that the black employee had hit the white employee in the face which had caused the white employee to require treatment in a hospital. The black employee brought a discrimination action against the company in the district court under Title VII of the Civil Rights Act. The court granted the employer's motion for summary judgment on the ground that deference given to the results of arbitration awards, along with the Federal policy of promoting industrial stability by use of arbitration to settle labor disputes, should prevail over a person's independent right to enforce equal employment rights under Title VII.

B-E's reliance on the Wynn case is misplaced because this proceeding involves a Federal statute which expressly prohibits discrimination against miners who are "the subject

of medical evaluations and potential transfer under a standard published pursuant to section 101". That statute was designed to prevent the very type of discrimination which occurred in this proceeding. Furthermore, in article III(c) of the NBCWA, the parties state that they are in complete accord with the purpose of the Congress expressed in section 2 of the Act and that they "do hereby affirm and subscribe to the principles as set forth in such section 2 of the Act" (Exh. 27).

Section 2(a) of the Act, with which the parties say they are in full accord, provides that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner." Section 2(b) of the Act states that "deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families". [Emphasis supplied.] I do not understand how the parties can insert such noble goals in the first part of the NBCWA and then abandon those goals to pursue the course of action taken in this proceeding which resulted in giving the best job in low dust to a miner with undiseased lungs who had the most seniority.

The Issue of Whether B-E Discriminated Against Mullins by Complying with the Arbitrator's Award Instead of Insisting that It Was Precluded by Section 101(a)(7) of the Act and Part 90 from Complying

Mullins' brief (p. 9) asserts that B-E discriminated against Mullins by removing him from the dispatcher's job in compliance with the arbitrator's award of the job to Caudill. Mullins argues that the discrimination came about from the fact that section 101(a)(7) provides that "[w]here appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned." [Emphasis supplied.] Mullins notes that his removal from the job of electrician to a working place exposing him to no more than 1.0 milligram of dust had been accomplished when B-E assigned him to the dispatcher's job and that he should not have been removed from that job in compliance with the arbitrator's award because B-E was obligated to comply with the provisions of the Act rather than the provisions of the collective-bargaining agreement.

Mullins' argument which is summarized above raises a question very similar to that decided by the Supreme Court in W. R. Grace Co. v. Local 759, 461 U.S. 757 (1983), previously discussed in this decision for a different reason.

In the Grace case, the employer had entered into a conciliation agreement, to which the union was not a party, for the purpose of eliminating racial discrimination pursuant to Title VII of the Civil Rights Act. When Grace laid off some employees in order to comply with the conciliation agreement, those employees obtained an arbitral award of back-pay damages under the collective-bargaining agreement. A court held that the seniority provisions of the agreement could be modified to alleviate the effects of past discrimination. The union appealed and it was held that the agreement could not be modified without the union's consent and that Grace was obligated to arbitrate the grievances. Two arbitrators issued subsequent decisions, one finding that Grace was not obligated to comply with the first arbitration award since Grace was under a court order holding that the seniority provisions of the agreement did not have to be followed. The other arbitrator held that Grace was bound by the collective-bargaining agreement and was required to make the back-pay award. On further appeal, the Fifth Circuit held that the back-pay award had to be made. W. R. Grace Co. v. Local Union No. 759, 652 F.2d 1248 (1981). The Supreme Court upheld the Fifth Circuit's decision, noting that courts do not have authority to overrule arbitration awards simply because they may disagree with the decision reached by the arbitrator. The Court, as I have previously noted in this decision, held, however, that a collective-bargaining agreement, like the one in this proceeding, which is contrary to public policy by being in violation of a Federal statute does not have to be enforced.

The discussion of the Grace case above shows that B-E could have acted in good faith in complying with the arbitrator's award because, until the matter was presented in this proceeding, the holding of the Supreme Court in the Grace case would seem to require B-E to comply with the arbitrator's decision until such time as article XVII(i)(10) of the collective-bargaining agreement on which the arbitral ruling in this proceeding was based, has been found to be unenforceable as being contrary to the provisions of section 105(c)(1) of the Act.

There is, however, another Supreme Court case in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), which seems to support a finding that B-E should be held liable, along with UMWA, D30, and Local 1468, for the discrimination against Mullins which occurred in this proceeding. In the Hines case, some employees were discharged for dishonesty under an arbitral decision. The employees brought an action under section 301 of the Labor Management Relations Act claiming that the falsity of the charges could have been discovered by the union representatives with little

investigative effort because the motel clerk had billed the employees for their rooms at an excessive rate and had kept the difference between the billed rate and the actual rate. The district court granted summary judgment for the employer on the ground that the arbitral decision was final and binding, absent a showing of bad faith, arbitrariness, or perfunctoriness on the union's part. The court of appeals reversed as to the union because the facts showed that it had acted in bad faith or arbitrariness, but agreed that the action should be dismissed as to the employer unless it had been shown that the employer had acted in bad faith or in a conspiracy with the union. The Supreme Court reversed, holding that it was improper to dismiss the action as to the employer because, if the employees should be able to show a breach of duty by the union in providing fair representation, the arbitral award would be tainted and the employees would be entitled to an appropriate remedy against the employer as well as the union.

In this proceeding, while B-E properly awarded the dispatcher's job to Mullins under article XVII(i)(10) of the NBCWA, B-E also took the position that Mullins was not entitled to the dispatcher's job under Part 90 (Tr. 132) despite the fact, as I have already noted in this decision, there is nothing in Part 90 which prohibits a Part 90 miner from asking that he be allowed to fill a vacant low-dust position simply by reexercising his Part 90 rights. Therefore, B-E discriminated against Mullins by advising him in the first instance that he was not entitled to fill the vacancy in the dispatcher's job. It was clearly a job located in no more than 1.0 milligram of respirable dust and the comments in the Part 90 rulemaking proceeding show that several parties believed that Part 90 miners would be able to obtain some, if not all, of the best jobs in low dust simply because of their exercise or reexercise of their Part 90 rights. 45 Fed. Reg. at 80768 and section 101(a)(7) of the Act.

D30 represented Caudill and B-E represented Mullins before the arbitrator. The arbitrator's decision states that "[b]oth parties were ably represented and were given full opportunity for presentation of evidence and arguments" (Exh. 18, p. 3). Therefore, while it would appear that the arbitral decision involved in this proceeding is not "tainted" like the one at issue in the Hines case discussed above, it does not seem that Mullins was fairly treated after the dispatcher's job was awarded to Caudill by the arbitrator because Mullins testified that he argued before the arbitrator that he was entitled to the job under the Act and Part 90. The arbitrator held that he was bound by the NBCWA irrespective of any rights which Mullins might have under Federal law (Exh. 18, p. 15).

At the hearing held in this proceeding, counsel for D30 stated (Tr. 13):

> Now on the points of law in this case District 30 wants to make the point that even if the arbitrator in the labor case was wrong in holding that Mr. Caudill had that job, Mr. Mullins did not try to vacate that award or exercise the super seniority rights through the courts under the contract.

Mullins denied D30's claim that he had not tried to get the arbitrator's award reversed. He said that he attempted "to regain" his "rights as a Part 90 miner" because he felt that he had "been done wrong" (Tr. 51). He said that he asked D30's president and MSHA for help and wrote to the International Union trying to get someone to assist him in getting the arbitrator reversed, but no one would listen to his pleas (Tr. 50-51; 93). Counsel for UMWA wrote me a letter on March 2, 1984, in response to a letter in the nature of a prehearing order which I had sent to the parties. Attached to counsel's letter was a letter from UMWA's Deputy Director of Occupational Health to Mullins dated April 16, 1983. The first paragraph of that letter states as follows:

> This letter is in response to your letter of July 25 to President Trumka concerned with your experience as a Part 90 miner. There are two points that I want to make in this letter. First, your right to obtain the dispatcher's job at the Beth-Elkhorn mine has been denied by the Arbitrator on April 15. As far as I am concerned, that settles the matter and I do not think further discussion of that issue would be fruitful.

The letter from UMWA supports Mullins' claim that he had tried to get relief from the arbitrator's ruling from his own union before resorting to the discrimination complaint which he ultimately filed because no one in the union or elsewhere would listen to his contentions.

It is a fact that B-E and other coal operators are parties to the NBCWA. Since B-E was the only representative Mullins had before the arbitrator, it seems to me that it ought to have been interested enough in getting its position upheld to support Mullins in his efforts to get some authoritative ruling on why article XVII(i)(10) should not apply, or be modified to apply, to <u>all</u> Part 90 miners regardless of whether they are on producing or nonproducing crews.

As the Supreme Court stated in Conley v. Gibson, 355 U.S. 41, 46 (1957):

> The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. [Footnotes omitted.]

Since B-E was a party to the NBCWA and was the party which represented Mullins before the arbitrator, it should have been willing to reexamine the NBCWA, along with UMWA, to determine why it should not be revised in order to permit all Part 90 miners to bid on vacancies in positions performed in less than 1.0 milligram of respirable dust. By simply taking the easy way out and acquiescing to an arbitrator's award with which it was in disagreement, B-E should be held liable for allowing the discrimination against Mullins to continue without making any effort to obtain a modification of article XVII(i)(10) to eliminate the discrimination.

Since the UMWA is responsible for representing all the miners, not just Caudill, it is unseemly for D30's counsel to come into this proceeding and criticize Mullins for not appealing the arbitrator's award in view of UMWA's position, expressed in the letter of April 16, 1983, to the effect that the arbitrator's decision had settled the matter and made further discussion unfruitful. Thus, while the arbitral award involved in this proceeding may not be as "tainted" as the one described in the Hines case discussed above, it is certain that UMWA has been most insensitive to Mullins' claims that his Part 90 rights were improperly restricted and rendered meaningless by article XVII(i)(10) of the NBCWA.

In view of the fact that no one in the union or in management would represent Mullins in his efforts to obtain some relief from the discrimination to which he was subjected by the interpretation given to article XVII(i)(10) by the arbitrator, I believe that it would be improper for me to hold that B-E was in no way responsible for the discrimination which I have found occurred when Mullins was

removed from the dispatcher's job in violation of section 105(c)(1) of the Act. For the foregoing reasons, I find that B-E discriminated against Mullins and should be required to share equally with the union (50% to be paid by B-E, 25% by UMWA, and 25% by D30 and Local 1468) in providing the monetary relief to which Mullins is entitled, as hereinafter ordered.

Relief Issues

Introduction

At the time the hearing in this proceeding was concluded, I did not require the parties to present evidence as to the relief issues of back pay and attorney's fees because I believed that the legal briefs which the parties were going to file would be even more persuasive than their oral arguments at the hearing and that I would find it necessary to deny Mullins' complaint. After I had received and read the parties' initial and reply briefs, however, I realized that they had not really explained how article XVII(i)(10) of the NBCWA could be found to be other than a revision of Part 90 miners' rights and therefore a violation of section 105(c)(1) of the Act. Since the Commission has held in such cases as Council of Southern Mountains, Inc. v. Martin County Coal Corp., 2 FMSHRC 3216 (1980) and Bobby Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1 (1982), that a judge may not issue a final decision as to which petitions for discretionary review may be filed until such time as he has awarded the complainant all the relief to which he is entitled, I issued on July 25, 1985, a procedural order requesting that the parties submit stipulations as to the relief issues of back pay, attorney's fees, and other expenses to which complainant might be entitled. The order also provided for the parties to advise me if they could not stipulate sufficient facts for me to determine all relief issues so that a hearing could be convened to consider those issues.

Only counsel for D30 filed a written response to the procedural order of July 25, 1985. His reply stated that he would not stipulate to anything and accused me of having prejudged the issues. Counsel for Mullins called me to state that she was trying to arrange a conference call to determine if the parties could reach a stipulation, but she failed to get back in touch with me until the time for answering the requests made in the procedural order had expired. Consequently, on August 29, 1985, I issued an order providing for a hearing to be held with respect to all relief issues. Counsel for D30 filed on September 23, 1985, a motion requesting that I recuse myself as the judge in this proceeding. The last section in this decision considers and denies D30's motion to recuse.

D30 also filed other pleadings in which it agreed to accept the facts which counsel for the other parties had agreed to submit with respect to back pay and attorney's fees. Counsel for UMWA filed on September 25, 1985, a response with respect to the relief issues; counsel for Mullins filed on September 30, 1985, a response to the relief issues, and counsel for B-E filed on October 18, 1985, 6/ a response to the relief issues. The filings by the parties amount to an agreement as to the basic facts of the days, including holidays, on which Mullins worked in his present position of electrician as compared with the days on which Caudill worked as dispatcher. The parties have also stipulated to the wages which Mullins and Caudill received. A few issues were left for me to decide, such as whether Mullins should be paid for the Saturdays and Sundays when Caudill worked as dispatcher even though Mullins did not work as electrician on many of those same Saturdays and Sundays. Those issues are hereinafter considered.

Calculation of Back-Pay Differential

The amount of back pay to which Mullins is entitled is complicated by the fact that when Mullins was removed from the position of dispatcher, effective May 1, 1983, he returned to his previous job of electrician. Therefore, Mullins is entitled to the difference between the wages he would have received had he continued to work as a dispatcher and the amount of pay which he actually received for working as an electrician. Mullins and the dispatcher both work on the evening shift from 4 p.m. to midnight and both receive a 30-cent evening shift differential. The dispatcher and the electrician also work on Saturdays and Sundays. When they do work on weekends, they are paid 1-1/2 times their regular rates for Saturday work and twice their regular rates for Sunday work.

B-E submitted a single sheet showing the amount the dispatcher (Caudill) received for working at the regular rates from Monday through Friday, the amount received for working Saturday, and the amount received for working Sunday. A similar sheet was submitted to show the amounts received by

6/ The letter submitted by B-E's counsel requested that the parties submit "any exceptions, additions or deletions to the" back-pay information prepared by B-E "no later than ten days from the date of this letter." The applicable 10 days expired on October 28, 1985, and I have received no responses from any party with respect to the back-pay information submitted by B-E. Mullins called my office on October 28, 1985, but I declined to listen to or talk to him. Counsel for Mullins filed on November 4, 1985, a motion for a 10-day extension of time within which to file a reply to B-E's submissions. I issued an order on November 4, 1985, denying the motion.

Mullins for regular, Saturday, and Sunday work. A comparison of the amounts which B-E shows as being received by Mullins and Caudill for the period from May 1, 1983, through August 30, 1985, is set forth below:

	Regular	Saturday	Sunday	Total
Caudill	$62,703.20 7/	$24,888.32	$7,314.53 9/	$94,906.05
Mullins	-60,600.66	- 8,008.53 8/	- 767.62	-69,376.81
Differential	$ 2,102.54	$16,879.79	$6,546.91	$25,529.24

B-E's wage computation is not explained in detail in that B-E simply multiplied the number of hours worked in each of several periods for regular, Saturday, and Sunday work by the applicable rates to arrive at the totals which have been given in the tabulation above. Mullins prepared a detailed calculation of the differential in pay received by Caudill as compared with the pay which he received. Mullins calculated the amount a dispatcher receives for a regular shift, the amount he receives for a Saturday shift, and the amount he receives for Sunday work. The dispatcher's rate is slightly less per hour than the electrician's rate, but the dispatcher works 8-3/4 hours per shift as compared with the 8 hours per shift worked by Mullins as an electrician. For each of the pay periods involved, Mullins simply subtracted the rate received by the dispatcher from the rate received by an electrician to develop a wage differential for the three types of shifts which pay different rates. Mullins does not show the hourly rates he used nor the calculation used by him to allow for the fact that the dispatcher was working 3/4 of an hour each shift more than the electrician was working.

Mullins does not show, for example, how he allowed for the fact that the dispatcher worked 3/4 of an hour past midnight each day 10/ and was presumably paid for that 3/4 hour at the Saturday rate or that the dispatcher, who worked most Saturdays, was presumably paid at the Sunday double rate for working 3/4 hour on Sunday. There is also apparently some

7/ B-E made an error of $1,000 in adding the amounts for Caudill's regular rates, but the error was corrected in arriving at the total of $94,906.05.
8/ B-E made an error of $1,000 in determining Mullins' wages for the period 3/7/84 through 6/6/84 and the total for Saturday wages must be corrected by $1,000 and that increases Mullins' total wages for the period by $1,000.
9/ B-E made an error of $9.00 in Caudill's wages for Sunday work for the period of 6/7/84 through 9/30/84, but the error was corrected when B-E arrived at its total of $7,314.53 for Sunday work.
10/ Caudill was paid for only 8-1/2 hours per shift on and after November 27, 1984.

sort of Saturday and Sunday differential which B-E reflects in its calculations, but does not explain, except for the letters "SD" which appear in B-E's Saturday and Sunday calculations. The fact that Mullins and B-E used completely different methods to show the wage differential between Caudill and Mullins makes it impossible to find for certain which has used the most appropriate or accurate method of arriving at a back-pay differential. Although both B-E and Mullins appear to have taken into consideration the differential for regular, Saturday, and Sunday work, they arrive at figures which are considerably different. Mullins does not purport to show a total for Caudill's wages as compared with his wages, but the differential is given below:

Differential for regular time pay	$ 7,102.63
Differential for Saturday pay	10,853.74
Differential for Sunday pay	13,954.24
Total Back-Pay Differential	$31,910.61
Less pay ($2,298.88) received by Mullins for working as substitute dispatcher	$29,611.73

B-E's calculations do not provide any breakdown of the pay received by Mullins when he worked as substitute dispatcher. If B-E's differential, shown above, of $25,529.24 is reduced by the amount of $2,298.88 which Mullins received for working as substitute dispatcher, B-E's comparable differential would be $23,230.36.

I would be inclined to allow Mullins a back-pay differential of $23,230.36, but counsel for both UMWA and B-E say that Mullins refused to work on 21 Sundays and 7 Saturdays and that Mullins' refusal rate should be taken into consideration in trying to determine whether he would have worked as many Saturdays and Sundays as Caudill did if he had been the dispatcher. The letter submitted by Mullins' counsel states that the parties have agreed to stipulate as to the number of Saturdays and Sundays on which Mullins refused to work, but the letter objects to the use of a "refusal" rate in determining whether Mullins should be paid exactly the same amount which Caudill received for working on Saturday and Sunday.

Mullins could have presented a tabulation showing how many Saturdays and Sundays he actually worked during the period when he did hold the job of dispatcher. That would have gone a long way toward showing whether Mullins likes the work done by a dispatcher in an atmosphere of no more than 1.0 milligram of respirable dust sufficiently more than working as an electrician to indicate that he would have worked as many Saturdays and Sundays as Caudill did if the job he was

going to perform had been that of a dispatcher as opposed to an electrician. The parties elected to present the back-pay data by stipulation and arguments. In the absence of some information to show that use of Mullins' refusal rate would create an inequitable back-pay differential, I believe that UMWA and B-E have suggested an appropriate method for determining how much Mullins should be paid for not working the Saturdays and Sundays which were worked by Caudill. B-E submitted side-by-side comparisons of the days worked by Mullins and the days worked by Caudill. Examination of those comparisons shows that Caudill worked many more Saturdays and Sundays than Mullins did.

Mullins

Year	Saturdays Worked	Sats.Not Worked	Sundays Worked	Suns.Not Worked	Saturdays Refused
1983	6	29	0	35	12
1984	17	26	0	44	3
1985	22	12	2	32	0
Total	45	67	2	111	15

Caudill

Year	Saturdays Worked	Sats.Not Worked	Sundays Worked	Suns.Not Worked	Saturdays Refused
1983	25	10	1	34	0
1984	43	5	8	41	0
1985	30	4	14	20	0
Total	98	19	23	95	0

During the back-pay period here involved of May 1, 1983, through August 30, 1985, there were 121 Saturdays and 122 Sundays, but B-E's mine was entirely or partially closed during the months of November and December of 1984. Caudill, the dispatcher, was called back on November 26, 1984, but Mullins, the electrician, was not called back until January 1, 1985. Therefore, the number of Saturdays on which Mullins could have worked must be reduced by 9 to 112 and the number of Sundays must be reduced by 9 to 113. Since Caudill was working throughout the month of December, the number of Saturdays on which Caudill could have worked must be reduced by 4 to 113 and the number of Sundays on which Caudill could have worked must be reduced by 4 to 118. The figures in the tabulations above show that Mullins worked on 40.18 percent of the 112 available Saturdays, whereas Caudill worked on 83.76 percent of the available Saturdays. Mullins worked on only 1.77 percent of the available Sundays, whereas Caudill worked on 16.11 percent of the available Sundays. Of course, the information provided by the parties does not show that Mullins, as an

electrician, was given an opportunity to work on as many Saturdays and Sundays as the dispatcher had that opportunity. Therefore, it is perhaps inappropriate to compare the Saturdays and Sundays Caudill actually worked with the Saturdays and Sundays actually worked by Mullins.

On the other hand, UMWA and B-E do not ask that Mullins' back-pay differential for Saturdays and Sundays be based on the actual number of Saturdays and Sundays he did work, but on the number of Saturdays and Sundays on which Mullins refused to work. Using Mullins' refusal rate for Saturday and Sunday work appears to be a fair method of determining whether Mullins would have worked as many Saturdays and Sundays as Caudill did if Mullins had been the dispatcher instead of Caudill.

The determination is not as simple as it might have been because of the fact that UMWA and B-E use somewhat different numbers for making their arguments. Moreover, the times on which Mullins refused to work on both Saturdays and Sundays have been stipulated to by counsel for Mullins, UMWA, and B-E. Therefore, I shall accept the numbers they have agreed upon despite the fact that B-E's side-by-side comparisons of the days worked by Mullins and Caudill show that Mullins refused to work on only 15 Saturdays as compared with the parties' stipulation of 21. The side-by-side comparisons do not show that Mullins refused to work on any Sundays, but the parties have agreed that Mullins refused to work on 7 Sundays.

Specifically, UMWA states that Mullins refused to work on 21 Saturdays and worked on 41 Saturdays, or refused to work 21 times out of 62 opportunities. B-E states that Mullins refused to work on 21 Saturdays and worked 43 Saturdays, or refused to work 21 out of 64 opportunities. On the other hand, B-E's side-by-side comparisons of the Saturdays worked by Mullins and Caudill show that Mullins worked on 45 Saturdays and that means that he refused to work 21 times out of 66 opportunities. No party has disputed the accuracy of B-E's side-by-side comparisons and I have used the information in those comparisons for nearly all purposes in determining the back-pay differential to which Mullins is entitled. Consequently, I think that the calculation of Mullins refusal rate for Saturday work should be based on the parties' stipulation that he refused to work on 21 Saturdays and on the information in the side-by-side comparisons showing that Mullins did work on 45 Saturdays. Using the most accurate figures available in the record, I find that Mullins refused to work 21 times out of 66 opportunities or 31.8 percent of the time. The side-by-side comparisons show that Caudill worked on 98 Saturdays, whereas Mullins worked on 45 Saturdays. Caudill, therefore, worked on 53 Saturdays when Mullins did not work. Applying

Mullins' working rate of 68.2 percent to Caudill's 53 Saturdays results in paying Mullins a back-pay differential for 36 of the 53 Saturdays worked by Caudill.

The side-by-side comparisons do not show that Mullins refused to work any Sundays, but counsel for Mullins, UMWA, and B-E have stipulated that Mullins worked 2 Sundays and refused to work on 7 Sundays, or that Mullins had a refusal rate as to Sundays of 78 percent, or should be entitled to be paid for 22 percent of the Sundays worked by Caudill but not worked by Mullins. UMWA states that Caudill worked 53 Sundays but B-E states that Caudill worked 21 Sundays on which Mullins did not work. B-E is correct because the side-by-side comparisons show that Caudill worked a total of 23 Sundays or 21 more than the 2 Sundays on which Mullins worked. Therefore, Mullins is entitled to be paid for 22 percent of 21 Sundays, or for 5 Sundays.

Using the side-by-side comparisons to make the above calculations results in my awarding Mullins back-pay differential for 2 more Saturdays than the 34 Saturdays to which UMWA agreed, but use of the side-by-side comparisons results in my awarding Mullins back-pay differential for 7 less Sundays than the 12 Sundays to which UMWA agreed. Inasmuch as Sundays involve pay at a rate twice as much as the regular rate, whereas Saturdays involve pay at one and one-half the regular rate, I do not believe that UMWA will find my calculations, based upon the side-by-side comparisons, to be objectionable.

While UMWA and B-E proposed an equitable method for determining the number of Saturdays and Sundays for which Mullins should be paid, they did not provide a method for translating those Saturdays and Sundays into an actual monetary amount. The easiest way to have done it would have been for me to award Mullins with pay at the dispatcher's rate for 36 Saturdays, but the Saturdays are spread over a period of 27 months and there is a gradual increase in the rates received by both Mullins and Caudill throughout that period. Moreover, B-E's calculations for Saturday and Sunday work do not show the exact amount paid for any specific Saturday or Sunday because B-E's calculations are based on the total number of hours worked in each graduated pay period by both Mullins and Caudill.

Mullins calculations, on the other hand, are based on a computation of the <u>difference</u> between the dispatcher's wages and the electrician's wages for a regular shift, a Saturday shift, and a Sunday shift, but Mullins does not explain how he arrived at the total amount for each type of shift. While UMWA, B-E, and D30 do not say that they agree with Mullins' method of showing the back-pay differential, they do not at any time say that his method is incorrect. All they object to is his having computed the differential so as to allow him to receive <u>all</u> the pay received by Caudill for working on

both Saturdays and Sundays even though Mullins did not work those same Saturdays and Sundays as an electrician.

It is obvious that Mullins and B-E are not far apart in the total differential between Mullins' and Caudill's wages for the period involved. The tabulations given at the beginning of this discussion of back pay show that Mullins obtained a pay differential for regular shifts of $7,102.63 and a differential for Saturday work of $10,853.74 or a total of $17,956.37. B-E's calculations show a differential for regular shifts of $2,102.54 and a differential for Saturday work of $16,879.79, or a total of $18,982.33. Consequently, there is only about $1,025 difference in the amount that B-E shows as having been paid to Caudill for regular and Saturday work and the amount which Mullins shows as having been paid to Caudill for regular and Saturday work.

The complex nature of B-E's calculations may be seen if one examines the total number of hours worked by Caudill on regular shifts and on Saturdays. The total of the hours worked by Caudill on regular shifts is 4,520 hours and the total for Saturdays is 1,190 hours. If one divides 1,190 hours by 8.75 hours per shift, the result is 136 Saturdays. That is an illogical result because the total period involves only 121 Saturdays and Caudill only worked 98 of those. The reason for the apparent discrepancy is that every time the dispatcher worked 8.75 hours, the 3/4 hour was worked after midnight and was paid at the Saturday rate even though the actual time was from 12:00 midnight to 12:45 a.m. on Tuesday through Saturday. Therefore, every time Caudill worked five so-called regular shifts, he was being paid at the Saturday rate for 3/4 hour each shift, but B-E's calculations simply include all time past midnight with the hours worked by Caudill on Saturdays.

If one takes the total hours (4,520) on which Caudill worked regular shifts and divides those hours by 8, he obtains a result of 565 days. If one multiplies 565 days by .75, the result is 423.75 hours. Those hours, when deducted from the 1,190 hours shown by B-E as having been worked by Caudill on Saturday leaves a total of 766.25 hours, or about 96 days as having actually been worked on Saturday which is very close to the 98 days on which Caudill did work on Saturday.

The above discussion shows why Mullins claims a differential for regular shifts which is much larger than the amount shown by B-E because Mullins' differentials are based on a calculation which includes an allowance for <u>each</u> shift of 3/4 hour paid at the Saturday rate, whereas B-E's calculations include all those 3/4-hour amounts in the payments

made to Caudill for working on Saturday even though those hours were not actually worked on Saturday, except, of course, the 3/4 hour worked after midnight on Friday of each week.

In view of the fact that the back-pay differential cannot be determined with any great precision and in view of the fact that it is impossible for me to determine exactly how either Mullins or B-E computed payment for any one specific Saturday, I believe that it is fair and reasonable for me to compute the amount to be paid to Mullins for 36 Saturdays on which Caudill worked, but Mullins did not, by using the Saturday dispatcher shift rate of $202.23 derived by Mullins for the period from October 1, 1984, through August 30, 1985. That multiplication ($202.23 x 36) results in an award of $7,280.28 for the 36 Saturdays which UMWA and B-E agree is appropriate.

Mullins did work a total of 45 Saturdays and should be paid the differential of $25.65 between the dispatcher's rate of $202.23 and the electrician's rate of $176.58 for Saturday work. That calculation results in a total of $1,154.25 which, when added to the above amount of $7,280.28, produces a back-pay differential for Saturday work totaling $8,434.53.

The discussion above as to the unexplained nature of B-E's calculations for Saturday work is also applicable to B-E's calculations of the amount which B-E shows as pay to Caudill for working on Sundays. To be consistent with the manner in which I have determined the back-pay differential for working Saturdays, I believe that Mullins should be paid at the dispatcher's shift rate of $268.92 for Sunday work as calculated by Mullins for the period from October 1, 1984, through August 30, 1985. As indicated above, Mullins is entitled to be paid for 5 of the Sundays on which Caudill worked but Mullins did not. That calculation ($268.92 x 5) produces an amount of $1,344.60. Since Mullins only worked on 2 Sundays, he is entitled to the Sunday differential of $33.48 for those 2 Sundays, or an amount of $66.96, for a total back-pay differential for Sunday work of $1,411.56. The reason that Mullins' claim of $13,954.24 for Sunday work is much larger than the amount I have allowed is that Mullins sought to obtain the amount paid to Caudill for <u>all</u> of the 21 Sundays on which Caudill worked but Mullins did not.

When it comes to the amount of back-pay differential which Mullins should receive for regular shifts, I believe that Mullins should be paid the amount that he claims of $7,102.63 because the differential which he uses is based on a calculation for an entire shift based on the graduated pay rates and on a calculation which includes the 3/4 hour worked after midnight as a part of the total amount paid to the dispatcher for 8-3/4 hours per shift.

There is an additional complexity in the way Mullins prepared his claim for back-pay differential. Mullins made a separate group of calculations to show the amount he was paid for vacation days and holidays as compared with the amount he would have received for those days if he had been working as the dispatcher. He shows a total differential of $1,524.22 for holiday and vacation pay, but he did not include that amount in the back pay he requests on the summary page accompanying his computations. The reason he does not include that amount is that he shows in his calculations for days he worked payment of a differential for days actually worked even though some of the days were holidays or vacation days. For example, Mullins claimed a differential for 22 days of regular shifts worked in January 1984 even though he actually worked only 18 of those days and received holiday or vacation pay for the remaining 4 days. Mullins did not explain the reason for computing the calculations as to holiday and vacation pay because he is not entitled to collect the wage differential twice. B-E included pay for holidays and vacation days as part of the hours for which both Mullins and Caudill were paid. Therefore, no special allowance has to be awarded in connection with holidays and vacation days.

D30 raised the issue that miners are paid at triple the regular rate when they work on their birthdays and D30 objected to payment to Mullins of a differential for any amount which might have been received by Caudill for working on his birthday if Mullins did not also work on his birthday. Mullins included the birthday differential with the differential for holidays and vacation days and he shows that both Caudill and he worked on each of the three birthdays involved in the period from May 1, 1983, through August 30, 1985. The total birthday differential for all three birthdays is only $48.36 and does not seem to have been claimed by Mullins because it is shown as part of the figure of $1,524.22 for holidays and vacation days. As indicated above, Mullins is not being awarded any amount for vacation, holiday, or birthday pay as a separate allowance.

The side-by-side comparison sheets submitted by B-E show that Mullins was laid off for economic reasons during the months of November and December 1984, but Caudill was called back to work on November 26, 1984, with the result that Caudill was paid for working 5 regular shifts in November, and for 22 regular shifts (including 2 holidays), 4 Saturdays, and 1 Sunday in December. If Mullins had been the dispatcher, he would have been paid for all those days at the rates received by Caudill. It is not possible to obtain the amount Caudill was paid for that period by using either Mullins' or B-E's figures. Therefore, I have calculated the amount as shown below. If my decision is affirmed

by the Commission so that the respondents are required to pay the amount I have calculated, the parties should feel free to compute the amount correctly if I have failed to take into consideration some obscure aspect of the calculations. I know, for example, that my calculations are slightly less than they probably should be in view of the fact that I have not added any amount for the Saturday and Sunday differential which is apparently paid by B-E when employees work on Saturday and Sunday.

As indicated in footnote 10 above, Caudill was paid for only 8-1/2 hours per shift on and after November 27, 1984, instead of 8-3/4 hours per shift for which the dispatcher was paid prior to that time.

November

November 26, 1984, involved being paid for 8-3/4 hours. That day was paid at the regular rate of $14.31 for 8 hours, or $114.48, and 3/4 hour at the overtime rate of $21.47, or $16.10, for a total of $130.58 for November 26, 1984.

The remaining 4 days were paid at the regular rate of $14.31 times 8 hours times 4, or a total of $457.92 plus 1/2 hour times the overtime rate of $21.47 times 4, or a total of $42.94, producing a grand total of $500.86 for the remaining 4 days. The total amount paid to Caudill for five regular shifts in November 1984 was $631.44.

December

22 regular shifts x $14.31 x 8	$ 2,518.56
22 x overtime rate of $21.47 x 1/2 hour	236.17
4 Saturdays x the Saturday rate of $21.47 x 8	687.04
4 x the Sunday rate of $28.62 x 1/2 hour	57.24
1 Sunday x the Sunday rate of $28.62 x 8.5 11/	243.27
Total for December	$ 3,742.28

11/ Mullins computed the dispatcher's Sunday shift as paying an amount of $268.92, but I cannot ascertain how he determined that large an amount unless there is some sort of Sunday differential which accounts for the difference between my figure of $243.27 and his computation of $268.92. Since 1/2 hour is worked after midnight on Sunday, it is possible that the 1/2 hour is paid at the normal overtime rate of $21.47, but that would make the amount even less than the $243.27 shift payment I have calculated above.

Mullins' back-pay calculations show that he received payments totaling $2,298.88 by working as substitute dispatcher. Mullins appropriately subtracted that amount from the back-pay differential which he is claiming. I shall deduct that amount in determining the total amount of back-pay differential which is summarized below:

$ 7,280.28	- Amount due Mullins for 36 of the 53 Saturdays worked by Caudill but not worked by Mullins.
1,154.25	- Amount of differential due Mullins for the 45 Saturdays on which Mullins did work as an electrician.
1,344.60	- Amount due Mullins for 5 of the 21 Sundays worked by Caudill but not worked by Mullins.
66.96	- Amount of differential due Mullins for the 2 Sundays he did work as an electrician.
7,102.63	- Amount of differential due Mullins for the regular shifts he did work as an electrician at less pay than that received by Caudill for the period from 5/1/83 to 8/30/85.
4,373.72	- Amount due Mullins for the time Caudill worked in November and December 1984 before Mullins was called back to work after having been laid off for the months of November and December 1984.
$21,322.44	- Total amount due Mullins before deduction of amount received by Mullins for working as substitute dispatcher.
- 2,298.88	- Amount earned by Mullins for working as substitute dispatcher.
$19,023.56	- Total back-pay differential to which Mullins is entitled.

Expenses

Mullins claims expenses totaling $1,946.68. Mullins' itemized list of expenses is divided into two parts consisting of such items as purchase of the transcript of the hearing, postage, meals, phone calls, and mileage. Those items are described in detail and appear to be adequately supported. No party has raised an objection as to their justification. Mullins does not show a separate total for those items, but they amount to $866.06. The second part of Mullins' claim for expenses consists of a request for lost time for trips made to MSHA's office in Pikeville, for meeting with his attorney, and for attending the hearing. Mullins shows that the total of those items amounts to $1,020.62, but there is a $60 error in his addition of those

amounts so that he should have derived a total of $1,080.62. Mullins' claim for lost time is well documented and appears to be reasonable and no party has specifically objected to any of those claims. They should be accepted.

One other expense item claimed by Mullins is not supported and should be disallowed. That is a claim of $500.00 as a "secretarial fee". The claim appears at the top of a page where Mullins begins a list of pay differential for holidays. Mullins' entire support for the claim is a two-line statement which reads as follows: "Omitted from the other estimate of pay differential and expenses was the secretarial fee of $500.00". Mullins does not show the number of hours the secretary worked or the number of pages he or she typed or give any information whatsoever to justify allowance of $500.00 for secretarial services. Mullins' back-pay claims and itemization of expenses constitute a total of 11 pages and those pages are marked as Exhibit A in the materials submitted by Mullins' counsel in response to my order requesting the parties to provide information for awarding Mullins any amounts which might be due him in this proceeding. It is unlikely that any secretary would charge $500.00 to type 11 pages.

The Commission held in John Cooley v. Ottawa Silica Co., 6 FMSHRC 516 (1984), that a judge should not award compensation in a discrimination case for items which are claimed without adequate support. It is a fact, however, that Mullins did not list any amount for secretarial help in the expenses which I have discussed above. A typist should not have to spend more than 8 hours to type all the materials which Mullins has written or supplied in connection with this proceeding. Mullins' attorney only seeks $20.00 an hour for the work performed by a law clerk. It would appear that $15 an hour for work performed by a typist would be a fair amount to allow. Therefore, I shall allow Mullins an amount of $120.00 ($15 x 8 hours) to reimburse him for obtaining the services of a typist in preparing the written submissions he has made in connection with this proceeding.

The expenses which are allowed are listed below:

$ 141.00	- Purchase of transcript of hearing
53.70	- Postage
48.00	- Motel
63.11	- Meals
282.25	- Phone calls
278.00	- Mileage
120.00	- Typing
1,080.62	- Lost time
$2,066.68	- Total amount allowed for expense reimbursement

Attorney's Fees

No party has objected to the amount claimed by Mullins' attorney for her time and that of a law clerk, along with the associated expenses, which were involved in representing Mullins in this proceeding. I have carefully checked all the figures shown in the itemized list of expenses and labor and have found no errors.

The amount claimed for such items as telephone calls, copying, postage, mileage, motel room, and meals is $439.33. The amount claimed as expenses by the law clerk is $40.00.

Mullins' attorney lists a total of 56.40 hours of time for conferences, preparation of the brief, and replies to various orders. She asks payment at the rate of $50.00 per hour, or an amount of $2,820.00. Mullins' attorney also describes 186 hours of work done by her law clerk in research and writing of the brief filed on Mullins' behalf. She claims $20.00 per hour for the law clerk's work, or an amount of $3,720.00.

All charges for expenses and labor are reasonable in every respect and should be approved as summarized below:

$2,820.00	- Attorney's charge for 56.4 hours at $50.00 per hour
439.33	- Attorney's expenses
3,720.00	- Law clerk's charge for 186 hours at $20.00 per hour
40.00	- Law clerk's expenses
$7,019.33	- Total for attorney's fees and expenses

B-E's Argument Based on the Adams Case

B-E's letter (p. 2) filed on October 18, 1985, argues that even if Mullins should not have been removed from the

job of dispatcher on May 1, 1983, he would still not be entitled to the dispatcher's job after a realignment which occurred on October 31, 1984. B-E supports its argument that Mullins is not entitled to pay for the job of dispatcher after October 31, 1984, by enclosing as a part of its backpay submission a copy of an arbitrator's decision which held that another employee named Ray Adams was not permitted to retain the job of janitor over another employee because Adams sought to retain his job of janitor under article XVII(i)(10) of the NBCWA. The arbitrator held that Adams could not be permitted to retain the job of janitor because he had previously exercised the superseniority provisions of article XVII(i)(10) and that article specifically provides that it may not be relied upon by a miner more than once in his lifetime. I have already held in this decision that article XVII(i)(10) is a discriminatory provision which cannot be used to deprive a miner of a job in no more than 1 milligram of dust and I see no reason why the "one-time" discriminatory aspect of that section should be recognized as a basis to deprive a Part 90 miner of a position in no more than 1 milligram of dust any more than article XVII(i)(10)'s provision that a Part 90 miner is not entitled to a specific position in no more than 1 milligram of dust because he happens to be working on a nonproducing shift rather than a producing shift. Moreover, the arbitrator noted on pages 14 and 15 of his decision that he was dealing only with the job-bidding provisions of the NBCWA and that Adams had rights under the provisions of Part 90 [which he referred to as the 1969 Act] which were outside the purview of his authority to consider.

Additionally, in the Adams case, there were two jobs as janitor on the midnight shift and one of them was eliminated in a realignment. In this case, Caudill has retained the job of dispatcher up to the present time so that the facts in the Adams case are different from those in this proceeding.

In any event, it would be inconsistent with my rulings in this decision for me to find that a miner's exercise of his Part 90 rights can be reduced to a once-in-a-lifetime right by a contractual provision. That sort of restriction on Part 90 rights is just as discriminatory as article XVII(i)(10)'s provision that Part 90 rights apply to miners working on a producing shift but not to miners working on a nonproducing shift. As hereinbefore indicated, I find that Mullins should be paid the differential in wages between the dispatcher's job and his electrician's job from May 1, 1983, when he was removed from the job of dispatcher, to the date on which payment is made, if my decision is upheld by the Commission.

Order To Cease and Desist from Further Discrimination

Mullins' counsel requested, as part of the relief sought in this proceeding, that an order be entered requiring respondents to cease and desist from any and all discrimination activities directed toward Mullins for his having exercised his Part 90 rights as well as his rights under section 105(c) of the Act.

There is evidence showing that D30 is extremely hostile toward Mullins for having brought this discrimination case. During cross-examination, it was quite obvious that counsel for D30 was upset with Mullins because he would not settle the issues and withdraw his complaint (Tr. 84-86; 88). In his reply brief (p. 4), D30's counsel referred to Mullins' complaint as being "frivolous" and as having "cost the UMWA, Beth-Elkhorn and the federal government money and resources that would have been better spent in efforts to remedy actual hazards to the health and safety of working miners."

In such circumstances, there is every possibility that D30 will use subtle and overt methods to retaliate against Mullins for having brought the instant discrimination case. Therefore, I shall include a provision in the order accompanying this decision that all respondents refrain in the future from discriminating in any way against Mullins or other miners who invoke the rights which are granted to them by Part 90 and denied by article XVII(i)(10) of the NBCWA.

Civil Penalty Issues

Although respondents have complied with my request that they provide me with enough information to permit assessment of civil penalties, it has never been my practice to assess civil penalties in a discrimination case pending a determination as to whether the Secretary of Labor is required in a case initiated under section 105(c)(3) of the Act to propose a penalty before such a penalty is assessed. Milton Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2048, n. 11 (1983).

Inasmuch as the issues in this proceeding are almost entirely legal in nature, including the question of whether UMWA, D30, and Local 1468 may be assessed civil penalties, I believe that it is especially appropriate in this case to deter the assessment of civil penalties until the legal questions have been resolved by the Commission or the courts.

Consideration of District 30's Motion To Recuse

Counsel for D30 filed on September 23, 1985, a motion asking that I recuse myself as the judge in this case on grounds of "bias, prejudgment of the merits, and ex parte contact with the complainant." The affidavit submitted in support of the motion shows that the alleged bias and ex parte contacts occurred either before the hearing or during the hearing. Yet counsel for D30 filed initial and reply posthearing briefs on the merits of Mullins' complaint without ever at any point in his briefs making a claim that I was so biased against D30 that I would be unable to render an impartial decision. Finally, on September 23, 1985, more than 6 months after the alleged prejudicial statements or actions had occurred, counsel for D30 filed his untimely motion to recuse.

The motion to recuse does not purport to have been filed under any statutory basis, such as 29 C.F.R. § 2700.81 or 28 U.S.C. § 144, 12/ but it is untimely under either of those statutory provisions. Section 2700.81 of the Commission's rules provides as follows:

> (b) Request to withdraw. Any party may request a Commissioner, or the judge (at any time following his designation and before the filing of his decision), to withdraw on grounds of personal bias or disqualification, by filing promptly upon discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. [Emphasis supplied.]

12/ Section 144 of the United States Code provides as follows: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days after the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

(c) Procedure if Judge does not withdraw. If the Judge does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and shall proceed with the hearing, or, if the hearing has been completed, he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings by granting a petition for interlocutory review.

On July 25, 1985, I issued an order in which I indicated that I would probably decide the issues raised in this proceeding in favor of the complainant, but I pointed out that the Commission had held in Council of Southern Mountains v. Martin County Coal Corp., 2 FMSHRC 3216 (1980), that a judge could not issue a "final" decision as to which petitions for discretionary review could be filed until the judge had provided as a part of his decision all of the relief to which the complainant is entitled, including back pay and attorney's fees. That order suggested that the parties might be able to stipulate enough facts pertaining to back pay and attorney's fees to enable me to award Mullins all the back pay and attorney's fees to which he was entitled. The order also requested that the parties provide me with a date on which they could attend a hearing on the relief issues if they could not agree upon stipulations. Counsel for D30 responded to the order by stating that D30 would not stipulate to anything. D30's response did not provide me with a date for a hearing and accused me of having prejudged the issues and of having been unduly considerate of Mullins' position. The response did not, however, move that I disqualify myself.

Since the parties did not seem able to stipulate as to back pay and other matters, I issued on August 29, 1985, an order providing for a hearing on the relief issues of back pay and attorney's fees and some of the criteria pertaining to civil penalties. Thereafter, on September 23, 1985, D30 filed the aforementioned untimely motion to recuse. Section 2700.81(c) of the Commission's rules shows that a motion for recusal should be made as soon after occurrence of the alleged disqualifying acts as possible in order to avoid the expense of a hearing and the time and expense involved in writing a decision in the event the judge disqualifies himself or is disqualified by the Commission after granting an interlocutory appeal. I had already written the first 54 pages of this decision pertaining to the merits of the case, and they had been typed in final form, before D30 filed its motion asking me to disqualify myself.

Although court cases on the subject of motions for disqualification are based on some provision of Title 28 of the United States Code, the reasons given by the courts for requiring prompt filing of motions to recuse are the same as those indicated in section 2700.81(c) of the Commission's rules. In re International Business Machines Corporation, 618 F.2d 923 (2d Cir. 1980), for example, held that a motion for disqualification was untimely and stated that "[a] major practical reason for the timeliness requirement is that the granting of a motion to recuse necessarily results in a waste of the judicial resources which have already been invested in the proceeding". 618 F.2d at 933.

In United States v. Daley, 564 F.2d 645, 651 (2d Cir. 1977), a motion to recuse was held to have been untimely filed because the motion was not made until after the trial had been held despite the fact that defendant was aware of the judge's alleged prejudicial acts at the time the trial was held. In Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), the court held that a motion to recuse was untimely filed when it was filed on the 14th day of a trial and 2 weeks after the trial judge had made a statement "purportedly showing that the trial judge had prejudged the merits of the defendant's prospective motion for judgment." 408 F.2d at 183. In Refior v. Lansing Drop Forge Co., 124 F.2d 440 (6th Cir. 1942), the court held that a motion to recuse was untimely because the statute "does not permit a litigant, after he has knowledge of the alleged bias or prejudice of the trial judge and without notice, to go forward in the cause before filing such affidavit after the facts of disqualification are known to him." 124 F.2d at 445. In Scott v. Beams, 122 F.2d 777 (10th Cir. 1941), the bases for the motion to recuse were some events which occurred during the last 2 days of the trial. The court held that the motion was untimely because it was filed 2 "months after the bias and prejudice of the court became apparent. That is too late." 122 F.2d at 789.

In addition to having been untimely filed, the motion to recuse, when considered on its merits, fails to allege any truthful facts showing bias or prejudice against D30. The affidavit submitted by D30's counsel purports to find prejudgment or bias because of a statement which I made on pages 35 and 36 of the transcript:

> Well I didn't think before I had this discussion with Counsel that Mr. Mullins could be other than right, both legally and factually, but I guess Mr. Heenan hasn't been in this work all this time for nothing and I think he has

pretty much convinced me that legally maybe Mr. Mullins doesn't have too good a case, but I haven't made up my mind for certain. I'm just letting you see that you had a better case than I thought you had, Mr. Heenan. That's what makes these cases interesting I guess. If they weren't close questions we wouldn't have hearings and we wouldn't have contested cases.

I think at this point we can go ahead and have Mr. Mullins testify, then Mr. Ward and Mr. Heenan can ask him any questions that they want to, and then we can hear for the first time what he thinks about all of these things that he has been hearing the attorneys expound on. I'm sure he's not too pleased with a lot of these arguments, just as I wasn't when they started out. I thought they were somewhat frivolous when we started but actually they seem to have a little more merit to them than I first anticipated. We've been going an hour, suppose we take a little break at this point and then we'll start out with Mr. Mullins.

The other basis given in D30's affidavit for my alleged prejudice against it is that I stated, at the close of the hearing, after I had set dates for the filing of briefs, words to the effect that I would give complainant all the "help" I could under the Act.

The portion of my statement on pages 35 and 36 which D30 claims is evidence of prejudice toward D30 is that I referred to D30's arguments as being "somewhat frivolous". Despite my unflattering description of D30's arguments, I have discussed them in detail in this decision, have considered them fully, and have given the reasons for my belief that they do not overcome the discrimination which is prohibited by section 105(c)(1) of the Act. D30 also contends that my statement at pages 35 and 36 shows that I am not able to render an impartial decision in this case because I had prejudged the merits of D30's arguments before the hearing was held. I have been hearing and deciding cases under the discrimination provisions of both the 1969 and 1977 Acts for more than 13 years and I have formed tentative legal opinions as to the validity of cases filed under those provisions after I have read each of the discrimination complaints which have been assigned to me.

The courts have uniformly rejected a claim of a judge's having formed legal opinions as a basis for the grant of a

motion to recuse. In Re J. F. Linahan, 138 F.2d 650 (2d Cir. 1943), contains one of the most interesting discussions on the fact that a judge cannot avoid having legal opinions. The court in that case stated:

> Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial *before a judge lacking in impartiality and disinterestedness*. If, however, "bias" and "partiality" be defined to mean the total absence of pre-conceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired "slants", pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obligated to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. * * * An "open mind", in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded. * * *
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> * * *
>
> [A judge] must do his best to ascertain [the witnesses'] motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewedly observe the strategems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions. [Footnotes omitted.]

138 F.2d at 651.

In Hortonville School District v. Hortonville Ed Assn., 426 U.S. 482 (1976), the Supreme Court held that "mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker." 426 U.S. at 493. In F. T. C. v. Cement Institute, 333 U.S. 683 (1948), the court stated that it was aware of no decision by the court which "would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." 333 U.S. at 703.

D30's motion to recuse is accompanied by a 15-page memorandum which consists primarily of a response to my order providing for hearing on the relief issues of back pay and attorney's fees. I do not believe that I am required to debate any further or answer the personal matters discussed by D30's counsel in much of that memorandum. Suffice it to say that a large part of that memorandum is devoted to rearguing the merits of D30's position. I have considered each of D30's arguments in detail in the first 55 pages of this decision and it is not necessary for me to restate my disposition of those contentions.

On page 6 of that memorandum, however, D30's counsel makes the following utterly false accusations:

> There was a great deal of ex parte contact and personal involvement by the ALJ in this case long before District 30 was ever served with a complaint. The complainant provided the ALJ with the information the ALJ used to draft the detailed "proposed findings" in the order of June 21, 1984. 13/ [Tr. 10]. The proposed findings are detailed and drafted exclusively from the complainant's point of view. They evidence the obvious prolonged ex parte contact resulting in bias.

The truth of the matter is that I have had only three telephone conversations with complainant. The first one occurred on January 28, 1985, when complainant stated that he

13/ In contrast to the claims made by D30 with respect to my proposed stipulations, counsel for B-E filed a response to the order which stated as follows:

> Enclosed is Respondent Beth-Elkhorn Corporation's Response to the Order of June 21, 1984. The effort to reduce this case to basic facts and legal issues is greatly appreciated. We believe that the meeting of counsel, which we proposed in the enclosed response, could be very helpful in simplifying and expediting the case.

could not agree with one of the stipulations proposed by counsel for the parties and requested that I schedule his case for hearing. D30's counsel states on page 10 of his memorandum that he "is not concerned with the casual contact of the complainant's phone call on January 28, 1985, requesting a status report." The second phone call was made shortly after complainant received a copy of my order providing for hearing on the relief issues dated August 29, 1985. In the second phone call, complainant apologized for his attorney's failure to respond to my order of July 25, 1985, which also pertained to relief issues. Additionally, he asked me what he was supposed to do at the hearing and I told him the hearing would not deal with the merits of his case in any way and would be devoted exclusively to back pay and the other matters discussed in my order of August 29, 1985. Finally, I received a call from complainant on October 2, 1985. On that occasion, he wanted to discuss a letter which I had written to D30's counsel on September 26, 1985, providing him with a copy of anything in the official file which D30 might not have and a description of all phone calls between me and counsel for the parties and complainant. I refused to discuss anything with complainant on October 2, 1985, other than to inform him that the letter of September 26, 1985, did not constitute my final action with respect to the motion to recuse.

D30's counsel provided me with a copy of the Commission's order in James M. Clarke v. T. F. Mining, Inc., 6 FMSHRC 1401 (1984), in which the Commission referred to "a prohibited ex parte telephone conversation with counsel for the operator." [Emphasis supplied.] If D30's counsel had read the Commission's decision in James M. Clarke v. T. F. Mining, Inc., 7 FMSHRC 1010 (1985), he would have found the definition of an "ex parte communication" given on page 1014 of that decision, as set forth in the Administrative Procedure Act, 5 U.S.C. § 551(14), to be "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding". 7 FMSHRC at 1014 [Emphasis supplied.] All three of the phone calls I have received from complainant have been in the nature of status-report inquiries because Mullins has always asked questions pertaining only to the status of his case.

Section 2700.82 of the Commission's regulations prohibits "ex parte communication with respect to the merits of any case" between a judge and the parties to a proceeding. At no time has Mullins ever discussed the merits of his case with me. Therefore, the claim by D30's counsel that I have engaged in "a great deal of ex parte contact" is absolutely false. Moreover, all of the materials used by me in drafting the 13

proposed stipulations which I mailed to the parties on June 21, 1984, were based on letters written by or received by Mullins and a copy of an arbitrator's decision decided in D30's favor which resulted in the filing of Mullins' complaint in this proceeding. All of those materials were supplied by Mullins in response to a routine deficiency letter sent to Mullins by Chief Judge Merlin before this case was ever assigned to me. The first telephone call received by me from Mullins occurred on January 28, 1985, after the parties had already agreed upon the stipulations of fact which are set forth and explained on pages one to seven of this decision. Counsel for D30 agreed at the hearing that those stipulations correctly state the facts (Tr. 7; 11; 169) and my decision (pp. 9-17) shows that I have adhered to the stipulations and have rejected Mullins' conflicting testimony in which he endeavored to establish that Stipulation No. 16 is incorrect.

Section 2700.81(b) pertaining to requests that a judge disqualify himself provides for the affidavit to set forth "in detail the matters alleged to constitute grounds for disqualification." In United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977), the court stated that an affidavit requesting disqualification should be strictly construed and must be definite as to time, place, persons, and circumstances. Assertions merely in the nature of conclusions are not enough, nor are opinions or rumors. D30's counsel is so uncertain about his alleged charges of ex parte communications between me and Mullins that he declines even to mention them in his affidavit, much less state when they occurred or what they dealt with. It is not surprising that D30's counsel fails to provide the kind of information which the court said was necessary in the Haldeman case because no prohibited ex parte communications have ever occurred between me and complainant or any other party to this proceeding.

I am not entirely sure what bias D30's counsel attributes to me because I am supposed to have told Mullins at the completion of the hearing that I would give him all the help I could in making my decision in this case. Perhaps I should have used the word "consideration", but the point of the statement was that I had heard a lot of arguments which, at the time, made me doubt whether I could grant his complaint. He looked rather forlorn at the completion of the hearing and I thought that a word of encouragement was appropriate. In any event, that statement, whatever it was, was made in the presence of counsel for all parties who had attended the hearing after they had been given notice of the hearing. Therefore, it certainly was not a prohibited ex parte communication and counsel for D30 could have objected to it at the time if it disturbed him, but he said nothing about that or

any other action or statement by me until 6 months after the hearing had been concluded and he had been advised that my decision in this case would probably be in Mullins' favor.

On the basis of the discussion above, I find that the motion to recuse was untimely filed and that it fails to state any truthful grounds whatsoever which would require me to disqualify myself as the judge in this proceeding. No sense of accomplishment is achieved by rendering a decision in this case after having been wrongfully accused of as many unwarranted claims as have been made by D30's counsel in this proceeding, but I am reminded of the case In re Union Leader Corp., 292 F.2d 381, 391 (1st Cir. 1961), cert. denied, 368 U.S. 927 (1961), in which the court stated, "[t]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is."

The Other Parties' Position Regarding the Motion To Recuse

Counsel for Mullins filed a letter on September 30, 1985, in which she objected to the grant of D30's motion to recuse. Counsel for UMWA filed a letter on September 25, 1985, in which he stated that UMWA would not take a position pertaining to the motion to recuse filed by D30 and that he would prefer to think that I had reached my decision in this case for reasons other than bias.

Counsel for B-E filed a statement in opposition to the granting of the motion to recuse. It is four pages long and contains 13 paragraphs with which, not surprisingly, I agree in every respect. B-E's statement in opposition to the grant of the motion is so well stated that I considered quoting it as my total response to the motion because it is a better piece of writing than I can do, but I believe that the Commission would like for me to address the erroneous nature of the motion, as I have done above, so as to point out the lack of merit to the false accusations made in the motion and the memorandum submitted in support of the motion.

WHEREFORE, it is ordered:

(A) The discrimination complaint filed by Jimmy R. Mullins in Docket No. KENT 83-268-D is granted based on the finding herein that Mullins was unlawfully removed from the position of dispatcher on the 4-p.m.-to-midnight shift at the No. 26 Mine of Beth-Elkhorn Coal Corporation by an interpretation of article XVII(i)(10) of the National Bituminous Coal Wage Agreement which is unenforceable because it discriminated against Mullins in violation of section 105 (c)(1) of the Federal Mine Safety and Health Act of 1977 by

causing him to be removed from the position of dispatcher after he had been awarded that position by virtue of his having exercised the rights granted to him by Part 90 of Title 30 of the Code of Federal Regulations.

(B) Complainant's motion to supplement the amended complaint to name Local 1468 as a party is granted.

(C) As hereinbefore explained in detail, respondents shall provide Mullins with the relief provided below:

(1) Reinstate Mullins to the position of dispatcher on the 4-p.m.-to-midnight shift from which he was removed.

(2) Pay Mullins a back-pay differential of $19,023.56 and expenses associated with bringing this action in the amount of $2,066.68 together with interest computed in accordance with the Commission's decision in Milton Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2053 (1983). The back pay has been computed as of August 30, 1985, and will continue to accumulate, along with interest, until date of payment and Mullins' reinstatement.

(3) Pay Mullins' attorney an amount of $7,019.33 as charges for work done and expenses incurred in representing Mullins in this proceeding. Additional attorney's fees will, of course, have to be awarded if the Commission grants petitions for discretionary review and Mullins' attorney performs additional work with respect to the grant of review by the Commission, assuming this decision is affirmed.

(4) All respondents shall cease and desist from any and all discriminatory activities directed toward Mullins for his having exercised his Part 90 rights and having filed the discrimination complaint in this proceeding.

(D) The untimely motion filed on September 23, 1985, by District 30 requesting that the judge recuse himself is denied for the reasons hereinbefore given.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 14, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 85-156 A.C. No. 15-13918-03522
STEMCO COAL COMPANY, INC., Respondent	:	Mine No. 2

DECISION

Appearances: Charles F. Merz, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner

Before: Judge Melick

This case is before me upon the petition 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" for a violation of the regulatory standard at 30 C.F.R. § 75.1711.[1] The general issue before me is whether Stemco Coal Company, Inc. (Stemco) has violated the cited regulatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation

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[1]Hearings were scheduled to commence in this case at 8:30 a.m. on November 13, 1985. At approximately 8:45 a.m. counsel for the Secretary received a telephone call at the hearing site from counsel for the mine operator, Herman Lester, Esq. As related by the Secretary's counsel at the subsequent commencement of hearings, Mr. Lester indicated that he was not authorized by the mine operator to appear at the hearing and that no representative of the mine operator would appear thereat. As subsequently related counsel for the Secretary informed Mr. Lester that he was prepared to present, and in fact, intended to present on behalf of the Secretary, evidence in support of the citation and civil penalty at issue. Mr. Lester reportedly stated that he understood that this would occur. Under the circumstances I found at hearing that the mine operator waived his right to appear and contest the matters presented at hearing.

was "significant and substantial". If a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Under the authority of section 110(b) of the Act the Secretary also seeks a civil penalty of $1,000 for each day Stemco purportedly continues to violate the cited standard. Because of the exigency of the circumstances presented at hearings held on November 13, 1985 this decision is being issued on an expedited basis.

The citation at bar, No. 2290849, as amended at hearing, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.1711, and charges that "the subject mine was abandoned on September 28, 1984 and the drift openings were not sealed in a manner prescribed by the the Secretary." The cited standard requires in relevant part that "the opening of any coal mine that is declared inactive by the operator, or is permanently closed, or abandoned for more than 90 days shall be sealed by the operator in a manner prescribed by the Secretary."

It is not disputed that on September 28, 1984, Stemco notified the Secretary through the Mine Safety and Health Administration (MSHA) that its No. 2 Mine had been abandoned, that the work of all miners had been terminated and production had ceased. The Secretary subsequently notified Stemco by letter dated October 29, 1984, of the prescribed manner for sealing the No. 2 Mine and informed Stemco that it had 60 days to comply with that notification. The Secretary's letter of October 29 prescribed in part as follows:

> In accordance with section 75.1711, the mine shall then be sealed with solid, substantial, incombustible material, such as concrete material for a distance of at least 25 feet into such openings. A means to prevent a build-up of water behind the seals shall be provided in at least one of the seals. Metal pipes used for this purpose shall be a minimum of 4 inches in diameter and shall be installed a sufficent height above the bottom of the seal to prevent it from becoming blocked with mud or debris.

MSHA inspector William Hatfield testified at hearing that more than 2 months after the subject letter had been issued (in January or February 1985) he observed that none of the 11 entrances to the Stemco No. 2 mine had been sealed and accordingly he reminded one of the Stemco owners, Allen Stump, of the sealing requirements. Stump requested an extension to comply because of a strike then pending against its exclusive contractor, A.T. Massey Coal Company, and this

request was granted. Hatfield later observed however that the Stemco owners were nevertheless continuing to mine coal at other locations in spite of the strike and accordingly he told Stump that no further delays in sealing the Stemco mine would be permitted. When no effort had been made to seal the mine by March 6, 1985, the citation at bar was issued requiring abatement by March 20, 1985.

At Stump's request and upon his representation that he could seal the mine if he had a few more days, an extension for abatement was granted to April 12, 1985. Since no work toward abatement had in fact been performed as of April 30, 1985, a section 104(b) order was then issued.[2] Indeed, the evidence shows that until 2 weeks before the hearing in this case (held November 13, 1985) no work had been performed to abate the citation and order. According to Inspector Hatfield, at that time he observed that dirt had been pushed into the 11 mine entrances to form appropriate seals but inadequate drainage had been provided to prevent water build-up behind those entrances as required by the Secretary's letter of October 29, 1984. Hatfield explained that one drain pipe had been installed in what has been designated on the mine map (Government Exhibit G) as "Stemco Coal No. 2" but that no drainage or other means to prevent a build-up of water was provided for any of the seals in the area of the mine designated on the mine map as "Stemco Coal No. 1". Hatfield explained that the areas designated on the subject mine map as "Stemco Coal No. 1" and "Stemco Coal No. 2" constituted for purposes of MSHA regulation one mine designated as the Stemco No. 2 Mine. This was

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[2]Section 104(b) provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation decribed in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as orginially fixed therein or subsequently extended, and (2) that period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately to cause all persons, 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.

consistent with the requirements of the Commonwealth of Kentucky and Stemco's request to abandon its Stemco No. 2 Mine. The mine map required to be submitted on abandonment included both "Stemco Coal No. 1" and "Stemco Coal No. 2".

According to Hatfield the failure to provide proper drainage from the seals in "Stemco Coal No. 1" resulted in a serious hazard to residents and school children in the hollow or valley below. Hatfield explained that an elementary school was positioned only 3/4 of a mile and some houses were located as close as 1/4 of a mile below the subject mine entrances. Hatfield observed that while he did not believe that an "imminent danger" existed he believed that without proper drainage water seeping into the mine could build-up fairly rapidly behind the seals. Since the seals consisted only of dirt of unknown depth, eventually the water could push the dirt out and inundate the houses and elementary school below. Hatfield opined that such a build-up could occur as soon as within several weeks. Within the framework of this undisputed evidence it is clear that immediate remedial action must be taken.

Under section 110(b) of the Act I have authority to order civil penalties of "not more than $1,000 for each day" during which the mine operator fails to correct a violation for which a citation had been issued under section 104(a) of the Act within the time permitted for its correction. The citation at bar was issued under section 104(a). For the reasons noted below, I also find that the mine operator has violated the cited standard and has failed to correct the violation therein within the designated extension of time i.e. April 12, 1985. While the mine operator has now provided seals composed of dirt of unknown depth for each of the 11 mine openings it has clearly not provided a "means to prevent a build-up of water" from what has been designated as "Stemco Coal No. 1". Because of the immediate and grave hazard presented by this situation and the demonstrated absence of efforts by the mine operator to properly abate the cited conditions, I am directing herein that the mine operator provide such means to prevent a build-up of water behind the seals in "Stemco Coal No. 1" within 2 days of receipt of this decision or be subject to civil penalties of $1,000 a day for each day thereafter in which this condition is not fully abated.

I am also assessing a civil penalty of $1,000 in this case based in part upon the failure of the mine operator to have provided any seals in the subject mine until only 2 weeks before the instant hearing. The mine operator was notified of the requirements for sealing its mine as early as its receipt of the letter from MSHA dated October 29, 1984. It was thereafter periodically notified of this requirement

until it was considered necessary to issue the citation at bar on March 6, 1985. Even then an additional extension was granted and abatement was still not attempted by the mine operator. This demonstrated intransigence warrants a significant civil penalty.

I have also considered the undisputed evidence that leaving 11 mine entrances unsealed for such a long period of time posed a grave hazard to children and adults who would be tempted to enter the mine. According to Inspector Hatfield a mine abandoned for that period of time would present extremely hazardous conditions from the build-up of methane gases and "black damp" and from the deterioration of roof and ribs. In addition, according to Hatfield it would have been "very easy to get lost" in the subject mine. Under the circumstances the violation was also "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I further find that the mine operator was negligent in failing to seal the mine after having received repeated notices of the requirement to do so. I have also considered that the mine is relatively small in size and has a moderate history of violations. Within this framework of evidence I find that a civil penalty of $1,000 is warranted.

ORDER

Stemco Coal Company Inc., is hereby ordered to pay a civil penalty of $1,000 within 30 days of the date of this decision.

Stemco Coal Company, Inc., is further ordered to provide a means to prevent a build-up of water behind the seals at Stemco No. 2 Mine (including what is identified on Government Exhibit G as "Stemco Coal No. 1" and "Stemco Coal No. 2") within 2 days of receipt of this decision or be subject to further civil penalties of $1,000 for each day thereafter for which compliance therewith has not been achieved.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail and Federal Express)

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rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 18 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 85-51
Petitioner	:	A.C. No. 05-03787-03530
	:	
v.	:	Docket No. WEST 85-52
	:	A.C. No. 05-03787-03531
BEAR COAL COMPANY, INC.,	:	
Respondent	:	Bear No. 3 Mine

DECISION APPROVING SETTLEMENT

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Stephen B. Shapiro, Esq., Morrato, Bieging, Burrus & Colantuno, Denver, Colorado, for Respondent.

Before: Judge Carlson

These consolidated civil penalty cases were fully heard upon the merits on August 2, 1984, in Denver, Colorado. Before the briefs were due the parties asked for more time in order to work out a possible settlement.

The parties have now submitted a settlement agreement which, if approved, would resolve all pending issues.

Specifically, the parties agree that citation number 2336348 and citation number 2336329 arose out of the same factual situation and were therefore improperly duplicative. They therefore propose that citation number 2336348 be vacated.

They also agree that the penalty assessments for the remaining citations should be modified as follows:

Citation No.	Original Proposed Penalty	Modified Penalty
2336329	$ 600.00	$ 125.00
2336350	750.00	550.00
2336510	650.00	500.00

Having heard all of the evidence in this case and considered the representations made in the settlement agreement, I am convinced that the terms of the agreement are reasonable and appropriate.

Accordingly, the settlement agreement is ORDERED approved in its entirety. Citation no. 2336348 is ORDERED vacated, and respondent Bear Coal Company is ORDERED to pay a total civil penalty of $1,175.00 for the remaining three citations within 40 days of the date of this decision.

John A. Carlson
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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DENVER, COLORADO 80204

NOV 18 1985

EMERY MINING CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 85-95-R Order No. 2503086; 4/17/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-137 A.C. No. 42-00121-03581
v.	:	Deer Creek Mine
EMERY MINING CORPORATION, Respondent	:	

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring, Washington, D.C., for Contestant/Respondent; Heidi Weintraub, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner.

Before: Judge Lasher

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977. At the close of a hearing on the record and after consideration of evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during argument, a decision was entered. Such bench decision appears below as it appears in the transcript aside from minor corrections.

A preliminary hearing was held in Denver, Colorado, on September 26, 1985, to determine the issues raised by the Contestant-Respondent (herein Emery) in the above two dockets in its motion for summary decision filed June 12, 1985. Counsel for the parties, at the close of the hearing, indicated that there was no issue of any material fact sufficient to bar the resolution of the motion on the record developed. Counsel for both parties, prior to the preliminary hearing, submitted excellent briefs which fully set forth the positions advanced by them together with supporting points and authorities.

The dispute in this matter arose out of the issuance of a withdrawal order issued pursuant to the provisions of section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, which alleged that Emery had violated 30 C.F.R. section 75.1704 on April 12, 1985, to wit: "The designated escapeway in the "B" North working section was not maintained to ensure passage at all times of any person, including disabled persons, on April 12, 1985. At about 11:45 p.m. on the No. 21 crosscut in the intake escapeway, the roof was shot down 16 feet in width, 20 feet in length, and 2 feet in depth. The area was unsupported and men were inby at the time the roof was shot down. The section is advancing and only three entries are being driven intake belt and return."

The subject withdrawal order, No. 2503086, was issued on April 17, 1985, five days after the alleged violation occurred and during an AAA inspection which was being conducted by Inspector Robert L. Huggins, a duly authorized representative of the Secretary of Labor (herein Secretary). An AAA inspection is one of the four inspections required annually under the Act and Inspector Huggins indicated that this inspection commenced on April 1, 1985, and would have lasted a period of approximately 25 - 35 days. Inspector Huggins also indicated that he was the only MSHA inspector who was conducting the AAA inspection at Emery's Deer Creek Mine and that he was present at the mine and engaged in such endeavor on April 2, 3, 4, 8, 9, 10, 17, 18, and 22. 1/

Emery contends that a withdrawal order may not properly be issued under section 104(d)(2) of the Act for a violation which has been terminated and is no longer in existence where the inspector's determination that such violation occurred is based solely on statements made to the inspector some five days after the alleged violation occurred by miners who were present and witnessed the occurrence thereof. 2/

Emery contends that under section 104(d), as well as section 104(a), violations, in order to be cited and made the subject of citations and withdrawal orders issued by the enforcement agency,

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1/ Inspector Huggins was not present at the mine on the day the alleged violation occurred, April 12, 1985.

2/ One of the purposes of the preliminary hearing was to determine the factual setting in which the inspection was conducted and the alleged violation occurred. The parties presented the testimony of three witnesses, Inspector Huggins for the Secretary, and for Emery, two members of Emery's management: Kenneth E. Callahan (shift foreman on April 12, 1985) and James Atwood (mine manager during the period in question).

must be in existence at the time of an inspection in order to subject a mine operator to liability for violations under the Act. Emery also contends, however, that section 104(d) differs from section 104(a) and other provisions of the Act since, unlike other provisions, section 104(d) introduces a time factor into the enforcement equation. 3/

The Secretary takes the position that it is not necessary for an inspector conducting an inspection to actually view or otherwise otherwise perceive the existence or occurrence of a condition or practice in violation of a Mine Safety and Health standard; that the enforcement action taken by the inspector under section 104(d) was not restricted by Congress' placing limitations on the circumstances surrounding the issuance of such, other than that such enforcement action be found related to "any" inspection. The Secretary goes on to add that the withdrawal order in question was clearly related to the AAA inspection which was underway at the mine.

One of the principal, if not the principal, points of contention between the parties is whether or not the Act differentiates between "inspections" and "investigations," with Emery contending on the one hand that a section 104(d)(2) order must be issued "upon an inspection of the mine," and the Secretary contending on the other hand that "Congress did not define the terms 'inspection' or 'investigation' as a literal part of the 1979 Act." 4/

Although evidence was produced at the preliminary hearing in some detail with respect to issues which related to the merits of the fundamental issues raised by the issuance of the order in question, certain facts relating to the conduct of the inspection should be mentioned as a preliminary to discussion of the paramount legal issue which is involved here. It is concluded that the reliable and

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3/ This contention will be taken up in more detail subsequently.

4/ The parties also have differing views as to the significance and meaning of two other terms used in the Act, "finds" (or "findings") and "believes" (or "belief"). After careful consideration of the thorough research of the parties in this respect, I am of the opinion that attempting to divine congressional intention in the use of these terms will prove to be a futile act. Divining congressional intent in the major ways called for in this proceeding does not require a specific determination of the terms "find" or "believe." The distinction between "inspections" and "investigations" as those terms are used by Congress in formulating a range of enforcement mechanisms, is of considerable, if not critical, importance, however, in determining the merit of the motion for summary dismissal.

probative evidence introduced on the record indicates that the conditions which existed in the "intake escapeway" area described in the order on April 17, 1985, differed from those in existence on April 12, 1985. 5/

Although the inspector testified that he viewed the area described in the order on April 17, 1985, before issuing the citation, it is concluded from the entire record that his decision was made primarily on the basis of the oral reports received from miners who were present on the day of the blasting, April 12, 1985. In this connection, it should be noted that the inspector indicated that he received one written statement from one miner, Caroline Booker, on the day following the issuance of the order in question. Since that statement was received subsequent to the issuance of the citation, it is concluded that this written statement, in and of itself, was not part of the intellectual fund of information the inspector used to decide whether or not to issue the order in question. Caroline Booker, however, was one of the witnesses who the inspector interviewed orally in the mine on April 17, 1985, prior to the issuance of the order in question.

The record does indicate that the order in question was issued during the approximately 25-day period commencing April 1, 1985, during which the AAA inspection was conducted by Inspector Huggins. In a general sense, the violative condition or practice described in the subject order was also extant during this same time frame. It is also clear that the violative condition was not extant on any day that the inspection actually was being conducted by the inspector since he was not at the mine engaged in inspecting, or for that matter investigating, on April 12; the surrounding days he was engaged in inspecting were April 10 and April 17. There is no question but that the inspector failed to actually see, observe, or perceive the area of the mine involved during any period of time it was in a state of violation as alleged in the order.

The inspector testified that on April 17, 1985, the intake escapeway (passageway) was not in violation of the safety standard. Nevertheless, the order was not issued until after the inspector had

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5/ This is reflected in the testimony of Emery's witness Callahan and also reflected indirectly by the fact that the inspector, on cross-examination, indicated that various answers to interrogatories propounded to him were, in fact, answered by him with the indication that he was not present in the "B" North section of the mine on April 12, 1985, the date the alleged violation occurred. There is no question but that some changes had occurred in the area of the mine involved, and described in the order, and exactly to what extent cannot, in this proceeding, be determined. Based on the testimony of the witnesses in this proceeding, it is unlikely that precisely what those differences are will ever be determined.

viewed the area involved and interviewed both miners and management personnel. 6/

It is concluded, on the basis of the entire record, that Inspector Huggins, on April 17, 1985, did not see or otherwise discover from his visual inspection of the area of the mine involved in the order any evidence which - in and of itself - established that a violation had occurred five days earlier.

Turning now to the legal issue raised concerning the necessity of an inspection, as distinguished from an investigation, in the process of the lawful issuance of a Section 104(d)(2) order, a general bird's-eye view of the Act itself is enlightening.

The first mention of the words "inspection" and "investigation" is at the heading of Section 103 of the Act. That heading reads "Inspections, Investigations, and Recordkeeping."

Section 103(a) of the Act provides: "Authorized representatives of the Secretary ... shall make frequent inspections and investigations in ... mines each year for the purpose of ... (4) determining whether there is compliance with the mandatory health or safety standards..."

Section 103(b) of the Act, speaking only of an "investigation," provides: "For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a ... mine, the Secretary may, after notice, hold public hearings, et cetera." 7/

Section 103(g)(2) of the Act, relating only to "inspection," provides that prior to or during "any inspection of a ... mine, any representative of miners ... may notify the Secretary ... of any violation of this Act, et cetera." 8/

6/ On the morning of April 17, 1985, Inspector Huggins' supervisor told him of a rumor concerning the blasting which occurred on April 12, 1985, and Inspector Huggins indicated that at approximately 9 o'clock, when he arrived at the mine, that he advised management representative Callahan of his "purpose," which the inspector explained meant that he was conducting an AAA inspection and also of the "25 shots" (utilized in the commission of the alleged violation).

7/ I note here that this is one of the more significant provisions of the Act in determining the validity of the order in question since it authorizes the Secretary to make an "investigation" of an accident or "other occurrence relating to health or safety." It is clear here, as well as in other provisions of the Act, that Congress saw an investigation as something different from an inspection. One can readily see the difference between the investigation of some past happening or occurrence or accident and the inspection of some physical plant or property.

8/ Section 103(g)(1) provides a procedure for the representative of miners to obtain "an immediate inspection" by giving notice to the Secretary of the occurrence of a violation or imminent danger.

Of considerable significance, the most used enforcement tool, section 104(a), mentions both inspections and investigations. It provides that "if, upon inspection or investigation, the Secretary ... believes that an operator of a ... mine ... has violated this Act, or any ... standard, ... he shall, with reasonable promptness, issue a citation to the operator. ... The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

Section 104(d)(1), in contrast to section 104(a), relates only to "inspections," providing that "if, upon any inspection of a ... mine, an authorized representative of the Secretary finds that there has been 9/ 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 can significantly and substantially contribute to the cause and effect of a ... hazard, and if he finds such violation to be caused by an unwarrantable failure ... he shall include such findings in any citation given to the operator under this Act."

The second sentence of section 104(d)(1) provides for the withdrawal order in the enforcement chain or scheme contemplated by Congress in this so-called "unwarrantable failure" formula. Significantly, it provides that "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 ... and finds such violation to be also caused by an unwarrantable failure ..., he shall forthwith issue an order requiring the operator to cause all persons ... to be withdrawn from ... such area ...."

If the position of the Secretary in this case were adopted, that is, if withdrawal orders could be issued on the basis of an investigation of past occurrences, the effect could be to increase the 90-day period provided for in the second section of section 104(d)(1) and by the amount of time which passed between the occurrence of the violative condition described in the order and the issuance of the order. 10/

9/ The Secretary attributes importance to the use of the past tense here in the sense that Section 104(d)(1) can cover an event or violative occurrence which occurred prior to the issuance of an enforcement order or citation. This contention is rejected on the basis of the subsequent provisions of section 104(d)(1) which are phrased in the present tense and the fact that the two paragraphs constituting section 104(d), when read in their entirety, indicate that use of the phrase "has been" was not an intentional extension of the coverage of the paragraph to prior events but simply a matter of practical phraseology.

10/ This could, if the principle is accepted, be a period well in excess of the five days involved in the instant proceeding.

Section 104(d)(2) of the Act permits the issuance of a withdrawal order by the Secretary if his authorized representative "finds upon any subsequent inspection" the existence of violations similar to those that resulted in the issuance of the section 104(d)(1) order.

Summing up, it is clear that nowhere in section 104(d) is the issuance of any enforcement documentation sanctioned on the basis of an investigation. Although Congress did not define the terms "inspection" or "investigation" specifically in the Act, there is no question but that Congress in using those terms in specific ways in prior sections of the Act, and by not using the term "investigation" in section 104(d)(1) and (2) 11/ did so with some premeditation.

Emery's reply brief, at page 6, makes a telling point in this regard: "A yet more graphic example of the fact that Congress intended the words to have different meanings is provided by section 107(b)(1) and (2) of the Act where Congress lays out an enforcement sequence whereby, based upon findings made during an 'inspection,' further 'investigation' may be made."

Finally, it is noted that section 107(a) of the Act permits the Secretary's representative to issue a withdrawal order where imminent danger is found to exist either upon an inspection or investigation.

Perusal of these various portions of the Mine Act, commencing at the point where the subject words are first used on through to the end of their use, indicates that such terms were used with care and judiciously and with an understanding of the general connotations contained in their definitions. 12/

11/ As it did, for example, in section 104(a) of the Act.

12/ Reference is made to Webster's Third New International Dictionary, G. & C. Merriam Company, 1976, which defines "inspect" in the following manner: "1: to view closely and critically (as in order to ascertain quality or state, detect errors, or otherwise appraise): examine with care: scrutinize (let us inspect your motives) (inspected the herd for ticks) 2: to view and examine officially (as troops or arms)." The word "inspection," in the same dictionary, contains various definitions, which include references to "physical" examinations of various things, including persons, premises, or installations. The word "investigate" is defined as follows: "to observe or study closely: inquire into systematically: examine, scrutinize (the whole brilliance of this novel lies in the fullness with which it investigates a past) (a commission to investigate costs of industrial production...)."

One concludes from reading these definitions that an investigation is more applicable to the study or scrutiny of some past event or intellectual subject, whereas an inspection relates more generally to looking at some physical thing. This common distinction between these phrases is consistent with the congressional usage of the term "investigate," for example, in section 103(b) of the Act and for the use of both terms in section 104(a) of the Act.

I agree with my colleague, Judge Richard C. Steffey, who observed in a proceeding involving Westmoreland Coal Company, which was unreported: 13/

"WCC correctly argues that an order issued section 104(d) should be based on an inspection as opposed to an investigation. As hereinbefore indicated, the Secretary argues that Congress has not defined either term to indicate that Congress recognized that there is a difference between an 'inspection' as opposed to an 'investigation.' If one wants to examine the legislative history which preceded the enactment of the unwarrantable-failure provisions of the 1977 Act, one must examine the legislative history which preceded the enactment of section 104(c) of the 1969 Act. The reason for the aforesaid assertio is that Congress made no changes in the wording of section 104(c) of the 1969 Act when it carried those provisions over to the 1977 Act as section 104(d).

"The history of the 1969 Act shows that there was a difference in the language of the unwarrantable-failure provisions of S. 2917 as opposed to H.R. 13950. Whereas S. 2917, when reported in the Senate contained an unwarrantable-failure section 302(c) which read almost word for word as does the present section 104(d), H.R. 13950 contained an unwarrantable-failure section 104(c) which provided that if an unwarrantable-failure notice of violation had been issued under section 104(c)(1), a reinspection of the mine should be made within 90 days to determine whether another unwarrantable-failure violation existed. H.R. 13950 also contained a definition section 3(1) which defined an 'inspection' to mean '*** the period beginning when an authorized representative of the Secretary first enters a coal mine and ending when he leaves the coal mine during or after the coal-producing shift in which he entered.'

"Conference Report No. 91-761, 91st Cong., 1st Sess., stated with respect to the definition in section 3(1) of H.R. 13950 (page 63)

> *** The definition of 'inspection' as contained in the House amendment is no longer necessary, since the conference agreement adopts the language of the Senate bill in section 104(c) of the Act which provides for findings of an unwarrantable failure at any time during the same inspection or during any subsequent inspection without regard to when the particular inspection begins or ends.***

Section 104(c)(1) of H.R. 13950 provided for the findings of unwarrantable failure to be made in a notice of violation which would be issued under section 104(b). Section 104(c)(1)'s requirement of a reinspection within 90 days to determine if an unwarrantable-failure violation still existed explained that the reinspection required within 90 days by section 104(c)(1) was in addition to the

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13/ Westmoreland Coal Company, "Order Granting In Part Motion for Summary Decision," et cetera, Docket Numbers WEVA 82-340-R, et al, (May 4, 1983).

special inspection required under section 104(b) to determine whether a violation cited under section 104(b) had been abated. Section 104(c)(1), as finally enacted, eliminated the confusion about intermixing reinspections with special inspections by simply providing that an unwarrantable-failure order would be issued under section 104(c)(1) any time that an inspector, during a subsequent inspection, found another unwarrantable-failure violation (Conference Report 91-761, pp. 67-68).

"The legislative history discussed above shows that Congress thought of an inspection as being the period of time an inspector would spend to inspect a mine on a single day because the inspection was to begin when the inspector entered the mine and end when he left. It would be contrary to common sense to argue that the inspector might take a large supply of food with him so as to spend more than a single day in a coal mine at one time. On the other hand, Congress is very experienced in making investigations to determine whether certain types of legislation should be enacted. Congress is well aware that an investigation, as opposed to an inspection, is likely to take weeks or months to complete. Therefore, I cannot accept the Secretary's argument that Congress did not intend to distinguish between an "inspection" and an "investigation" when it used those two terms in section 104(a) and section 107(a) of the 1977 Act.

"It should be noted, for example, that the counterpart of section 104(a) in the 1977 Act was section 104(b) in the 1969 Act. Section 104(b) in the 1969 Act provided for notices of violation to be issued 'upon any inspection,' but section 104(a) in the 1977 Act provides for citations to be issued 'upon inspection or investigation.' Likewise, the counterpart of imminent-danger section 107(a) in the 1977 Act was section 104(a) in the 1969 Act. In the 1969 Act an imminent-danger order was to be written 'upon any inspection,' but when Congress placed the imminent-danger provision of the 1977 Act in section 107(a), it provided for imminent-danger orders to be issued 'upon any inspection or investigation.' On the other hand, when the unwarrantable-failure provision of section 104(c) of the 1969 Act was placed in the 1977 Act as section 104(d), Congress did <u>not</u> change the requirement that unwarrantable-failure orders were to be issued 'upon any inspection.'

"The legislative history explains why Congress changed section 104(a) in the 1977 Act to allow a citation to be issued 'upon inspection or investigation.' Conference Report No. 95-461, 95th Cong., 1st Sess., 47-48, states that the Senate bill permitted a citation or order to be issued based upon the inspector's <u>belief</u> that a violation had occurred, whereas the House amendment required that the notice or order be based on the inspector's <u>finding</u> that there was a violation. Additionally, as both the Secretary and WCC have noted, Senate Report No. 95-181, 95th Cong., 1st Sess., 30, explains that an inspector may issue a citation when he believes a violation has occurred and the report states that there may be times when

> *** a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted

accident investigation, or for other legitimate reasons. For this reason, [section 104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. ***

"The legislative history and the plain language of section 107(a) in the 1977 Act explain why that section was changed so as to insert the provision that an imminent-danger order could be issued upon an 'investigation' as well as upon an 'inspection.' Section 107(a) states that '*** [t]he issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.' Both Senate Report No. 95-181, 37, and Conference Report No. 95-461, 55, refer to the preceding quoted sentence to show that a citation of a violation may be issued as part of an imminent-danger order. Since section 104(a) had been modified to provide for a citation to be issued upon an inspector's 'belief' that a violation had occurred, it was necessary to modify section 107(a) to provide that an imminent-danger order could be issued upon an inspection <u>or</u> an investigation so as to make the issuance of a citation as part <u>of</u> an imminent-danger order conform with the inspector's authority to issue such citations under section 104(a).

"Despite the language changes between the 1969 and 1977 Acts with respect to the issuance of citations and imminent-danger orders, Congress did not change a single word when it transferred the unwarrantable-failure provisions of section 104(c) of the 1969 Act to the 1977 Act as section 104(d). Conference Report No. 95-461, 48, specifically states '[t]he conference substitute conforms to the House amendment, thus retaining the identical language of existing law.'

"My review of the legislative history convinces me that Congress did not intend for the unwarrantable-failure provisions of section 104(d) to be based upon lengthy investigations. Congress did not provide that an inspector may issue an unwarrantable-failure citation or order upon a 'belief' that a violation occurred. Without exception, every provision of section 104(d) specifically requires that <u>findings</u> be made by the inspector to support the issuance of the first citation and all subsequent orders. The inspector must first, 'upon any inspection' <u>find</u> that a violation has occurred. Then he must <u>find</u> that the violation could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. He must then <u>find</u> that such violation is caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard. He thereafter must place those <u>findings</u> in the citation to be given to the operator. If during that <u>same</u> inspection or any <u>subsequent</u> inspection, he <u>finds</u> another violation of any mandatory health or safety standard and <u>finds</u> such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall <u>forthwith</u> issue an order requiring the operator to cause all persons in the area affected by <u>such violation</u> to be withdrawn and be prohibited from entering such area until the inspector determines that such violation has been abated.

"After a withdrawal order has been issued under subsection 104 (d)(1), a further withdrawal order is required to be issued promptly under subsection 104(d)(2) if an inspector finds upon any subsequent inspection that an additional unwarrantable-failure violation exists until such time as an inspection of such mine which discloses no unwarrantable-failure violations. Following an inspection of such mine which discloses no unwarrantable-failure violations, the operator is liberated from the unwarrantable-failure chain. Conference Report No. 95-181, 34, states that '[b]oth sections [104(d)(1)] and [104(e)] require an inspection of the mine in its entirety in order to break the sequence of the issuance of orders.' [Emphasis supplied.]"

I conclude that the Act does not permit a section 104(d)(2) order to be based on an investigation, as here, but rather the order must be based on and it must have been a product of an inspection of the site. Section 104(d)(2) provides that an order may be issued only if, upon an inspection of the mine, the Secretary finds a violation of a safety or health standard. Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d)(2) order may not be issued.

As I have previously noted, when it intended to permit MSHA enforcement actions to proceed on the basis of an inspection, or an investigation, Congress so provided. As Emery points out in its motion, the section 104(d)(2) requirement of an inspection cannot be dismissed as mere semantic inadvertence on the part of Congress.

Insofar as the instant proceeding is concerned, I find it clear that on April 17, 1985, Inspector Huggins was engaged in both an inspection and an investigation. His inspection of the mine apparently did produce the existence or occurrence of a (separate) violation which allegedly was in existence on April 17, 1985. 14/

However, Inspector Huggins, in questioning the miners and in questioning management personnel on April 17, 1985 (about the subject violation which allegedly occurred on April 12) was engaged in an investigation, as Congress has used that term in the Act. The special and severe sanctions provided in section 104(d) of the Act cannot be based upon an investigation but must be derived from an inspection.

Accordingly, I find that Order No. 2503086 was improperly issued pursuant to section 104(d)(2) of the Act. In so finding, no death knell is sounded with respect to the alleged violation described in the body of the order, however; thus, I do not accept Emery's contention that even under section 104(a) of the Act, an inspector is required to actually visually observe or otherwise perceive in person a violation in existence as a prerequisite to his citation of the infraction.

14/ The record is somewhat confused on this point, however, I find that a citation was issued on April 17, 1985.

Section 103(a), as noted previously, authorizes inspections - and investigations - by the Secretary for the purpose of determining whether there is compliance with the mandatory health or safety standards. That provision should be read in conjunction with section 104(a), which authorizes the Secretary, upon either inspection or investigation, to issue a citation if he believes an operator has violated the Act or a standard.

I conclude that section 104(a) permits the issuance of a citation even though the violative condition or practice is not in existence at the time of the inspector's observation or actual detection since section 104(a) refers to investigations as well as inspections.

In conclusion, while I have found the issuance of a section 104(d) order invalid in this proceeding since it was based on a condition or practice not in existence during the time period of an inspection but on one which had already occurred and been abated and was not actually perceived, observed, or otherwise directly detected by a duly authorized representative of the Secretary as part of an inspection, I also conclude that such condition (or practice) is properly cited under section 104(a) Based on the inspector's testimony in this case in connection with the circumstances surrounding the issuance of the order, I find such issuance comports with section 104(a) requirements. 15/

Based on the foregoing analysis, it is concluded that the motion for summary decision should be granted in part.

ORDER

Withdrawal Order No. 2503086 dated April 17, 1985, is modified pursuant to section 105(d) of the Act to reflect its issuance as a citation under section 104(a) of the Act rather than as a withdrawal order under section 104(d)(2) of the Act. United States Steel Corporation, 6 FMSHRC 1908, at 1915 (Fn. 3)(1984).

All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr.
Administrative Law Judge

15/ This decision does conflict with holdings of at least two other Administrative Law Judges who have dealt, in some degree, with the issue; however, in reading their decisions, I was unable to determine whether the precise issue was presented to them squarely. (Their decisions are referred to in the Secretary's memorandum, and in Emery's motion.)

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

November 19, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-72-M A.C. No. 42-01638-05501
v.	:	Veyo Mine
LAVA PRODUCTS, INC., Respondent	:	

DECISION

Appearances: JayLynn Fortney, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Mr. Samuel N. Rucker, President, Lava Products, Inc., Washington, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating five safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Las Vegas, Nevada on November 27, 1984.

The citations, the standards allegedly violated and the proposed penalties therefor are as follows:

Citation No.	30 C.F.R. §	Proposed Penalty
2008000A	55.12-25	$225
2008000B	55.12-2	225
2008000C	55.12-40	225
2084002	55.12-65	420
2084003	55.12-1	420

The cited regulations provide as follows:

> 55.12-25 Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

55.12-2 Mandatory. Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed.

55.12-40 Mandatory. Operating controls shall be installed so that they can be operated without danger of contact with energized conductors.

55.12-65 Mandatory. Powerlines, including trolley wires, and telephone circuits shall be protected against short circuits and lightning.

55.12-1 Mandatory. Circuits shall be protected against excessive overload by fuses or circuits breakers of the correct type and capacity.

The parties waived their right to file post-trial briefs.

Issues

The issues are what penalties are appropriate for the violations.

Stipulation

Samuel N. Rucker, President of respondent, admitted the company was in violation of the regulations. Further, the company was only contesting the amount of the penalties (Tr. 25-27).

Summary of the Evidence

Gary Ferrin, an MSHA inspector with extensive expertise in electricity, inspected Lava Products on September 15, 1983 (Tr. 6-10).

On that date the inspector issued five separate withdrawal orders and five separate citations under section 104 of the Act. He subsequently vacated the orders and citations and issued them under a single order (Tr. 28, 29).

There were three workers at the site. This was the average workforce (Tr. 29). When he returned to the site on September 20 he found three of the violative conditions had been abated. In his opinion, the condition of imminent danger no longer existed at the time of the later inspection (Tr. 30, 31).

The hazards here could cause death or serious injury to the three workers (Tr. 32). On his reinspection the entire plant had been grounded and the inspector terminated the violation of § 55.12-25. The violations of § 55.12-1 and § 55.12-65 had not yet been abated (Tr. 33). Hazards of fire and a possible fatal shock could result from the violation of § 55.12-65 (Tr. 39, 40).

Concerning the violation of § 55.12-2 there were two service entrances on the switches. This required a person to open the door and strike the contact with a stick (Tr. 34). In addition, the citation for this violation was issued because the switch was upside down and thus not properly installed. If a person opened the reversed switch handle the fuse remained energized (Tr. 34, 36, 37).

The violation of § 55.12-40, which had existed for two years, was a highly dangerous condition. The 480 volts could cause death or serious bodily injury (Tr. 35-38).

After granting two extensions to abate the inspector returned to the mine on January 4, 1984. The violations concerning § 55.12-65 and § 55.12-1 had not been abated. At that point the inspector issued a closure order against the entire electrical system (Tr. 41, 42). The violative conditions were, in fact, abated on January 13, 1984 (Tr. 42).

Samuel N. Rucker testified for Lava Products. The witness, part owner and manager of respondent, failed to rapidly abate all of the citations because he had difficulty in obtaining the services of an electrician (Tr. 47-49). St. George, Utah, with a population of 10,000, has only three electricians (Tr. 49, 50).

The owners of Lava Products have lost about $250,000 in the business. Mr. Rucker himself has not drawn any money from the company for 90 days (Tr. 51). The witness indicated the company had no funds and the proposed penalties might put the company into bankruptcy (Tr. 55).

Don Larkin, an accountant, owns seventy percent of the business. Larkin keeps the financial records and was aware of the hearing (Tr. 57, 58). The company had not filed for bankruptcy and the owners were attempting to sell it (Tr. 59).

Discussion

Respondent's admission of liability establishes the violations. All of the contested citations should be affirmed.

The Congressional directive to assess civil penalties is contained in Section 110(i), now 30 U.S.C. § 820(i), of the Act. It provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the ap-

propriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering the above factors I note that the company has no adverse prior history. The size of respondent's business must be considered as small, inasmuch as it has only three employees. The operator was negligent in failing to correct the violative conditions. The evidence that the imposition of penalties may force the company into bankruptcy is rejected because such evidence was without any supporting financial statements. Particularly, I note that the majority stockholder, a public accountant, did not appear nor seek to offer any evidence on this subject. The gravity of each of these electrical violations should be considered as high. The company's good faith is apparent in abating the violations of § 55.12-25, § 55.12-2 and § 55.12-40 within four days of the first inspection (Tr. 56). However, the company receives no credit for the violations of § 55.12-65 and § 55.12-1 because it did not rapidly abate these violations. On balance, I consider that the following penalties are appropriate:

Citation No.	Penalty
2008000A	$125
2008000B	125
2008000C	125
2084002	420
2084003	420

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated the citations herein and they should be affirmed and penalties for such violations should be assessed.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. The following citations are affirmed and the civil penalties, as noted, are assessed:

Citation No.	Penalty
2008000A	$125
2008000B	125
2008000C	125
2084002	420
2084003	420

2. Respondent is ordered to pay to the Secretary the sum of $1,215 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 19 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 85-12 A.C. No. 15-13881-03539
	:	Docket No. KENT 85-110 A.C. No. 15-13881-03557
PYRO MINING COMPANY, Respondent	:	Pyro No. 9 Slope William Station Mine
	:	Docket No. KENT 85-24 A.C. No. 15-11408-03533
	:	Pride Mine
	:	Docket No. KENT 85-26 A.C. No. 15-13920-03526
	:	Pyro No. 9 Wheatcroft Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
William Craft, Safety Manager, Pyro Mining Company, Sturgis, 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," for alleged violations of regulatory standards. The general issues before me are whether the Pyro Mining Company (Pyro) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to specific citations and orders.

Docket No. KENT 85-12

Citation No. 2337756 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.400 and charges as follows:

> Loose coal and coal dust 4 to 6 inches deep on the mine floor and from 4 inches to 24 inches deep 3 feet wide and approximately 40 feet in length in three directions at the 001-0MMV ratio feeder along the ribs in the No. 4 entry and 5 the [sic] left and right crosscuts beside the feeder had been permitted to accumulate. Coal dust sample No. 1 was taken in the left crosscut No. 2 in the No. 4 entry and No. 3 in the crosscut right all approximately 20 feet from the feeder. The feeder was energized.[1]

The standard at issue, 30 C.F.R. § 75.400, requires that "coal dust, including float coal dust deposited 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."

The testimony of MSHA health specialist Arthur Ridley is not disputed. He found the coal accumulations at the dumping point (but not at the ratio feeder) extending across the width of the entries some 40 feet in three directions. The loose coal was from 4 inches to 24 inches deep and was being further crushed by the movement of shuttle cars, thereby making it more volatile. He obtained three floor samples about 20 feet from the dumping point and the resulting lab reports on the samples showed 18%, 18% and 17% incombustible content.

According to Ridley the hazard was agravated by the existence of float coal dust for an additional 100 feet along the belt entry. He observed that this float coal dust was most volatile and could be ignited by an arc or spark and spread to the area cited in this case. Power sources such as lights and power cables were near the cited dust. He also observed an acetylene tank lying on the mine floor which he opined could explode if run over by vehicles traveling in the area. He further opined that the 12 men working on the section were, under the circumstances, reasonably likely to encounter an explosion or fire and thereby suffer serious injury or death. Within this framework of evidence the

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[1]At hearing, the inspector who issued this citation, Arthur Ridley, conceded that the ratio feeder was in fact not located in the area of the alleged violation.

violation and its "significant and substantial" findings has been proven as charged. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I also find the violation was the result of operator negligence. Inspector Ridley opined that based upon the large amount of accumulations they had existed from 3 to 4 shifts. Under the circumstances sufficient time had elapsed during which the section foreman or other supervisory personnel should have observed and corrected the violation. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980).

Citation No. 2506981, as amended, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.313 and charges as follows:

> The methane monitor on the Joy loader was not working at time of inspection on No. 2 unit ID002-0. Coal was being loaded at the face of No. 3 entry. 5 tenths to 9 tenths percentum of methane was detected with 2 hand held methane detectors. The section was being supervised by Jerry Smith. Responsibility of Greg Legate - maintenance foreman the record book located on the surface stated that the methane monitor was not working on 8/6/84. No corrections were noted.

The cited standard, 30 C.F.R.§ 75.313, requires as relevant hereto, that an operative methane monitor must be provided for the cited equipment and that "such monitor shall be set to deenergize automatically such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane." In addition, the standard provides that "an authorized representative of the Secretary shall require such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage determined by such representative which shall not be more than 2.0 volume percentum of methane."

MSHA Inspector Larry Cunningham found that the electrical components on the cited methane monitor were not functioning so that neither the light indicator which shows that the monitor is in the "on" position nor the test button was functioning. According to Cunningham the cited loading machine was loading loose coal where pockets of methane are commonly found. He also observed that methane can be liberated between the required 15 minute manual tests thereby causing ignitions or explosions if not detected by the

machine monitors. Ignitions could come from the motor of the loading machine or by the loading machine striking rock. There were 12 miners working in this unit who would be subject to resulting fire or explosions. The "significant and substantial" violation is accordingly proven as charged. Mathies, supra.

The violation was also the result of operator negligence. The defective monitor had been noted in the mechanic check book three days before the citation was issued and for 2 days thereafter. Although management representatives indicated that the methane monitor had been repaired on the 5th of August (2 days before the citation) they noted that it again broke down on the 6th of August. No explanation was offered as to why the monitor had not been repaired after the 6th. It is apparent therefore that the mine operator had notice of the defective monitor on August 6th but nevertheless allowed the loader to continue working at the face.

Citation No. 2506983 alleges a violation of the standard at 30 C.F.R. § 75.301 and charges as follows:

> The quantity of air reaching the last open crosscut in the set of developing entries on No. 1 unit, ID 001-0 was not enough to turn an anemometer at time of inspection. Coal was being mined under the supervision of Jerry Smith section foreman. .4 to .6 per centum of methane was detected in all of the six working places. A smoke tube was used but a velocity of air was not determined.

It is not disputed that the cited standard requires a minimum of 9 thousand cubic feet of air per minute (CFM) at the cited location. According to Inspector Cunningham, coal was being mined and 12 miners were working on the section at the time of the violation. In addition, coal was being loaded directly across the section at the intake side and the cutting machine, roof bolter and shuttle cars were operating inby the last crosscut. Cunningham opined that without the proper ventilation it was reasonably likely to expect an explosion or fire. Methane and/or dust would accumulate without proper ventilation causing ignitions or explosions triggered by friction sparks from the operating equipment. The "significant and substantial" violation is accordingly proven as charged. Mathies, supra; Secretary v. US Steel Mining Company, Inc., 7 FMSHRC 1125 (1985).

The violation was also the result of operator negligence. Cunningham observed that two or three of the ventilation curtains had been nailed up so that shuttle cars could

pass through. Other curtains were a foot too short so that the ventilating air was escaping underneath. Section Foreman Jerry Smith was working on the section and was in a position to observe these conditions.

Citation No. 2506984 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1306 and charges as follows:

> The explosives and detonator magazine being used on No. 3 unit ID 003-0 was not placed so as to be protected from falls of roof. The magazine was placed in the last open crosscut from the face area, and the crosscut had not been completely bolted. Two rolls [sic] of bolts had been left out of the center of the crosscut. Loose and broken roof was present in the crosscut and no timbers had been set around the powder magazine at time of inspection.

The cited standard, 30 C.F.R. § 75.1306 reads as follows:

> "When supplies of explosives and detonators for use in one or more working sections are stored underground, they shall be kept in section boxes or magazines of substantial construction with no metal exposed on the inside, located at least 25 feet from roadways and power wires, and in a dry, well rock-dusted location protected from fall of roof . . .".

It is not disputed that the cited area had loose roof with no timbering and was not fully bolted. Accordingly Cunningham believed the powder magazine was not sufficiently protected from foof falls. The magazine was located in an area in which mining equipment with power cables was operating. These conditions constituted a violation of the cited standard and were contrary to the safe practices for handling Tovex explosive established by the manufacturer. (See Exhibit P-23). Under the circumstances it may reasonably be inferred that the violation was "significant and substantial" and serious. Mathies, supra. Assistant Mine Foreman, Don Ramsey conceded that the magazine had just been brought to the cited location. It is apparent therefore that he was aware of the violative condition and the violation was therefore the result of operator negligence.

Citation No. 2506987 alleges another "significant and substantial" violation of the standard at 30 C.F.R. § 75.301 and charges as follows:

> The quantity of air reaching the last open crosscut of the developing entries of No. 2 unit ID 002-0 was not enough to turn an anemometer at time of inspections. Coal was being mined under the supervision of James Lichenar section foreman. Concentrations of CH4 were detected in all six of the working faces ranging from .4 per centum to .8 per centum.

Cunningham measured 8870 CFM on the intake side but was unable to obtain any air readings at the return side of the last open crosscut. The same hazards were present in these circumstances as described by Cunningham with respect to Citation No. 2506983. Under the circumstances I find that a "significant and substantial" and serious violation existed here as well.

The violation was also the result of operator negligence. Cunningham observed that some of the line curtains were full of holes and others had been nailed up to allow vehicles to pass beneath. Section Foreman James Lichenar was present and could have seen the condition of the curtains. Lichenar had reportedly found 11000 CFM at the beginning of the shift, three hours before Cunningham's observations. Cunningham observed that such readings were highly unlikely however because once the curtains were properly positioned and repaired there was only 12600 CFM. I find Cunningham's testimony to be credible in this regard.

Docket No. KENT 85-24

Citation No. 2338997 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.301 and charges as follows:

> The quantity of air in the last open crosscut of the No. 006 working section is 1250 CFM when measured with a calibrated anemometer. Coal was being loaded in #2 heading and cut in the No. 7 heading.

The cited standard requires 9000 CFM to ventilate the last open crosscut. According to Inspector George Newlin, deficient air could result in the build up of methane, noxious gases and dust in the working area subjecting the 7 man crew in the section to ignitions and explosions. I find that the violation did exist and was "significant and substantial" under the circumstances. It is not disputed however that the foreman had checked the air only shortly before the citation and found it to be sufficent. Accordingly I find no operator negligence.

At hearing, the parties proposed a settlement of Citation No. 2338998 and a reduction of the penalty from $85 to $40. A minimal violation was found in connection with the spacing and number of support posts. The government conceded that it had no evidence that management knew of the condition and, once cited, it was corrected immediately. I find the settlement appropriate and it is accepted.

Docket No. KENT 85-26

At hearing a motion for settlement was also proferred by the parties as to each citation in this docket. The motion was approved at hearing and that determination is now affirmed.

Docket No. 85-110

Citation No. 2506350 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

> The No. 1 Goodman 10 ton locomotive was being operated in an unsafe condition in that due to the low level of charge of the batteries on board the locomotive and the excessive degree of elevation the locomotive was being operated in, the motor could not safely negotiate such elevation.

The cited standard, 30 C.F.R. § 75.1725(a), provides that "mobile and stationary machinary and equipment shall be maintained in safe operating condition and machinary or equipment in unsafe condition shall be removed from service."

In determining whether there was a violation of the cited standard it is immaterial whether the mine operator knew that the cited equipment was not in a safe operating condition. Mine operators are liable under the Act for violations of mandatory safety standards regardless of fault. A form of strict liability is imposed to insure worker safety. See Allied Products Company v. Federal Mine Safety and Health Review Commission, 666 F.2d 890, 893 (5th Cir. 1982); and (9th Cir. 1983); Secretary v. El Paso Rock Quarries Inc., 3 FMSHRC 35 (1981). Thus, if the Secretary sustains his burden of proving in this case that the cited equipment was not in a safe operating condition the violation is established. It is immaterial in this regard whether or not the operator knew that the equipment was not in a safe operating condition.

Bart Noffsinger was acting as motorman on a 10 ton battery powered "Goodman" locomotive on October 30, 1984,

when a fatal accident occurred. He had been driving that locomotive for about 2 to 3 months and had additional experience operating other locomotives at other mines. The deceased, Larry Sutton, was motorman on a similar locomative and he and Noffsinger were working together as a team. Both locomotives were "on charge" when they arrived for work that day. Noffsinger filled his sanders with sand before resumption of work but did not check the water level of the batteries. He understood this was the mechanics job.

After operating his locomotive for awhile Noffsinger saw that his battery indicator or "fuel gauge" had moved about halfway into the "yellow" caution area. He called the supply cordinator, Lynn Shanks, to advise him of that condition. Shanks requested a replacement locomotive but the replacement was apparently diverted to another task and was not available. Shanks then asked Noffsinger and Sutton about the condition of their batteries and, according to Noffsinger, "we told him we didn't think we would have any trouble".

The men were then told by Shanks to pick up some empty cars. Three of the empty cars were later attached behind Sutton's locomotive and three behind Noffsinger's. Noffsinger went first. As Noffsinger noted, visibility was limited over a portion of an upgrade to be encountered in that the bottom of the grade could be seen but not the other side. On his first effort up the grade the wheels on his locomotive "spun out" and he was forced to back down to the bottom of the grade. He yelled to Sutton that he "didn't make it that time but [would] try again". Sutton apparently signaled to go ahead and nodded "yes". Noffsinger then made another effort to surmount the hill. This time he did not hear the wheels spinning but the motor apparently lost power and the locomotive went back down the grade. As he was backing down the grade Noffsinger was "flagging" his lamp to warn Sutton. Suddenly he felt a jolt and found that one of his trailing cars had jumped over Sutton's locomotive killing him.

Noffsinger testified that the charge indicator never left the "yellow" area on the "fuel gauge" and that until his second effort to surmount the grade there had been no decline in power. When the needle on the "fuel gauge" moves into the red area a red alarm signal is triggered. This signal light was never activated on the day of the accident.

When MSHA electrical inspector Kurtis W. Haile examined Noffsinger's locomotive several hours after the accident the battery gauge was still in the "yellow" area. Haile was unable however to take a hydrometer reading because

the level of liquid in the batteries was below the plates and inaccessible. Several battery cells were tested with a cell condition tester approximately 2 to 3 hours after the accident. On the particular cells tested a "fully discharged" reading was obtained on the testing gauge.

Within this framework of evidence it is apparent that the cited locomotive was unable in its second effort to overcome the steep grade on the tracks because of insufficent power. It may reasonably be inferred from the undisputed evidence that this deficiency was caused by inadequate charge in its battery. Under the circumstances this constituted an unsafe condition and the violation is accordingly proven as charged. This was also a serious and "significant and substantial" violation in that it was reasonably likely under the circumstances for the violative condition to lead to serious or fatal injuries.

In determining whether the mine operator was negligent it is appropriate to consider what knowledge it had or should have had of the insufficient battery charge. In this regard I believe primary reliance could properly have been placed by the mine operator and its employees upon the so called "fuel gauge" indicating the battery charge status on the cited locomotive. MSHA has not shown that this gauge was deficient in any way. In addition it is not disputed that the cited locomotive was being operated just before the accident within the "yellow" or cautionary area of the gauge and the gauge had never reached the "red" level of discharge status.

According to Jack Stuart the maintenance mechanic at the Slope William Station Mine, the maintenance records show that the cited locomotive had its batteries filled to the proper level on October 25, 1984, 5 days before the fatal accident. In addition, Thomas Chirel, director of maintenance, testified that the batteries hold 100 gallons of water and that following the accident he found it necessary to add only 8 gallons to fill up the cells.

Within this framework it is apparent that the operator's battery maintenance program was not deficient, that the locomotive "fuel gauge" was not malfunctioning and that the locomotive showed no decrease in power until the second and fatal attempt to surmount the grade. Indeed, shortly before the accident Pyro's supply coordinator confirmed with the locomotive operators that their batteries had adequate power to continue working. Under these circumstances I cannot find that the mine operator was negligent.

In finding this violation of the standard at 30 C.F.R. § 75.1725(a) I have not considered the Secretary's allegations made at hearing and in its post-hearing brief

concerning purportedly defective sanding devices on the locomotive at issue. These conditions were not alleged in the citation at bar and no amendment to incorporate those allegations has been made.[2] The allegations are accordingly not properly before me. See section 104(a) of the Act, 29 C.F.R. § 2700.53, and 5 U.S.C. § 554(b).

Citation No. 2506354 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1404-1. That standard provides in relevant part that "a trailing locomotive or equivalent devices should be used on trains that are operated on ascending grades." The citation charges that "a trailing locomotive or equivalent devices were not being used on the supply train that was on ascending grades in the 3rd main north entries on 10-30-84 and was a contributing factor in a fatal injury."

Pyro argues that the use of the word "should" in the cited standard indicates an intent to make the standard advisory rather than mandatory and that under the circumstances a specific safegaurd notice would be a condition precedent to finding a violation.

30 C.F.R. Part 75, which incorporates the relevant regulatory provisions, is entitled "Mandatory Safety Standards - Underground Coal Mines". The word "should" as used in the cited standard must therefore be construed as mandatory and not permissive and the failure to comply with its provisions will subject the operator to the appropriate enforcement mechanisms and penalties under the Act. See Secretary v. Kennecott Minerals Company, 7 FMSHRC 1328 (1985).

Since Respondent did not use a trailing locomotive or "equivalent device" during relevant times it was not in compliance with the cited standard. Under the circumstances the violation is proven as charged. It may reasonably be inferred from the credible evidence that the fatal accident in this case could have been prevented by use of a connected trailing locomotive. The violation was accordingly "significant and substantial" and serious. Again, however, I do not ascribe negligence to the mine operator. The use of the word "should" in the cited standard before any authoritative interpretation by the Commission or the Courts could in my opinion

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[2]The Secretary in his post-hearing brief suggested that the pleadings "could be amended to conform to the proof at hearing pursuant to 20 C.F.R. § 2700.1 and Rule 15(b) F.R.C.P." Even assuming, arguendo, that such an amendment could have been made, the fact is that it was not.

have reasonably led the mine operator to have believed, as it alleges, that the regulation was indeed advisory and not mandatory.

The remaining citation in this docket, Citation No. 2339146, was the subject of a motion for settlement filed at hearing in this case. That motion was approved at hearing and that determination is now affirmed.

ORDER

Pyro Mining Company is hereby directed to pay the following civil penalties within 30 days of the date of this decision:

	Citation No.	Amount
Docket No. KENT 85-12		
	2337756	$ 250
	2506981	150
	2506983	150
	2506984	150
	2506987	150
Docket No. KENT 85-24		
	2338997	50
	2338998	40
Docket No. KENT 85-26		
	2505204	157
	2505205	85
	2505208	85
	2505209	85
	2505211	85
	2505212	85
	2505217	136
	2505762	276
Docket No. KENT 85-110		
	2506350	150
	2506354	50
	2339146	50
Total		$2,184

Gary Melick
Administrative Law Judge

Distribution:

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rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 21 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 85-59
	:	A.C. No. 33-00968-03588
v.	:	
	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Petitioner; Robert C. Kota, Esq., Youghiogheny & Ohio Coal Company, St. Clairsville, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with an alleged violation of mandatory safety standard 30 C.F.R. § 75.200. The respondent filed a timely answer and a hearing was convened in Wheeling, West Virginia. The parties waived the filing of written posthearing proposed findings and conclusions, but were afforded an opportunity to make oral arguments on the record at the conclusion of the hearing. Their respective arguments have been considered by me in the course of this decision.

Issue

The issue presented in this case is whether the respondent violated the cited mandatory safety standard in question, and if so, the appropriate civil penalty that should be

assessed based upon the criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 96-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that the respondent and the subject mine are subject to the jurisdiction of the Act, that the respondent is a moderate size operator, and that any civil penalty assesment made for the violation in question will not adversely affect the respondent's ability to continue in business (Tr. 6).

Discussion

The section 104(a) Citation No. 2206129, issued by MSHA Inspector Ray H. Morrison in this case on January 7, 1985, cites a violation of 30 C.F.R. § 75.200, and the conditions or practice cited is described as follows:

> The roof was not adequately supported in the track entry of No. 6 section in the following locations: The roof was broken along the left rib at 18+60 inby to 19+00 feet; the roof was broken along the left rib from 16+50 to 16+70 a distance of 20 feet, and at 16+90 inby to 17+10 for a length of 20 feet.

Petitioner's Testimony and Evidence

Ray Morrison, testified that he is an MSHA inspector and roof control specialist, and he detailed his background and experience which includes 24 years in the coal mining industry as a loader, cutter, machine operator, and mine foreman. He confirmed that he conducted a spot roof control inspection at the mine on January 7, 1985, and stated that the inspection was conducted because there were some roof control problems and roof falls in the mine. He was accompanied on his inspection by Bob Merrifield and Carl Minear, MSHA roof control specialists, and John Woods, the respondent's safety

director. Mr. Morrison stated that the mine roof support was inadequate in that the respondent was using 54-inch roof bolts and MSHA was seeking a change in the plan to require the respondent to use 7 foot bolts.

Mr. Morrison testified that the number 6 section was one of the areas where the respondent had roof control problems, and he described the track entries and roof bolting pattern, and confirmed that 54 inch bolts were being used for roof control. Mr. Morrison stated that he observed fractures in the roof strata at the 16+90 and 16+50 locations, and he indicated that the roof had "dropped down" and was sagging at all three locations described in the citation. It sagged from 6 to 10 inches at the fracture points. The fractures or "cutters" were located approximately 12 inches off the rib line for about 20 feet at each of the three locations. He also observed excessive water dripping from the fractures at the 19+00 location, and he stated that water causes roof deterioration and roof separations. He also believed that sagging roof conditions indicate roof failure.

Mr. Morrison confirmed that he issued the citation because of the presence of roof fractures along the left rib, the sagging roof, and the presence of water at the locations which he described. The area where he detected water dripping from the roof was a heavily travelled track entry used by the miners as a travelway to and from the working faces. Mr. Morrison stated that he issued the citation on his own and did not consult with Mr. Merrified.

Mr. Morrison stated that 10 men were on the working section at the time of his inspection, and he believed that the cited conditions presented a potential roof fall hazard. He confirmed that there were 13 reported intentional roof falls in the mine in 1984, and that he inspected some but not all of them. He identified exhibit G-3, as the roof fall reports, and indicated that two or three of them occurred on the number 6 section, but that they were outby the track areas cited in this case.

Mr. Morrison stated that roof support posts were installed to abate the citation, and while rehabilitation work had taken place on the entry in question, he was not aware of any such work being planned or done on the day of his inspection. The rehabilitation work included the installation of roof bolts and trusses, and he confirmed that posts had been installed at the area where he observed water seeping through the roof fractures.

Mr. Morrison stated that the track entry is required to be examined during the preshift and onshift inspection, and since it takes some time for the roof to show signs of failure, he believed that the cited conditions existed for at least 1 week. However, he believed that the respondent exhibited moderate negligence because of the fact that extensive rehabilitation work was done to address the roof problems.

Mr. Morrison was of the opinion that a roof fall was reasonably likely to occur, and if it did, a miner would suffer permanently disabling injuries. He believed the cited roof conditions constituted a significant and substantial violation because the areas were heavily travelled, and the sagging roof, with water dripping, indicated serious roof problems, including a roof failure (Tr. 10-35).

On cross-examination, Mr. Morrison conceded that the respondent was addressing its roof control problems and that it was using different approaches in attempting to solve them. He was not aware when MSHA last reviewed the respondent's roof-control plan, and it was his view that longer roof bolts were required for roof support. He confirmed that longer notched bolts had been used in the past, but that they failed. He was also aware of prior tests conducted by the respondent with grouted and resin bolts, and that some of these had failed at 42 inches. Mr. Morrison was of the personal view that the roof-control plan is inadequate, but conceded that the roof bolts which were used were in compliance with the plan. However, he did not believe that the roof was adequately supported, and that is why he issued the citation. He conceded that unintentional roof falls are not per se violations of the roof-control plan.

Mr. Morrison stated that the only rehabilitation work he observed at the locations were some roof support posts which are shown on the sketch of the area (exhibit G-2). He did not review the onshift or preshift examination books at the time of his inspection, and he conceded that there is a difference of opinion in this case as to what is required to adequately support the roof. The roof cracks he observed were located 3 inches or less from the nearest roof bolt, and while there was a lot of roof trussing taking place, he did not know the extent of such trussing throughout the mine.

Mr. Morrison conceded that the respondent had done a lot of work on its roof, but given the conditions which he found, he believed they were negligent for not doing more. He also conceded that the respondent had installed more roof bolts than were required under the roof plan, but he felt that this

was not adequate. He did not know whether any further trussing would have been done in the track and belt entries, and was of the view that most of the trussing in the areas in question was done as a last resort and not on a systematic basis (Tr. 35-53).

On re-direct examination, Mr. Morrison stated that the roof areas which were sagging were roof bolted, and that the plates were in place at the end of the bolts. He stated that when sagging occurs "everything comes down at that point" (Tr. 54). In response to further questions, he stated that the roof problems in the mine were the result of the natural physical characteristics of the roof strata and that "the strata in this particular area of the mine is very bad" and that "it's the worst type strata than what they had in other areas of the mine previous to this" (Tr. 55).

Respondent's Testimony and Evidence

John Woods, respondent's safety director, testified as to his background and experience of some 22 years in mining. He confirmed that he accompanied Inspector Morrison during the inspection of January 7, 1985, but expressed disagreement with Mr. Morrison's assertions that the roof was inadequately supported. Mr. Woods stated that it is not unusual to encounter "cutters" or cracks in the roof, and simply because they are present does not always indicate evidence of roof failure. The cutter at the 19+00 location was lightly rock dusted, and he surmised that it had appeared earlier than the day of the inspection. Mr. Woods stated that management was aware of the problems with the roof on the section and that the conditions were being closely monitored. Roof trussing had taken place in other roof areas, as well as in the nearby areas where Mr. Morrison issued his citation. Mr. Woods stated that he asked UMWA safety committeeman Donald Arnold to look at the roof conditions and to give him an opinion as to whether it was safe, and that Mr. Arnold indicated that he saw nothing wrong with the roof.

Mr. Woods could not state the distance from the roof crack observed by Mr. Morrison and the nearest roof bolt. He confirmed that abatement was achieved by installing anchor bolts and posts at the cited areas. He confirmed that small cracks were found in the roof approximately a foot or a foot and a half above the roof bolt anchor point, but that the crew who did the work advised him that the roof was sound enough to anchor the bolts. This led him to conclude that while the roof "was slightly broken at one and one-half feet,

and above that, solid strata to anchor in." Mr. Woods confirmed that there were three prior roof falls on the section, and he stated that they were "just places we didn't get" (Tr. 66); (Tr. 62-69).

On cross-examination, Mr. Woods stated that the only place where there was water in the roof was at the 19+00 location. However, he confirmed that additional posts were set at that location, and he agreed with Inspector Morrison's observations that water was dripping from one of the roof locations, as well as the existence of cracks and "cutters" at the other locations noted in his citation. He also agreed that the roof was "hanging down" for approximately 10 inches, but disagreed that it was "sagging in the middle." Although he stated that he saw no sagging, he indicated that "it would be hard to say, I imagine it was there. I don't know" (Tr. 70). He agreed that the track entry would be the general travelway that the miners used to go to the working section (Tr. 73).

Mr. Woods agreed that there were problems with the roof, but disagreed with Inspector Morrison's conclusion that the conditions posed a roof fall hazard. Mr. Woods did not believe that the conditions constituted a violation of section 75.200 (Tr. 70-74). He conceded that the minimum roof bolting pattern under the plan was 48 inches between bolts, but that if conditions warranted, additional steps had to be taken. These included closer spacing, longer bolts, or crossbar trusses.

In response to further questions, Mr. Woods stated as follows (Tr. 78):

> JUDGE KOUTRAS: What he is driving at is that if you went in this area, let's assume that you agreed with the Inspector before he came there that these cracks and whatnot indicated to you that the roof was about to fall in, what would you have done?
>
> THE WITNESS: Either posted it or used longer bolts.
>
> JUDGE KOUTRAS: You would have taken additional measures, right?
>
> THE WITNESS: Right.
>
> JUDGE KOUTRAS: To support the roof?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: But, if you went there and observed these conditions and felt that there was no hazard, you wouldn't have done that additional work?

THE WITNESS: I wouldn't, no.

Dale Ingold, respondent's Manager of Mining Engineering, testified as to his mining background and experience, and he confirmed that he holds a B.S. degree in engineering, mine foreman's papers issued by the State of West Virginia, and that he is a registered engineer in the State of Ohio. Mr. Ingold stated that the respondent was aware of certain roof control problems in the mine and that in 1982 and 1983, it retained the firm of John F. Griffin Geological Associates to conduct a study of the roof conditions, particularly in those areas where unusual roof conditions were encountered. Additional consultants were also hired to conduct roof control stress tests and studies in connection with certain horizontal stress problems which were discovered in the mine. Further, the developing mine entries were turned to accomodate these problems, and ongoing experiments were conducted with different types of roof bolts. In addition, timbering and trusses were used as additional roof support where required, and after the citation was issued, an alternate roof-control plan was implemented.

Mr. Ingold stated that the presence of "cutters" in the roof strata is not of itself an indication of a bad roof or an imminent fall. However, once such conditions are encountered, one has to observe for additional signs of roof failure or weakening, and if any appear, additional steps may have to be taken (Tr 79-85).

On cross-examination, Mr. Ingold stated that a roof sag, coupled with a cutter with water dripping out of it, is indicative of "additional roof breaking some place" and that "the ground control methods are not adequate" (Tr. 85). Had the sagging existed along a travelway, as described by Inspector Morrison, Mr. Ingold believed that it would warrant additional watching of the area, but he would not take any additional measures that had already been done (Tr. 86). However, should the conditions worsen, then he agreed that something had to be done in the inby areas. In this case, additional posts were installed at the area where the inspector observed roof sagging and water. In his view, the conditions described by

both Mr. Woods and Inspector Morrison in the outby areas did not warrant additional roof control measures, and he conceded that this assessment on his part was not by personal observation (Tr. 87). He confirmed that he was not present during the inspection and did not view the conditions cited by Inspector Morrison (Tr. 88).

Petitioner's Arguments

Petitioner's counsel asserted that the facts in this case support the inspector's findings of a violation, as well as his conclusion that the violation was "significant and substantial." Counsel argued that Mr. Morrison's testimony establishes that there were bad roof conditions at three areas along the track entry where miners travelled to the active working areas, and that three shifts would use this heavily travelled walkway. The existence of cutters along the rib, a roof sag of some 6 to 10 inches at another point, with water dripping from the roof, support the fact that a hazardous roof fall condition existed. Further, in view of the fact that the respondent has admitted that it was having roof control problems in the cited section of the mine, and that three unintentional roof falls had occurred in the general area of the mine, it is not an unreasonable inference to draw that the conditions were ripe for an incident of a roof fall that could lead to a serious injury.

Petitioner's counsel asserted that while there may be a difference of opinion, the inspector's job is to point out violations and take enforcement action where warranted. His job is not that of a consultant to advise the operator as to what is required to adequately support the roof. Conceding that the respondent may have installed roof bolts closer than required by its roof-control plan, the plan does specify that as working conditions merit it, additional support should be provided. Counsel pointed out that the inspector's "moderate negligence" finding was made in recognition of the fact that the respondent had done some work on its roof control problem. The fact that 95 percent of an area is rehabilitated or rebolted, does not mean that the 5 percent area along an active travelway, which is not, cannot cause serious injury. Counsel concludes that it was not unreasonable for Inspector Morrison, with his 23 years of experience in the mines, including his years as an inspector and mine foreman, to find that the conditions constituted a "textbook example of a significant and substantial violation" (Tr. 89-92).

Respondent's Arguments

Respondent's counsel agreed that the crux of this case lies in the difference of opinion between Mr. Woods' assessment of the conditions cited by Inspector Morrison and the need for additional roof support, and the assessment made by the inspector as to those conditions and his judgment that additional roof support should have been provided (Tr. 89).

In defense of the citation, respondent's counsel argued that the testimony in this case does not support a finding of a violation of section 75.200. Counsel asserted that the respondent was following its approved roof-control plan, was aware of the roof control problems, and was observing the areas in question. The areas had not been missed and there were no reports of any hazard conditions made in the preshift, onshift, or fire boss reports. Counsel asserted further that the respondent was aware of the crack in the roof and that a lot of work was taking place to insure the stability of the roof. The additional support posts were adequate to support the roof, both before and after the citation was issued. Counsel conceded that the respondent may have resisted the use of longer roof bolts, but insisted that it did so because it did believe that this was the safest thing to do, and the outside consultants confirmed that longer roof bolts was not the answer to the roof control problems. However, once the studies were concluded, the information was incorporated into the latest revision of the roof-control plan, and this was agreed to by MSHA. Assuming a violation of section 75.200, counsel argued that the violation was not significant and substantial because the respondent was following its roof plan. Counsel concluded that the case turns on a difference of opinion as to whether or not the respondent was doing enough to insure adequate roof support (Tr. 92-94).

Findings and Conclusions

Fact of Violation

The respodnent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.200, which provides in pertinent part as follows:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such

system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * * (Emphasis added).

The respondent is not charged with a violation of its roof-control plan. While there is disagreement as to the use of 54-inch roof bolts, the fact is that the applicable roof-control plan did not prohibit the use of these bolts, and the respondent was following the plan in this regard. Inspector Morrison confirmed that he issued the citation because of the roof conditions which he observed during his inspection of the track entry, namely the fractures along the left rib, the sagging of the roof, and the roof water condition at the intersection which had additional roof posts. He relied on the second sentence of section 75.200, which is underscored above, to support his findings of a violation. Thus, the issue presented is whether or not the evidence presented supports a conclusion that the roof was not adequately supported. The parties recognize that the issue is one of a "difference of opinion" as to the roof conditions observed by the inspector, and whether or not they support his belief that the roof was not adequately supported.

All of the witnesses who testified in this case made reference to the existence of roof "cutters." The Dictionary of Mining, and Related Terms, U.S. Department of the Interior, 1968 Edition, at pg. 294, defines the term "cutter" in pertinent part as follows:

> b. A joint, usually a dip joint, running in the direction of working; usually in the plural. Fay. c. At Mount Pleasant, Tenn., an opening in limestone, enlarged from cracks or fissures by solution, that is filled by clay and usually contains valuable quantities of brown phosphate rock. Fay. d. A solution crevice in limestone underlying Tennessee residual phosphate deposits. A.G.I. Supp. e. A joint in a rock that is parallel to the dip of the strata. C.T.D. * * * n. Applied to closed or inconspicuous seams along which the rock may separate or break easily. BuMines I.C. 8182, 1963, p. 7.

By definition, the term "cutter" indicates the presence of roof strata or seams which dip, and which contain separations or breaks. Mr. Woods believed that the existence of such a condition does not necessarily mean that the roof has failed, and he confirmed that such conditions are not unusual. Mr. Ingold testified that the presence of such a condition is not indicative of a bad roof or an imminent fall, but conceded that additional steps must be taken to insure the stability of the roof once the condition is known, and in the event other signs of possible roof failure are detected. He conceded that a roof sag, coupled with the existence of cutters with water dripping from them are signs of additional roof breakage and indicate that the ground control methods are not adequate (Tr. 85). Inspector Morrison believed that these conditions indicated the existence of roof failure. With regard to Mr. Woods' statement that the safety committeeman was of the opinion that the roof conditions were safe, I give this no weight at all since the committeeman did not testify and his credibility remains untested.

Mr. Woods conceded that the roof conditions in question were such as to cause mine management to monitor them very closely. Mr. Woods conceded further that the roof was broken in several places and that the roof bolters had problems with anchoring the supports since the roof kept breaking above the roof bolt anchor points. He also confirmed that he was aware of at least three prior unintentional roof falls, and candidly admitted that they were "places we didn't get." Given these circumstances, I believe it is reasonable to conclude that the roof conditions cited by Inspector Morrison could realistically have resulted in another unintentional roof fall and would have been another incident or example of "a place we didn't get."

Mr. Woods agreed with Inspector Morrison's observations concerning the existence of cracks or cutters in the roof, and that water was dripping from the roof at the track entry location used by miners as a travelway to and from their working areas. Mr. Woods also agreed that the roof was hanging down, and while he disagreed that it was sagging in the middle, he later equivocated when he stated that "it would be hard to say. I imagine it was there. I don't know" (Tr. 70).

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that the petitioner has established by a preponderance of the evidence that the roof areas cited by Inspector Morrison were not adequately supported. While it may be true that Mr. Woods and

Mr. Morrison had a difference of opinion as to the adequacy of the roof support which was installed at the time of the inspection, I find Inspector Morrison's testimony to be credible, and in fact, Mr. Woods was in agreement with his observations concerning the roof conditions. I take note of the fact that Mr. Ingold was not present during the inspection and did not view the roof conditions. However, his testimony concerning the hazards of cutters and the presence of water, particularly with respect to the fact that they may contribute to additional roof breakage and failure, and indicate the need for additional support, supports Inspector's Morrison's assessment of the roof conditions in question. The citation IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The parties have stipulated that the respondent's mining operation is moderate, and that the proposed civil penalty assessment will not adversely affect its ability to continue in business. I adopt these stipulations as my finding and conclusion on this issue.

History of Prior Violations

Exhibit GX-5 is an MSHA computer print-out detailing the respondent's compliance record for the period January 1, 1983 to January 6, 1985. The information on the print-out reflects that the respondent was issued 56 section 104(a) citations for violations of the roof control requirements of section 75.200, for which it paid a total of $2,353 in civil penalty assessments. Although 37 of the citations were "single penalty" citations for which the respondent paid assessments of $20 for each violation, 19 of the citations were "significant and substantial" (S&S) violations. A second print-out reflects that for the period prior to January 7, 1983, the respondent paid civil penalties in the amount of $68,106, for 438 violations of section 75.200.

I take note of the fact that the petitioner's submissions concerning the respondent's history of prior violations is limited to violations of section 75.200. For an operation of its size, I am of the view that the respondent's compliance record with respect to section 75.200, is not a good one, and this is reflected in the civil penalty which has been assessed for the violation in question. While one may conclude that the violations are the result of the natural roof conditions which exist in the mine, one may also conclude that the roof conditions are such which need constant

attention in order to preclude the existence of hazardous conditions, and that the respondent needs to give more attention to those conditions on a daily basis.

Good Faith Compliance

Although the inspector extended the time for abatement in this case because the respondent needed additional time to support the roof at several of the cited locations, abatement was ultimately achieved in a timely manner. Accordingly, I conclude and find that the respondent abated the cited conditions in good faith.

Negligence

Inspector Morrison conceded that the respondent was aware of its roof control problems and was attempting to solve them by utilizing different roof control measures. I have considered this fact in mitigation of the respondent's negligence in this case. However, the fact remains that with respect to the specific conditions cited by Mr. Morrison, Mr. Morrison was of the view that they should have been detected during the preshift or onshift examinations, and that they appeared to have been present for at least 2 days. Considering the mitigating circumstances, he believed that the negligence was moderate. I agree with the inspector's assessment and find that the cited conditions resulted from the respondent's failure to take reasonable care, and that this constitutes ordinary negligence.

Gravity

The inadequately supported roof conditions were present at the track entry used by the miners as a means of travel to and from their work stations. Under the circumstances, the work crews were exposed to the hazard of a roof fall, particularly at the location where water was dripping from the fractured roof at the 19+00 location. In view of these conditions, I conclude and find that the violation was serious.

Significant and Substantial Violation

Inspector Morrison believed that the violation was significant and substantial because the sagging roof, with water dripping from factures, indicated the existence of serious roof problems, including the reasonable likelihood of a roof failure or fall. Since the areas were heavily travelled, he concluded that a roof fall or failure would result in permanently disabling injuries. Given the fact that the mine has

a history of bad roof conditions, including recent documented unintentional roof falls, I conclude and find that Inspector Morrison's "S&S" finding is fully supported, and IT IS AFFIRMED.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $250 is appropriate and reasonable for the violation in question.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $250 for the violation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 22, 1985

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	
I. B. ACTON	:	SE 84-31-D
GRADY ADERHOLT	:	SE 84-32-D
FREEMAN BUTLER	:	SE 84-33-D
JAMES L. CAMPBELL	:	SE 84-34-D
J. D. ELLENBURG	:	SE 84-35-D
W. D. FRANKLIN	:	SE 84-36-D
BILLY R. GLOVER	:	SE 84-37-D
TERRY PEOPLES	:	SE 84-39-D
WILLIAM REID	:	SE 84-40-D
CHARLES W. RICKER	:	SE 84-41-D
TERRY SHUBERT	:	SE 84-42-D
THEODORE TAYLOR	:	SE 84-43-D
MARVIN WISE	:	SE 84-44-D
CHARLES BLACKWELL	:	SE 84-45-D
ROBERT BURLESON	:	SE 84-46-D
HOUSTON EVANS, and	:	SE 84-47-D
KENNETH RANDAL COFER	:	SE 84-52-D
Complainants,	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor,	:	
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC,	:	
Respondent	:	

DECISION

Appearances: Frederick Moncrief, Esq., and Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia; for Complainants; Mary Lu Jordon, Esq., and Earl R. Pfeffer, Esq., UMWA, Washington, D.C., for Intervenor; David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., Birmingham, Alabama; and Robert W. Pollard, Esq., Jim Walter Resources, Inc., Birmingham, Alabama; for Respondent

Before: Judge Melick

These cases are before me upon remand by the Commission on September 30, 1985, to allow the Secretary of Labor more time, in addition to the 35 days previously given, to submit calculations of interest due on the damages awarded in the decision below (7 FMSHRC at 1355) and similarly to provide additional time for the Intervenor, United Mine Workers of America (UMWA), to submit any petition for attorney's fees.

Interest and Total Awards

Based upon the undisputed submissions by the Secretary of Labor, Jim Walter Resources, Inc., is directed to pay the following amounts to the named Complainants within 30 days of the date of this decision:

Name	Damages	Interest	Total Due
I.B. Acton	523.48	96.56	620.04
Grady Aderholt	485.54	89.56	575.10
Robert Burleson	528.74	112.06	640.80
Freeman Butler	418.40	88.69	507.09
James Campbell	493.88	91.10	584.98
W. D. Franklin	437.54	80.70	518.24
Billy Glover	429.86	79.29	509.15
Terry Peoples	436.54	92.51	529.05
William Reid	425.86	78.55	504.41
Charles Ricker	500.00	92.22	592.22
Terry Shubert	420.14	89.05	509.19
Theodore Taylor	439.74	81.10	520.84
Marvin Wise	404.86	85.81	490.67

Attorney's Fees

Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", provides that "[w]henever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."[1] In these cases the UMWA was a representative of miners.

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[1]Contrary to Respondent's letter in opposition to attorney's fees, such fees may be assessed for proceedings under any part of subsection (c) of section 105, i.e. either 105(c)(2) or 105(c)(3).

In Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir.), cert. denied 104 S.Ct. 163 (1983), it was held that the UMWA may be awarded cost-based attorney fees (i.e., salary for in-house counsel plus proportionate overhead) or, alternatively, the in-house counsel may be awarded market-rate fees. As best as can be determined from the application submitted herein, the UMWA is seeking cost-based attorney's fees plus specific costs for trial transcripts and travel expenses totaling $5,307.01. In determining the eligibility of the UMWA for an award of attorney's fees in these cases consideration must initially be given to its status as an intervenor and to the degree of its success in the instant litigation. See 1 Court Awarded Attorney Fees ¶ 7.01.

Intervenors, as recognized parties (see Commission Rule 4, 29 C.F.R. § 2700.4), are generally eligible for the award of attorney's fees but only insofar as their participation in the litigation contributed more than that already provided by the parties themselves. 1 Court Awarded Attorney Fees ¶ 7.03(1). More particularly, attorney's fees may be reduced to the extent that the intervenor's positions have essentially duplicated those of the plaintiff and its participation has not added significantly in the formulation of remedial measures. Morgan v. McDonough, 511 F.Supp 408 (D.Mass 1981). In these cases it can not fairly be said that the UMWA intervention added in any significant way to the representation provided through the Secretary of Labor.

On the other hand the essentially de minimus role of the UMWA in this litigation should not totally preclude a fee award because to retrospectively deny such fees because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases could be essential parties. Seattle School District No. 1 v. State of Washington, 633 F.2d 1338, 1349 (9th Cir. 1980), aff'd, 102 S.Ct. 3187 (1982). In addition, it appears from the record in this case that the UMWA played a role in prompting the Secretary to act on behalf of the individual complainants. See Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir. 1970).

Section 105(c)(3) of the Act also requires for the award of attorney's fees, that an order have been issued "sustaining the complainant's charges". The decision and order in these proceedings did not sustain the primary charges of the Complainants i.e., that the mine operator unlawfully bypassed certain miners seeking reemployment on the grounds that those miners had not obtained certain federally mandated training (and denied entirely the complaints of four of the seventeen Complainants). The

secondary position of thirteen of the seventeen Complainants i.e., that the failure of the mine operator to reimburse them for their safety training constituted unlawful discrimination, was not even mentioned in the UMWA prehearing brief. That secondary position was however upheld and provided some benefit to those individuals. Accordingly the UMWA may be considered a prevailing party for purposes of eligibility for attorney's fees. Section 105(c)(3); Hensley v. Eckerhart, 103 S.Ct. 1933 (1983).

It is noted, however, that the legal principle upon which this secondary claim was based had already been established by earlier Commission decision (Secretary on behalf of Bennett et al v. Emery Mining Corp., 5 FMSHRC 1391 (1983)). It is apparent moreover that neither significant time nor effort was required to prevail on this issue. The UMWA has not distinguished between the time spent on various issues but it is apparant based on the above considerations, that a further reduction in the fee request is warranted.

The specific itemizations in the petition for attorney's fees filed by the UMWA are not disputed by Respondent. However, in consideration of the factors discussed herein I find that a reduction of 80% in the requested amount is warranted. Accordingly, Jim Walter Resources is directed to pay to the UMWA within 30 days of the date of this decision attorney's fees and expenses in the amount of $1,062.40.

Gary Melick
Administrative Law Judge

Distribution:

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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

November 25, 1985

LOCAL UNION 1859, DISTRICT 22, UNITED MINE WORKERS OF AMERICA (UMWA), Complainants	:	COMPENATION PROCEEDING Docket No. WEST 85-70-C Order No. 2501161; 12/26/84
v.	:	Little Dove Mine
EMERY MINING CORPORATION, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On November 14, 1985, Complainants moved to withdraw the complaint for compensation filed herein on the ground that the Complainants have been compensated for the time they were idled by the order involved herein.

Premises considered, the motion is GRANTED and this proceeding IS DISMISSED.

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th Street, N.W., Washington, D.C. 20005 (Certified Mail)

Timothy M. Ryan, Esq., Crowell & Moring, 1100 Connecticue Avenue, N.W., Washington, D.C. 20036 (Certified Mail)

Mr. Walter Oviatt, UMWA Health & Safety Representative, P.O. Box 783, Price, UT 84501 (Certified Mail)

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NOV 25 1985

DISCIPLINARY PROCEEDING : Docket No. D 85-2
:
:

DECISION

Appearances: W. Sydney Trivette, Esq., Pikeville, Kentucky

Before: Judge Melick

This case is before me upon referral by the Commission on September 23, 1985, for disciplinary proceedings under Commission Rule 80(c) 29 C.F.R. § 2700.80(c).[1] This matter had been initiated and forwarded to the Commission by one of its administrative law judges for consideration of circumstances regarding the conduct of counsel in a case before that judge, Tennis R. Daniels v. Woodman Three Mining Co., Inc., KENT 85-86-D, a discrimination proceeding pursuant

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[1]20 C.F.R. § 2700.80(c) provides as follows: "Procedure. Except as provided in subsection (e), a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision. Except as provided in subsection (e), no disciplinary action may be taken except by the Commission or the Judge to whom the Commission has referred the matter. The Commission or the Judge to whom the matter has been referred shall give the individual adequate notice of, and opportunity for reply and hearing on, the specific charges against him, with opportunity to present evidence and cross-examine witnesses. The decision shall include findings and conclusions and either (1) an order dismissing the charges or (2) an appropriate disciplinary order, which may include reprimand, suspension or disbarment from practice before the Commission."

to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). In particular, W. Sidney Trivette, counsel for the complainant in that case was referred for allegedly failing "to substantiate (1) his excuses for his failure to appear at the hearing in this matter in Paintsville, Kentucky on Thursday, July 25, 1985, or (2) his failure to file a timely written motion for continuance or dismissal."

There is no dispute that Mr. Trivette did not appear at the hearing scheduled in the underlying discrimination proceeding and did not file any motion for continuance or dismissal of that case. At initial hearings in this proceeding Mr. Trivette testified that he failed to appear at the hearing in the discrimination case because neither he nor his secretary had placed that hearing date on his calendar. He was sure he received the hearing notice but explained "evidently this had gotten by". His trial calendar maintained by his secretary indeed does not reflect any entry corresponding to hearings in that case for July 25, 1985.

At subsequent hearings, after reviewing the official Commission files in the discrimination case, Mr. Trivette observed that the return receipt (green card) for the certified mailing of the Notice of Hearing to his office was signed by his wife and he explained that he receives both personal and business mail at his office address. Since his secretary indicated that the office file did not as of the date of this hearing contain the subject notice, we are presumably to infer that the notice may have been misplaced or lost before the information it contained could be logged on the trial calendar.

However even had that Notice of Hearing been lost or misplaced it is clear from the record that Mr. Trivette was aware as of May 23, 1985, that a trial had in fact been scheduled in the discrimination case. A "Note to File" dated May 23, 1985, and filed in the official Commission file shows that the judge's secretary asked Mr. Trivette in a telephone call if he had a copy of the May 9, 1985, Notice of Hearing. The note indicates that Mr. Trivette replied that he did not and that the secretary then stated she would send him a copy.[2] At these proceedings Mr. Trivette said he could not recall the conversation. He maintains that he does not know, and cannot explain, why the trial date was not logged

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[2]It cannot be determined from that "Note to File" whether the judge's secretary also informed Mr. Trivette in this telephone conversation of the actual trial date appearing in the Notice of Hearing.

on his trial calendar. He explains however that because the trial date was not logged on the calendar he was not then aware of the need for his court appearance on that date.

Under the circumstances I believe that Mr. Trivette has now explained as best he can "his excuses for his failure not to appear at the hearing in this matter . . . [and] his failure to file a timely written motion for continuance or dismissal." Thus the stated purpose for the referral of this case by the trial judge and the Commission has been achieved. The reasons for counsel's failure to have appeared at the scheduled trial nevertheless give rise to legitimate concern and deserve comment.

The failure of counsel to have established adequate procedures to assure the proper receipt and logging of trial notices to his office constitutes unacceptable negligence for a practitioner before this Commission. It is particularly tragic in this case because, as a result of this negligence, this marginally literate complainant who was seeking redress for perceived discrimination under the Federal Mine Safety and Health Act lost his opportunity for a trial and disposition on the merits of his complaint.[3] It is also disturbing that counsel, after learning that the discrimination case had been dismissed because of his failure to appear, did not consult with his client about efforts to reinstate the case but allowed the dismissal to stand without challenge.

I also find troubling in these proceedings counsel's statement that it is to be expected of a busy lawyer such as himself that trial dates will occasionally be missed and that over the 12 years of his practice he had missed 2 or 3 other scheduled trial dates. Indeed, failure to appear at trial has resulted in severe sanctions against lawyers. I am also concerned by counsel's suggestion that it was his client's

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[3]The Complainant below, Tennis Daniels, testified at these proceedings that he too did not know of the trial date for his discrimination case and that he did not receive the Notice of Hearing. Since Mr. Daniels concedes that it appears to be his signature on the return receipt (green card) for the registered mailing of that notice, the testimony that he did not receive the notice must be viewed with some skepticism. It is possible, however, because of his limited ability to read (as demonstrated at hearing) that Mr. Daniels did not comprehend the nature and significance of that notice. Mr. Daniels was informed at these hearings that in any event the undersigned did not have jurisdiction to reopen that case and that efforts in that regard should be directed to the Commission.

obligation to remind him of the trial date. This suggestion indicates a serious lack of understanding of the responsibilities of a lawyer.

In mitigation I note that Mr. Trivette has apologized to the judge who presided at the discrimination case and to the Commission for his failure to have appeared at the scheduled trial and regretted any resulting problems and inconveniences. There is, moreover, no evidence that Mr. Trivette has ever before conducted himself in a less than acceptable manner before this Commission. Finally, I believe that Mr. Trivette is now sufficiently concerned so as to take measures necessary to prevent a repetition of events that led to this unfortunate situation. Because of these mitigating factors I do not believe that any further disciplinary referral is warranted at this time. It would be my recommendation however that any repetition of similar incidents be referred to the Commission for disciplinary action.

This disciplinary proceeding is accordingly terminated. A copy of this decision is being furnished to the Kentucky Bar Association for informational purposes.

Gary Melick
Administrative Law Judge

Distribution:

W. Sydney Trivette, Esq., Cline Building, P.O. Box 2744, Pikeville, KY 41501 (Certified Mail)

Bruce Davis, Director, Kentucky Bar Association, West Main Street at Kentucky River, Franfort, KY 40601 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
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NOV 25 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 84-18-M A.C. No. 29-00417-05501
v.	:	Ortega Pit
ALAMO TRANSIT MIX CONCRETE COMPANY, Respondent	:	

DECISION

Appearances: Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Mr. James Rogers, President, Alamo Transit Mix Corporation, Alamogordo, New Mexico, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with ten separate instances of violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits was held on December 11, 1984 in El Paso, Texas.

The parties waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Citations

The contested citations involve ten separate instances wherein respondent allegedly violated 30 C.F.R. § 56.12-25 which provides as follows:

> 56.12-25 Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Stipulation

At the hearing the parties stipulated that the Commission has jurisdiction and they agreed that respondent's sand and gravel operation is covered by the Act. But they further stipulated that respondent's cement mixing plant is not covered by the Act. Respondent averages a total of seven to eight employees with four of them in the sand and gravel portion of the business. The parties further stated that respondent's annual income is $150,000 to $200,000. In addition, the proposed penalty will not affect respondent's ability to continue in business (Tr. 3, 4).

Summary of the Evidence

MSHA inspector Ernest Scott, a person experienced in electrical hazards, inspected respondent's sand and gravel Ortega Pit on August 30-31, 1983 (Tr. 9-12).

Test equipment used by the inspector caused him to believe that the metal casings of ten motor starters were ungrounded (Tr. 14, 15). When a probe was used the reading went "off of the scale." The equipment showed over 50 amps of resistance (Tr. 15, 16). If there had been a ground fault on the frames of the motors, the workers would not have been protected (Tr. 16).

In connection with Citation 2235255 the inspector opened the junction box and discovered that the ground wire had not been connected to the frame of the motor (Tr. 17). The same condition existed on the other pieces of equipment (Tr. 17).

The purpose of an equipment ground conductor is to provide a low resistance path back to the transformer.

Severe shock or possible electrocution could result from these defective conditions (Tr. 18-20). Phase conductors are subject to weather conditions and equipment vibrations (Tr. 19, 20).

At the worksite two men were observed to be cleaning around the crusher and conveyor. All of the equipment was accessible to the workers (Tr. 21).

This was not battery operated equipment. Each metal enclosed motor was considered to be an electrical circuit within the meaning of the standard (Tr. 21).

Two or three of the motors had a peg ground. A peg ground is when a copper or a steel rod is driven into the earth. This ground, or electrode, is then tied to the motor frames. Such a ground can supplement a ground conductor (Tr. 22, 23). In the inspector's opinion the peg ground did not satisfy the requirements of the standard. While a peg ground can augment a ground

they can not be used solely as an equipment ground conductor (Tr. 23). A peg, such as a grounding electrode, is not an equipment grounding device (Tr. 23).

The inspector was familiar with the definition of a ground as contained in § 56.2. That definition does not apply to the standard because a peg is not a permanent nor a continuous ground (Tr. 24). The purpose of an equipment ground is to hold the electrical phases at earth potential. It is not equivalent to an equipment ground (Tr. 24). In addition, a peg ground would not have prevented the hazard here (Tr. 24, 25). A peg ground only furnishes protection if lightning strikes. It is not a ground but, on the contrary, it is an electrode (Tr. 25). Specifically, no protection is furnished as far as opening an overcurrent device (Tr. 27, 28).

Devices can be purchased to test electrical equipment. The National Electrical Code (NEC), 1948 Edition, under supplementary grounding, provides that a supplementary ground, such an electrode, shall only be used to augment the equipment conductors specified in another section of the NEC. Further, the intent of the section in the NEC is that the grounding electrodes connected to the equipment are not to be used in lieu of equipment grounding conductors (Tr. 31, 32).

James Rogers, president of respondent, testified that the citation should have been issued against the company's employee (Tr. 35).

Witness Rogers further testified that it was unconstitutional for MSHA to cite the company for violations. He hadn't known about the violations and he should have been given an opportunity to repair them (Tr. 37-39). Further, the company assumed the peg ground was sufficient (Tr. 41).

Discussion

The Secretary's regulation, 30 C.F.R. § 52.2, states that electrical grounding means to connect with the ground to make the earth part of the circuit.

The pivitol issue is whether the systems ground, that is, a peg ground, is sufficient within the terms of the regulation. Section 56.12-25 simply requires that "all metal enclosing circuits shall be grounded." I accept as credible the inspector's testimony that a peg ground is essentially different from a metal equipment ground. The difference lies in the fact that a peg ground will not protect workers from hazards due to ungrounded metal enclosed circuits. Since a peg ground does not protect against the hazards involved then it necessarily follows that respondent failed to comply with the regulation.

In McCormick Sand Corporation, 2 FMSHRC 21 (1980), Commission Judge Franklin P. Michels vacated a citation involving § 56.12-25. Judge Michels ruled that the circuit was grounded because it was attached to three ground electrodes, 2 FMSHRC at 22.

I decline to follow McCormick Sand. To do so would be the equivalent of stating that a peg ground, totally ineffective for metal enclosing an electrical circuit, complies with the regulations. This case illustrates the error in such a view. Here the system was grounded by peg electrodes but 10 separate electrical motors in the system were not grounded.

Respondent also argues that it was unconstitutional to give the company a citation because it had no knowledge of the violative conditions. Further, the company should have been given an opportunity to repair such conditions.

The above arguments lack merit. The lack of knowledge on the part of an operator is not a defense since the Act imposes liability without regard to fault. El Paso Quarries, Inc., 3 FMSHRC 35 (1981); United States Steel Corporation, 1 FMSHRC 1306 (1979).

Respondent's argument that the citations should have been issued against the responsible employee overlooks the fact that such a citation would require an employee to abate the violative condition when he lacks the authority to do so. Further, the Act specifically requires the operator to comply with a safety regulation of this type. Beckley Coal Company, 1 FMSHRC 1794 (1979).

All of the citations should be affirmed.

Civil Penalties

The Commission's mandate to assess civil penalties is contained in Section 110(i) of the Act, now 30 U.S.C. § 820(i). It provides:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering the above criteria I find that respondent does not have an adverse prior history. The stipulation establishes that the penalty is appropriate in relation to the size of the company. The operator was negligent in that it could have discovered these violative conditions. The gravity is high in view of the possibility of serious injuries or fatalities. The operator's good faith is established by the company's rapid abatement of the violations.

The Secretary has proposed $30 for each violation. In view of the statutory criteria, I am unwilling to disturb his proposed penalties.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.12-25 and all citations should be affirmed together with the proposed penalties.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

1. The following citations and proposed penalties are affirmed:

Citation No.	Penalty
2235255	$30
2235256	30
2235257	30
2235258	30
2235259	30
2235260	30
2235401	30
2235402	30
2235403	30
2235404	30

2. Respondent is ordered to pay to the Secretary the sum of $300 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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Mr. James Rogers, President, Alamo Transit Mix Corporation, Box 1353, Alamogordo, N.M. 88310 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

November 25, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-49 A.O. No. 33-03673-03511
v.	:	K&R No. 1 Strip Mine
KEFFLER & ROSE ENTERPRISES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

On November 14, 1985, the Secretary of Labor on behalf of the parties to this action, filed a motion to approve the settlement negotiated between them. At issue in this case are three violations, originally assessed at $10,500 in the aggregate. Settlement is proposed at $8,500.

Citation No. 2327906 was issued for a violation of 30 C.F.R. § 77.1713(a) on June 28, 1984. On that date, a fatal accident occurred at the operator's K&R No. 1 strip mine. A laborer had been assigned the task of pumping water from the underground water holding tank. In the process of carrying out his assigned duties, he entered the tank. At a point approximately fifteen feet down the ladder into the tank, he was overcome by a lack of oxygen and fell into the water, resulting in his death. During the investigation of the accident, it was determined that had there been an adequate examination of the tank by a certified individual, it would have revealed the oxygen deficient atmosphere, and the fatal accident may have been prevented. The Solicitor represents that the operator's negligence was moderate and the gravity serious. He goes on to state that good faith was exhibited by the operator by immediate institution of a retraining program for all personnel at the mine with respect to examinations for hazards.

Citation No. 2327907 was issued for a violation of 30 C.F.R. § 77.1710(g) which contributed to the same fatal accident as hereinbefore described. Two individuals, including the deceased, descended the ladder into the tank without safety belts or life lines. Use of a safety belt or life line by the deceased would have prevented his fall and might have prevented his death. The Solicitor again represents that the operator's negligence was moderate and the gravity serious.

Citation No. 2327908 was issued for a violation of 30 C.F.R. § 48.25(a) which is a training violation. The deceased miner had worked for the operator for nine weeks and had not received the formal 24 hours of training as required. The Solicitor asserts that the mine operator's negligence was high and the gravity serious.

In support of the proposed settlement, the Solicitor states that the parties have discussed the alleged violations and the six statutory criteria stated in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i), and that the circumstances presented warrant the reduction in the original civil penalty assessments for the violations in question. Further, he has submitted a detailed discussion and disclosure as to the facts and circumstances surrounding the issuance of the citations and orders, as well as a full explanation and justification for the proposed reduction.

I accept the Solicitor's representations and approve the settlements.

ORDER

The operator is ordered to pay $8,500 within 30 days of this decision.

Roy J. Maurer
Administrative Law Judge

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/db

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November 25, 1985

LOCAL UNION 1859, DISTRICT 22, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	COMPENSATION PROCEEDING Docket No. WEST 85-68-C Order No. 2501162; 12/26/84
v.	:	Deseret Mine
EMERY MINING CORPORATION, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On November 14, 1985, Complainants moved to withdraw the complaint for compensation filed herein on the ground that the Complainants have been compensated for the time they were idled by the order involved herein.

Premises considered, the motion is GRANTED and this proceeding IS DISMISSED.

James A Broderick
James A. Broderick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

NOV 26 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. CENT 85-6-M A.C. No. 16-00257-05505
N. L. BAROID-DIV/N. L. INDUSTRIES, INC., Respondent	:	Raymond Mill No. 1/2 or Raymond Mill No. 1/2/3

DECISION

Appearances: Chandra V. Fripp, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
J. D. Fontenot, Safety and Health Manager, N. L. Baroid Division, N. L. Industries, Inc., Houston, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $870 for 11 alleged violations of certain mandatory safety standards found in Part 55, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, and a hearing was held in New Orleans, Louisiana, on August 6, 1985. The parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the course of the hearing.

Issues

The issues presented in these proceedings are as follows:

1. Whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalty to be assessed for those violations based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S&S) findings concerning the violations are supportable.

3. Additional issues raised by the parties in this proceeding are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Mandatory safety and health standards, Part 55, Title 30, Code of Federal Regulations.

4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. The respondent's barite mining operation is covered by the Act, and the respondent is subject to the jurisdiction of the Act.

2. Respondent's annual mine production in 1984 was 150,000 tons of barite, and the mine worked 120,000 man hours.

3. The citations issued by Inspector McGregor are accurate, and were duly served on the respondent.

4. The respondent's history of prior violations is accurately stated in MSHA's exhibits P-1.

5. The respondent operates 10 additional similar mining operations at various sites and locations in several states.

6. The payment of the civil penalties assessed for the citations in question will not adversely affect the respondent's ability to continue in business.

7. The subject barite mining operation conducted by the respondent employed approximately 38 employees.

Discussion

Eight of the section 104(a) citations concern alleged violations of mandatory safety standard, 30 C.F.R. § 55.14-1, which provides as follows: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The conditions or practices cited by the inspector on August 22, 1984, are as follows:

"S&S" Citation No. 2237045. The No. 15 conveyor belt drive shaft is not guarded. Clean up and maintenance have to be performed in this area.

"S&S" Citation No. 2237046. Conveyor belt No. 90 head and tail pulley not guarded. Clean up and maintenance have to be performed in this area.

"S&S" Citation No. 2237047. The No. 91 conveyor belt tail pulley is not guarded. It is a flanged type pulley. Clean up and maintenance work have to be performed in this area.

"S&S" Citation No. 2237050. The drive shaft for the No. 3 dust collector is not guarded. This is in the mill building. Clean up and maintenance work has to be performed in this area.

"S&S" Citation No. 2237051. The drive shaft for the No. 2 dust collector in the mill is not guarded. Clean up and maintenance work have to be performed in this area.

"S&S" Citation No. 2237053. The No. 10 conveyor belt head pulley is not guarded. Clean up and maintenance work have to be performed in this area.

Citation No. 2237055 (Non-"S&S"). The No. 47 electric screw feed motor is not guarded. (The citation was modified

on August 24, 1985, to show that the drive shaft of the motor was not guarded).

"S&S" Citation No. 2237056. The dock sylo (sic) dust collector motor drive shaft is not guarded. Maintenance work has to be performed in this area.

"S&S" Citation No. 2237048, issued on August 22, 1984, cites an alleged violation of 30 C.F.R. § 55.11-12, which provides as follows: "Openings above, below, or near travelways through which men or materials may fall shall be protected by railways, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

30 C.F.R. § 55.2 defines the term "travelway" as follows: "'Travelway' means a passage, walk or way regularly used and designated for persons to go from one place to another."

The cited condition or practice is described as follows: "Holes have been cut in the top of the storage bin near the tail pulley of No. 91 belt. Clean up and maintenance work has to be performed in this area."

Citation No. 2237057, ("S&S"), issued on August 22, 1984, cites an alleged violation of 30 C.F.R. § 55.20-3, which provides as follows:

> At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

30 C.F.R. § 55.2, defines the term "working place" as follows: "'Working place' means any place in or about a mine where work is being performed."

The cited condition or practice is described as follows: "The elevated walkways and declines underground along the

conveyor belts at this plant are heavy (sic) burdened with rocks (ore), trash, tools, hoses, etc. This creates almost a plant wide trip and fall hazard."

Citation No. 2237058, ("S&S") issued on August 23, 1984, cites an alleged violation of 30 C.F.R. § 55.9-61, which provides as follows: "Stockpile and muckpile faces shall be trimmed to prevent hazards to personnel."

The cited condition or practice is described as follows:

> The stock pile at this plant is not trimmed to prevent a cave or slide situation which could cover the front-end loader or cat which move materials from the stock pile. An angle of repose should be established and maintained to prevent a hazardous cave or slide from occurring.

MSHA's Testimony and Evidence

MSHA Inspector Joe McGregor testified as to his background and experience, which includes approximately 3 years of inspecting surface ore and milling operations, and prior work as a miner. He stated that he conducts approximately 45 to 50 regular inspections a year, and he confirmed that he inspected the mining operation in question and that he issued the citations in issue in this case.

Mr. McGregor described the respondent's mining operation as a barite milling and grinding operation consisting of a relatively compact system of belt conveyors and storage bins. He believed it was a "fairly large" operation.

Inspector McGregor testified that he issued Citation No. 2237045, after finding the No. 15 belt drive shaft exposed and unguarded. The shaft is 1-1/2 to 2 inches in diameter and it powers the movement of the belt. The shaft is located approximately 4 feet above ground level and there is a walkway or travelway close by and directly below the shaft. No guard was provided for the shaft, and since he believed that the shaft bearings had to be greased from time-to-time, he was concerned that someone with loose clothing could become caught in the exposed shaft.

On cross-examination, and referring to respondent's photographic exhibit R-2, Mr. McGregor identified a handrail and a walkway, and he believed that it was reasonably likely

that a maintenance person could stick his hand into the moving motor parts which were unguarded. He agreed that it would be difficult for a person to reach the unguarded area (Tr. 91-92). He also believed that a clean up person or someone monitoring the motor shaft could get close enough to fall into the unguarded shaft motor (Tr. 97).

Inspector McGregor testified that he issued Citation No. 2237046 after finding that the No. 90 belt conveyor head and tail pulley moving parts were not guarded. He identified a photograph (exhibit P-3) he took of the tail pulley at the time of the inspection, and confirmed that he took no picture of the head pulley because his flash was not working.

Mr. McGregor stated that the pinch point at the tail pulley is at the bottom of the belt drum and that it is approximately 2 feet above ground level, and approximately 18 inches from the barrier shown in the photograph. The walkway adjacent to the belt is approximately 18 inches from the tail and head pulleys, and since the bearings have to be greased, he was concerned that a maintenance man and the person who conducts the daily onshift examination of the belt could reach in or slip into the unguarded pinch points.

Mr. McGregor stated that the cited condition was obvious, and he did not know whether the belt was in operation at the time of his inspection. He confirmed that he had previously inspected the mill on at least one prior occasion.

On cross-examination, Mr. McGregor identified photographs R-4, R-5, and R-6 as the tail pulley as it appeared after the citation was abated. He could not state whether the belt was running, and he saw no cleanup people in the area. He could not recall anyone telling him that the guards had been removed to clean the belts because of the heavy rains prior to the inspection. Since no one was in the area, he had no reason to check to see whether the belt was locked out, and he did not do so (Tr. 101-106).

Mr. McGregor stated that the tail pulley pinch point was approximately 3 to 4 feet from the walkway. He conceded that there was a physical barrier or handrail alongside the belt structure as shown in exhibit R-3. He conceded that someone would have to reach over this barrier and under the belt to reach the pinch point (Tr. 110). He agreed that it may be awkward for someone walking along the adjacent walkway to fall over the barrier and get under the belt to the pinch point, but stated that "it can happen" (Tr. 113). He agreed that someone casually walking by would not be in any danger,

but he was concerned with the person who has to grease the belt bearings. The belt was equipped with grease fittings, and if the belt is shut down, and the grease fittings are used, he would have "to go along" with the respondent's contention that there is no hazard. He then stated that he would still issue a violation in these circumstances because "people go by there when its operating," and even though a cleanup man is shovelling from the walkway, he could be injured "by getting into moving parts" (Tr. 117). He believed it was reasonably likely that a cleanup person could fall over the handrail for a distance of 18 inches and that his hand would go under the belt and into the pinch point (Tr. 118).

Mr. McGregor stated that he did not know the company procedures for performing maintenance on the tail and head pulley in question, and he did not ask (Tr. 120). He conceded that the only person in the area would be those who would be performing maintenance or inspecting the belt (Tr. 124).

Mr. McGregor testified that he issued Citation No. 2237047, after finding the No. 91 conveyor belt tail pulley unguarded. He stated that the pulley is a self-cleaning flange-type pulley which is more hazardous than a regular drum type. He identified a photograph of the pulley which he took during his inspection (exhibit P-4), and stated that the belt moves from left to right over the top of the pulley. He indicated that the pinch point is located at the bottom of the pulley, and that it is approximately 1 to 2 feet above ground level. He also indicated that the pulley is located on top of a bin and that a travelway was out and away from the pulley location. The condition was obvious and he was concerned that anyone performing cleanup or greasing the pulley could accidently get into the pinch point.

On cross-examination, Mr. McGregor stated that the No. 91 conveyor tail pulley was located on top of a bin structure 40 or 50 feet off the ground and approximately 3 feet above a walkway. Referring to his photograph, exhibit P-4, he identified a grease hose extension used for greasing the pulley. Photographic exhibit P-10 (Citation No. 2237048) is the other side of the pulley, and that is the side where normal clean up would be performed. Access to that area is by a cross-over and steps which go over the belt. He considered the area to be a work area where one would go for clean up or inspection, but he did not know how often this occurred

(Tr. 130-131). Mr. McGregor conceded that he issued the citation to cover every conceivable possibility of someone contacting the pinch point (Tr. 134-135).

Mr. McGregor testified that he issued Citation No. 2237050 after finding that the drive shaft for the No. 3 dust collector in the mill was not guarded. He stated that the drive shaft is "fairly small" in diameter, and that if contacted, a person may be injured. No pinch point was present, and Mr. McGregor's concern was with the exposed moving part. He took no picture of the drive shaft because his camera flash was not working.

Mr. McGregor described the shaft as smooth, approximately 1-1/2 to 2 inches in diameter, and approximately a foot long. The point of contact with the exposed shaft was approximately 3 feet off the floor, and the walkway was approximately 2 feet or less away. He was concerned that the mill operator, maintenance personnel, or the designated examiner would be exposed to a hazard of contacting the exposed shaft.

Mr. McGregor testified that he issued Citation No. 2237051, after finding an unguarded shaft on the No. 2 dust collector in the mill. His testimony with respect to the citation is identical to his testimony in support of Citation No. 2237057.

On cross-examination, Mr. McGregor examined respondent's photographs R-7 and R-8, which show the drive shaft for the No. 3 dust collector, and R-9, R-10, and R-11 which show a similar drive shaft for the No. 2 dust collector. He agreed that both shafts were located approximately 3 to 4 feet off the base plate of the adjacent motor (Tr. 139). Referring to photograph R-10, Mr. McGregor stated that the area behind the dust collector and to the wall was not a travelway or walkway. However, he considered the area in front of the collector under the ceiling duct to be a walkway, and he confirmed that one would have to bend down and reach in to contact the shaft (Tr. 144). He confirmed that there was a third dust collector with a similarly exposed shaft in the plant but could not state why he did not cite that one (Tr. 145).

With regard to both of the dust collector shaft guarding citations, Mr. McGregor conceded that it is doubtful someone casually walking by would become entangled in the shafts (Tr. 213), and that one would have to fall some 2 feet over the blower box in order to contact the shafts (Tr. 214).

Mr. McGregor testified that he issued Citation No. 2237053, when he found that the No. 10 conveyor belt head pulley was not guarded. He confirmed that he took a photograph on the day of the inspection, and he pointed to the unguarded pinch point as the area where the belt and drum come in contact at the top of the pulley. He believed that it was reasonably likely that someone could get caught in the pinch point, and if this occurred, it could result in fatal injuries.

Mr. McGregor testified that the belt was 3 to 4 feet off the ground and that a travelway was below and adjacent to the belt, and some 3 to 4 feet below the pinch point. Since the bearings have to be greased and rock has to be cleaned up off the walkway, he believed someone could contact the pinch point.

On cross-examination, Mr. McGregor identified exhibit R-12 as a photograph of the No. 10 belt conveyor head pulley, and he conceded that his photograph, exhibit P-7, was taken from the other side. He identified a stop cord, two small rails above and below the stop cord, and a larger handrail in exhibit R-12, but did not consider these to be sufficient as guarding for the head pulley. He believed that there was access to the pulley from the side where he took his picture, and that someone would have reason to be there at least once a week to grease the pulley (Tr. 154). Conceding that someone would have to climb up several ladders or a catwalk, and then remove several chains to reach the head pulley area, Mr. McGregor still believed that it was reasonably likely that an injury would result by someone contacting the pinch point (Tr. 156).

Mr. McGregor confirmed that he issued Citation No. 2237055, after finding that the drive shaft of the electric feed motor was not guarded. He took the photograph, exhibit P-8, at the time of the inspection. He stated that there was an unguarded opening approximately 1 foot long by the shaft, and he believed that a person's clothing could be caught in the drive shaft. He stated that the unguarded shaft was located "up in the air," and believed that anyone walking by during an inspection could get caught in the shaft.

On cross-examination, Mr. McGregor confirmed that his photograph, P-8, is a top view of the No. 47 electric screw feed motor, and exhibit R-13 is respondent's front view photograph. Mr. McGregor estimated the distance from the front of the motor to the unguarded shaft as 8 to 12 inches. He did not consider that the violation would reasonably likely cause

an accident (Tr. 159). He believed the motor was in the walkway and that a maintenance man would possibly be there once a month (Tr. 160). He knew of no injuries ever resulting from someone being entangled in a shaft motor of this size, but he still believed that it was required to be guarded (Tr. 161-162).

Mr. McGregor confirmed that he issued Citation No. 2237056, after finding that the dust collector motor drive shaft located on top of the silo bin was not guarded. He stated that the unguarded shaft opening was approximately 18 to 24 inches, and that a walkway was adjacent to and 4 feet below the drive shaft. He was concerned that someone greasing or inspecting the shaft could get their hair caught in the unguarded shaft.

Mr. McGregor stated that his principal concern with regard to the citation was that the unguarded moving parts presented exposed pinch point hazards. He believed that anyone caught in the exposed and unguarded moving parts with their clothing would suffer severe or fatal injuries.

Mr. McGregor indicated that his "S&S" finding was based on his belief that if the cited conditions were left unabated, it was reasonably likely that an accident would eventually occur. He also stated that all of the walkways which he identified are built into the belt frame structures and are provided with handrails. He observed barite materials on the walkways, and since it had rained and most of the cited areas are exposed to the elements, the footing along the walkways "was possibly bad." Although the walkway by the No. 10 belt head pulley (Citation No. 2237053) was included, the rest of the walkways were not.

Photograph P-9 is the dock silo dust collector motor drive shaft taken by Mr. McGregor, and R-15 through R-18 are the photographs taken by the respondent after abatement. On cross-examination, Mr. McGregor stated that the location of this shaft was some 50 feet off ground level, and he considered the area next to the motor as shown in respondent's photographs as a travelway, but conceded that he saw no one in the area. He believed that someone would be in the area once a day, once a week, or once a month during maintenance work (Tr. 166). Without the guard, it was reasonably likely that a person would suffer a disabling injury, but he has known of no injuries ever resulting from someone coming in contact with a drive shaft of this kind (Tr. 167).

Mr. McGregor stated that he issued Citation No. 2237048, after finding some holes approximately a foot in diameter at the top of the storage bin near the No. 91 belt tail pulley. He took a photograph of the cited conditions at the time of the inspection. He stated that persons had to be in the area to grease the pulley or to clean up, and that they could fall thru the openings and onto the tail pulley. The tail pulley was the same one cited as Citation No. 2237047. He believed the citation was "S&S" because if left uncorrected, it was reasonably likely that an accident with injury would occur.

On cross-examination, Mr. McGregor confirmed that the holes in question were located on the same side of the No. 91 conveyor point as were the pinch points cited in that case, and that he crossed over the belt to take the picture (exhibit P-10). He was told that the holes were there to facilitate the shovelling of spilled material into the silo tank (Tr. 175). He considered the area to be a travelway because work had to be done there (Tr. 176). While he saw no one at the location during his inspection, he did see evidence that recent clean up had taken place, and this led him to conclude that people were at the cited location (Tr. 178). He conceded that the holes would cut down the necessity for someone going to the area to clean up, but he saw nothing to prevent anyone from steping into the holes, and he did not consider the conveyor belt itself to be a barrier (Tr. 181).

Respondent's representative conceded that someone had to be in the area where the holes were observed to clean up any excess belt spillage that did not go down the holes, and that this person would probably be in the area at least once a month. However, he stated that this person would be tied to a safety line because the area is so high up (Tr. 222-223).

Mr. McGregor confirmed that he issued Citation No. 2237057 after finding loose ore rocks, trash, tools, and debris on the elevated walkways and underground declines. In view of the bad footing on the walkways, he believed that the cited materials presented a slipping and falling hazard. If a person slipped or fell on the metal walkways, different types of injuries could result.

Mr. McGregor stated that the inclines were at approximately 20 to 25 degrees, and while it was possible that someone could fall off the walkways, he did not believe that this was probable. He stated that there were places where a person could fall 50 to 75 feet, and since the cited areas were exposed to the weather and it had rained at least once during the day of the inspection, this contributed to the hazard.

On cross-examination, Mr. McGregor did not deny that there were heavy rains everyday for approximately 3 weeks before his inspection, and he conceded that belts which handle wet ore presents a "messy" situation, particularly around head and tail pulleys. Although wet materials are more difficult to handle, he denied that such wet materials pose a similar problem for the walkways (Tr. 183). He conceded that wet barite material would cause other materials, such as rocks, to stick to it, but insisted that the rocks he observed on the walkways varied in size, and he believed that one person would probably be involved in any slip or fall accident (Tr. 186). He considered the one decline in question to be a passageway (Tr. 187).

Mr. McGregor testified that he issued Citation No. 2237058, on August 23, 1984, after finding that the stockpile of crushed barite was not trimmed to prevent it from sliding. He confirmed that he took photographs of the stockpile during his inspection.

Mr. McGregor estimated the height of the stockpile as 30 to 40 feet, and the angle of respose as 80 to 85 degrees. He described the barite material as "heavy and fairly compact," and he indicated that it "would not run as freely" as sand or gravel.

Mr. McGregor stated that the angle of repose shown in the photograph would be hazardous to anyone cutting into the pile. He believed that undercutting the pile at its edges and rainfall would contribute to the hazard. The tracks shown in the photograph are those of a bulldozer which passed by the area during the day. The only person he observed near the pile was the dozer operator who was pushing some of the material into a conveyor.

Mr. McGregor stated that the stockpile was located between the mill and the mine office, and that normally no one has occasion to pass the area on foot. His concern was that the stockpile presented a hazard to the dozer operator or anyone working near the pile.

On cross-examination, Mr. McGregor confirmed that he had no knowledge of anyone being injured by a barite pile cave or slide, but indicated that he had never seen it stacked as high or undercut as much as the pile which he cited. Referring to his photograph P-12, he estimated the height of the pile as 15 feet. Referring to respondent's photograph R-21,

he stated that the pile by the caterpillar shown in the photograph is not the pile he cited, and he did not know whether a smaller caterpillar was working on the pile he cited. He explained that the material is moved by the blade of the caterpillar digging in to the edge of the pile, and even though the pile may not move or fall at that precise time, he never said that it would (Tr. 190).

Mr. McGregor described the consistency of the stockpiled barite, and he confirmed that he saw no one walking through the area on their way to the plant. He could not deny that the respondent had a rule prohibiting persons from walking through the stockpile area (Tr. 193).

Mr. McGregor could not remember issuing any citations during his inspections prior to August 22, 1984, and he would not disagree that he issued none (Tr 195). He was not aware that the respondent had a rule against employees wearing loose clothing, and he confirmed that for the year prior to his inspection, the respondent's facility had no accidents or incidents (Tr. 196).

Respondent's Testimony and Evidence

Barton Bradford testified that he has been employed for the past 17 months as the operations superintendent at the respondent's New Orleans plant, and that prior to that time he was employed by Amax. He has approximately 15 years of industry experience. He stated that all plant employees are required to report any hazardous conditions, and that he and his foreman conduct regular inspections of the plant and that any discovered hazards are repaired.

Mr. Bradford stated that his prior experience was in connection with OSHA safety requirements. He conceded that the plant was experiencing maintenance problems when he became superintendent, and that he regularly reviews accident reports in order to insure that similar conditions do not occur at the plant.

Mr. Bradford stated that he has never accompanied inspectors on prior inspections, but has accompanied company inspectors on "courtesy inspections." Although some hazards were pointed out during these inspections, they were corrected, and none of these were similar to those cited by Mr. McGregor.

With regard to Citation No. 2237045, concerning the No. 15 conveyor belt drive shaft, Mr. Bradford stated that he never considered it as a hazard because of its location. He

stated that the drive shaft in question was at an elevated location which was not accessible to anyone. It was mounted on some ceiling supports and the walkway was located beneath it. He stated that the motor "would see no activity for a long time" and that it was "most likely" shut down while it was being serviced. He did not believe that the motor would be in close proximity to anyone at its location.

With regard to Citation No. 2237046, concerning the No. 90 conveyor head and tail pulley, Mr. Bradford stated that he could not recall Mr. McGregor taking any photographs. He stated that the belt was not in operation and was locked out. He also stated that the guard had been removed to perform maintenance, but that it was not replaced when the citation was issued because Mr. McGregor indicated that it did not conform with MSHA's recommended guards as depicted in exhibit ALJ-1. The guard was reconstructed and then replaced. He conceded that the area was "cluttered."

With regard to Citation No. 2237047, regarding the No. 91 conveyor belt tail pulley, Mr. Bradford conceded that the exposed flange pulley as shown in photographic exhibit No. P-4, was a hazard because anyone could simply reach in and contact the pinch point. However, he stated that the guard was taken off and not replaced because Inspector McGregor would not accept it as an "acceptable" guard.

With regard to Citation No. 2237048, concerning the three holes on top of the storage bin, Mr. Bradford stated that while he recognized that the holes were a hazard, work was taking place at the time and everyone there was "harnessed off" or "secured by ropes." The holes were there to facilitate the removal of any material spillage into the storage bin below. He also stated that workers were never there "routinely" and that the holes were eventually closed.

With regard to Citation Nos. 2237050 and 2237051 concerning the dust collector drive shafts, Mr. Bradford conceded that they were not guarded. However, he believed that these smooth drive shafts were guarded by location and he did not recognize them as hazards. Although someone could walk by the areas where the shafts were located, they are not subjected to any regular or routine maintenance, and if they are, the equipment would be shut down and locked out before any work was performed. He stated that comparable OSHA regulations do not require that such "smooth" shafts be guarded, and he is not aware of any injuries ever resulting from such unguarded drive shafts. He confirmed that another identical

drive shaft at another location was not cited by the inspector.

With regard to Citation No. 2237055, concerning the unguarded drive shaft of the electric screw feed motor, Mr. Bradford believed that "partial guards" were provided on the structure by the manufacturer. However, once the citation issued, similar motor guards in the plant were voluntarily installed in order to comply with Mr. McGregor's citation and to avoid other citations. He stated that comparable OSHA regulations did not require that such "straight" drive shafts be guarded as long as they contained no "protrusions." Since these motor shafts were never previously cited by other MSHA inspectors during prior inspections, he assumed that guards were not required.

Mr. Bradford stated that the motor was located at the end of a catwalk, that no one is in the area on a day-to-day basis, and the motor is remotely started by a control panel.

With regard to Citation No. 2237056, concerning the unguarded motor drive shaft on the dock silo dust collector, Mr. Bradford stated that this motor was located on top of a 50 foot silo and that one would have to climb up two ladders and over some hand rails to reach the motor. He did not believe that the motor drive shaft presented a hazard because of its location, and he stated that the motor is started remotely and would be shut down when work was performed on it.

With regard to Citation No. 2237057, concerning the accumulation of rocks, trash, tools, hoses, etc., on the walkways and declines, Mr. Bradford conceded that the conditions existed as described by Mr. McGregor. He explained that the decline pits were not cleaned up and were a problem. He explained further that the day before the inspection there was a significant amount of rain and that he assigned several people to clean up the areas where the wet fine materials clogged the belts. He conceded that the tools and hoses were apparently left in place by the clean up crew when their work shift ended.

With regard to Citation No. 2237058, concerning the angle of repose on the stockpile, Mr. Bradford stated that it is no larger today than it was when the citation was issued. He stated that the material does slide down when it is cut down and removed by the dozer, and that while it "appeared" to be hazardous in the MSHA photograph, it is not. He explained that the consistency of the material is such that

it will not slide like a sand or gravel pile, and that one can walk on it without causing it to slide. He stated that it is common to have sheer faces at the stockpile, and that the experienced dozer operators do not consider the stockpile to present a hazardous slide condition. The material is so dense that it simply will not slide. He also indicated that an attempt was made to "trim" the pile by the use of a pipe attached to the dozer blade but that this proved to be unworkable. The pile was eventually trimmed down by removing the material from the face in order to abate the citation.

On cross-examination, Mr. Bradford stated that the respondent has a safety program which includes regular weekly meetings which he conducts. In addition, annual refresher training is given to all employees and they are provided with the company safety rules. He also stated that he stresses safety awareness to all employees and conducts bi-weekly safety inspections of the plant.

With regard to Citation No. 2237048, concerning the three holes on top of the storage bin, he stated that the regular walkway was on the opposite side of this location and he did not consider the area where the holes were located as a walkway.

Ward F. Stumpf, testified that he is employed by the respondent as operations manager of its Lake Charles baroid plant. He has 23 years experience in the industry, and previously served as the warehouse superintendent and safety coordinator at the New Orleans operation. He confirmed that he has accompanied at least six MSHA inspectors on prior inspections when he was at the New Orleans operations, but that he has never accompanied Inspector McGregor. The only question raised by the inspectors on prior inspections was the angle of repose of the material stockpiles, and no questions were ever raised about the specific conditions cited by Inspector McGregor. He conceded that prior inspections did result in prior guarding citations, but not at the locations cited by Mr. McGregor.

With regard to the angle of repose issue, Mr. Stumpf stated that due to the weight and heavy consistency of the raw barite material, the stockpiles do not present a slide hazard, and he has demonstrated this to the inspectors during past inspections.

Mr. Stumpf stated that he has accompanied company safety inspectors and engineers and insurance inspectors on prior inspections and while some hazardous conditions were pointed

out to him and corrected, none of these concerned the kind of alleged hazardous conditions cited by Mr. McGregor. Mr. Stumpf confirmed that the last lost time accident at the New Orleans operation occurred in 1981 and 1982, and two incidents were reported.

Mr. Stumpf stated that he is aware of no accidents or "near misses" resulting from any of the conditions cited by Mr. McGregor, nor is he aware of any instances when these conditions were ever pointed out as hazardous by previous inspectors. With regard to Citation No. 2237057, concerning the alleged tripping and fall hazards throughout the plant, Mr. Stumpf pointed out that due to the inclined metal walkways, rocks will fall off the belt.

On cross-examination, Mr. Stumpf confirmed that he served as safety coordinator at the New Orleans operations from approximately November, 1980 to July, 1981, and that his last inspection there was made sometime in 1982. He conceded that prior guarding citations were issued at that operation, and he also conceded that he is no expert in "soil mechanics" and has never conducted any studies in material stockpile stability.

Paul Davenport testified that he has served as the plant manager of the respondent's New Orleans milling operation for the past year and one-half. Prior to that time, he served as the operations superintendent. Based on his experience, he is able to recognize safety hazards, and in his opinion he never considered or recognized any of the conditions cited by Mr. McGregor as hazardous. He confirmed that he has accompanied other MSHA inspectors on their inspection rounds, but has never accompanied Mr. McGregor. He also confirmed that previous inspectors never cited these conditions as hazardous.

Mr. Davenport stated that he has accompanied company safety inspectors and engineers on safety inspections, but none of the conditions cited by Mr. McGregor were ever pointed out by these inspectors as hazardous. However, other conditions were pointed out as hazardous, but they were promptly corrected. He is aware of no accidents or "near misses" resulting from any of the conditions cited by Mr. McGregor in this case, and he has never read about or reviewed reports citing accidents resulting from similar conditions as those cited by Mr. McGregor.

Mr. Davenport stated that the last accident at the plant in question occurred in October, 1981. In 1984, seven or

eight "doctor visit" type injuries occurred at the plant, and that the plant worked approximately 115,000 man-hours that year.

Mr. Davenport stated that he would never knowingly jeopardize the safety of any of his employees, and if he believed the stockpile was unsafe, he would not permit any employee to work near it. He stated that the two employees who work on the stockpile are experienced employees and that they know what the safe angle of repose is and act accordingly. He also indicated that company policy requires that all equipment be locked out and tagged out when work or maintenance is performed.

Mr. Davenport stated that prior to Mr. McGregor's inspection, it rained for several weeks and that rain adversely affects the mill operations because the material fines collect on the belts, causing jamming and mechanical problems.

Mr. Davenport stated he is unaware of any stockpile collapses or equipment damage resulting from such collapses at any of the respondent's operations. Although he could not recall the exact cost for abating the citations issued by Mr. McGregor, he estimated that the company spent "hundreds of dollars" to achieve compliance. He confirmed that some of the citations issued by Mr. McGregor were abated the same day before he left the plant, and that others were corrected before the dates actually shown on the terminations. Those dates reflect the days he returned to the plant to issue the termination notices.

On cross-examination, Mr. Davenport confirmed that he did not accompany Mr. McGregor during his inspections of August 22 and 23, 1984. With regard to the stockpile citation, he confirmed that the dozer operators have the flexibility to determine whether they believe the stockpile to be hazardous and whether they are "frightened" by their work around the stockpile.

Findings and Conclusions

Fact of Violations Regarding the Eight Equipment Guarding Citations

In Secretary of Labor v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, (September 24, 1984), a case involving the guarding requirements of section 77.400(a), a surface

mining standard containing language identical to section 55.14-1, Judge Broderick rejected an operator's contention that it was virtually impossible for a person not suicidally inclined to contact the unguarded moving parts in question. In affirming the violation, Judge Broderick accepted the testimony of the inspector that the unguarded parts were accessible and might be contacted by persons examining or working on the equipment. In affirming Judge Broderick's decision, the Commission interpreted the application of the guarding standard as follows at 6 FMSHRC 2097:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

Inspector McGregor identified exhibit ALJ-1 as a booklet containing MSHA's recommenced guarding devices for belts, pulleys, etc. He conceded that these recommendations are not mandatory and are not part of the mandatory guarding standards, but confirmed that he follows them when conducting his inspections and issuing citations for guarding violations. He also confirmed that in issuing the guarding citations in this case, his intent was to cover "all eventualities" and to preclude anyone from deliberately or accidentally coming in contact with an exposed pinch point. Although he rejected

the respondent's contentions that the belt and machine structures presented "built in barriers" to the pinch points which concerned him, Mr. McGregor was of the view that the unguarded locations which he cited were required to be guarded with the types of guards depicted in MSHA's guidelines and recommendations.

Citation No. 2237045 - No. 15 Conveyor Belt Drive Shaft

Exhibit R-2 is a photograph of the location of the unguarded conveyor belt drive shaft cited by Inspector McGregor. Mr. McGregor had some difficulty in identifying the shaft in question (Tr. 82-84), but he indicated that it was behind the expanded metal mesh guarding which is bolted to the frame adjacent to the motor shown in the upper left hand portion of the photograph.

Inspector McGregor described the shaft as 1-1/2 to 2 inches in diameter, and he expressed concern that someone greasing the shaft bearings or someone with loose clothing could become entangled in the exposed shaft. However, no evidence was produced to establish that anyone with loose clothing would ever be near the shaft, and Mr. McGregor had absolutely no idea as to how frequently the shaft was greased, nor did he have any information regarding the respondent's maintenance schedules or procedures. Further, he conceded that it would be difficult for a person to reach the location of the unguarded shaft in question. He also conceded that the area directly in front of the motor has limited space for anyone to stand on (Tr. 98).

Superintendent Bradford testified that he did not consider the motor shaft in question to be hazardous because of its location. He stated that the shaft in question was at an elevated location mounted on some ceiling supports and that it was not accessible to anyone.

During a coloquy with MSHA's counsel, he agreed that unguarded machine parts which are inaccessible would be considered guarded by location and that no violation would occur. He also conceded that had he and the company "had gotten together on this, worked out -- some of these violations may not have been brought today" (Tr. 218).

After careful consideration of the testimony and evidence concerning this citation, I conclude that MSHA has failed to establish a violation. The photograph and testimony of Mr. Bradford establish that the cited motor shaft was rather isolated and not readily accessible. I take note of

the fact that in each of the guarding citations, Inspector McGregor noted that "clean up and maintenance have to be performed in this area." However, Mr. McGregor admitted that he was not familiar with the respondent's clean up and maintenance procedures, did not inquire as to the equipment lock-out procedures, and he made no attempts to speak with any miners to ascertain the precise nature of the work they perform, or are expected to perform, around the equipment locations which were cited. I believe it is incumbent on an inspector to develop these critical facts during his inspection so that he may make an informed judgment as to whether or not any miners are in these areas during their normal working shifts. As noted by the Commission in the Thompson Brothers case, an inspector must take into consideration all relevant exposure and injury variables, including accessibility, ingress and egress, and work duties. Absent any inquiries by the inspector at the time he observes the conditions during his inspection, I fail to understand how he can make an informed judgment as to a violation of the guarding requirements of the cited standard. Under all of these circumstances, the citation IS VACATED.

Citation No. 2237046 - No. 90 Conveyor Head and Tail Pulley

Although he cited both the head and tail pulley, Mr. McGregor did not take a picture of the head pulley, and all of his testimony is in regard to the tail pulley. He conceded that he did not know whether the conveyor belt was in operation at the time of his inspection, and he did not ascertain whether it was locked out. He confirmed that the tail pulley pinch point was some 18 inches from the walkway and that there was a physical barrier or handrail adjacent to the belt structure. He conceded that someone would have to reach over the barrier and under the belt to reach the pinch point, and he agreed that someone casually walking by would not be in any danger. Although he expressed some concern over maintenance personnel being exposed to the pinch point while greasing the belt bearings, he conceded that the belt was equipped with grease fittings and if the belt was shut down and the grease fittings used, there would be no hazard.

Mr. McGregor confirmed that he had no knowledge of the respondent's procedures for performing maintenance on the conveyor belt in question, and that he did not ask. Notwithstanding all of his testimony concerning the conveyor, he insisted that he would still issue a violation because "people go by there when its operating," and even though a belt shoveler is shoveling from the walkway he could "get into moving parts."

Superintendent Bradford testified that at the time of the inspection, the belt had been locked out and the guard had been removed to perform maintenance. He stated that it had not been replaced because Mr. McGregor did not believe that it conformed with MSHA's recommended guards as depicted in the booklet identified as exhibit ALJ-1. After the guard was reconstructed to suit the inspector, it was replaced.

I find Mr. Bradford to be a credible witness and I believe his version of the circumstances surrounding this violation. I find Inspector McGregor's testimony in support of this citation to be contradictory. In addition, I cannot conclude that his testimony establishes a reasonable possibility that anyone would contact the asserted pinch points. Most of the ingredients cited in Thompson Brothers for supporting a conclusion of reasonable contact are totally lacking. Accordingly, I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

Citation No. 2237047 - No. 91 Conveyor Belt Tail Pulley

Inspector McGregor testified that the cited flange type unguarded tail pulley is more hazardous than a regular drum type pulley, and he identified the pulley as the one depicted in photographic exhibits P-4 and P-10. He was concerned that a person cleaning up or greasing the pulley could accidently contact the exposed flange. Although the respondent pointed out that a grease hose was present to facilitate greasing, the inspector believed that a person in the area for greasing, clean-up, or inspection would be exposed to the flange hazard.

Although the respondent argued that the pulley was not readily accessible because someone had to cross-over a belt and go down some stairs, I believe it is reasonable to assume that the cross-over and stairs were constructed to facilitate ready access to the flange pulley area for clean-up and maintenance. As a matter of fact, the location of the flange as shown in photograph P-10 is adjacent to the area where there were three holes in the floor, and the testimony reflects that workers would be at this location while shoveling or cleaning materials which spilled off the belt. Someone stepping in those holes could lose their balance and accidently fall into or against the exposed flange. Superintendent Bradford conceded that the exposed flange was hazardous because someone could simply reach in and contact the exposed pinch point.

In view of the foregoing, I conclude and find that the exposed and unguarded flange pulley was readily accessible to those persons required to be in the area for clean-up. Given the existence of the floor holes, there was a real possibility that someone could inadvertently or accidently trip or fall and come in contact with the flange. Accordingly, I find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

In this instance, the respondent conceded that the unguarded flange type tail pulley was hazardous and anyone could simply reach in and contact the pinch point. Given the proximity of the exposed flange to the adjacent work platform or travelway, which had three holes in it, and the reasonable access to the flange, I conclude and find that it was reasonably likely that a person could trip or stumble, and upon contacting the unguarded flange could suffer serious injuries. Accordingly, Inspector McGregor's "S&S" finding IS AFFIRMED.

Citation Nos. 2237050 and 2337051 - Nos. 2 and 3 Dust Collector Drive Shafts

The cited drive shafts in question are shown in respondent's photographic exhibits R-7 through R-11. Inspector McGregor described the shafts as smooth and approximately 1-1/2 to 2 inches in diameter. He confirmed that no "pinch points" are involved in these citations, but that he was concerned that the mill operator, maintenance personnel, or the designated examiner would be exposed to a hazard if they contacted the rotating shafts. He also confirmed that an identical moving shaft on another collector was unguarded but not cited, but he could not explain why he did not cite that one.

Inspector McGregor testified that the two shafts in question were located approximately 3 to 4 feet off the floor or base plate and some 2 feet from the adjacent travelways or walkways in front of the dust collector blowers. He did not consider the area to the rear of the dust collectors to be a travelway or walkway. He conceded that someone casually walking by in front of the dust collector blowers would not contact the shafts, and that in order to do so they would have to stoop or bend down to avoid an overhead ceiling duct, and then fall or reach in some 2 feet over the blower boxes located in front of the shafts.

Superintendent Bradford believed that the two dust collector shafts were guarded by location, and he stated that they are not subjected to any regular or routine maintenance and are not required to be guarded by OSHA standards. He also stated that the collectors would be shut down and locked out before any maintenance was performed.

I take note of the fact that MSHA's Guide to Equipment Guarding, exhibit ALJ-1, at pages 19 and 20, figures 17 and 19, provides that drive shafts with protruding set screws, keys and keys ways, and power take-off shafts with universal joints (such as those used for portable crushing equipment) shall be guarded. Although the Guide is not incorporated as part of MSHA's mandatory guarding standards, Inspector McGregor relied on it in issuing the citations. However, the evidence establishes that the cited shafts in question were smooth, and had no protrusions. Inspector McGregor testified that the shafts in question were "slick shafts" and had no joints, bolts, or other protrusions, and that in his 20 years of mining experience he has never personally heard of any injuries resulting from contacts with such smooth shafts (Tr. 140-141).

Having viewed the photographs of the two shaft locations in question, and after consideration of the testimony adduced by the parties with respect to these two citations, I conclude and find that the petitioner has not established that the unguarded smooth shafts were required to be guarded. The inspector's assumptions that maintenance personnel would be exposed to any hazard are unsupported by any credible evidence. With regard to his concern for the safety of the mill operator or an examiner, absent any evidence to the contrary, I consider these individuals to be casual passerbys and the inspector conceded that such persons would not be exposed to any hazard. Further, given the rather isolated location of these shafts, and the fact that they are recessed some 2 feet behind the physical parameters of the dust collector blowers, I cannot conclude that they were reasonably accessible. Under the circumstances, the citations ARE VACATED.

Citation No. 2237053 - No. 10 Conveyor Belt Head Pulley

The location of this citation is shown in photogaphic exhibits P-7 and R-12. Inspector McGregor conceded that one had to climb up a ladder or catwalk and unfasten several protective chains before reaching the unguarded location. He was concerned that a maintenance man greasing the pulley or someone cleaning rock would be exposed to the hazardous pinch point between the pulley drum and belt.

Superintendent Bradford confirmed that the head pulley was not guarded and that Inspector McGregor would not accept the conveyor framework or metal strip structure as adequate guarding (Tr. 273-274). Mr. Bradford did not dispute the inspector's estimate that someone would be in the area at least once a week while greasing the pulley bearings, and respondent's counsel agreed that Mr. McGregor's assumption that someone would be in the area doing this work at least once a week was a reasonable assumption (Tr. 153-154).

Respondent's counsel pointed out that since the conveyor stop cord was on the side of the platform depicted in exhibit R-12, that one could reasonably conclude that this was the side of the conveyor from which one could reasonably expect access to the pulley, and not the opposite side shown in the inspector's photograph, exhibit P-7. Inspector McGregor believed that access to the pulley was from both sides, and he conceded that had the pulley been locked out there would not be an existing pinch point (Tr. 154).

Having viewed the photographs of the unguarded pulley in question, I conclude that the side of the conveyor pulley depicted in photographic exhibit R-12, was protected by the conveyor structure itself and was not readily accessible. However, the opposite side of the pulley, as depicted in photograph P-7, depicts an open exposed pulley with rocks and other materials which appear to have accumulated under the belt. Further, photograph R-12 shows a walkway or catwalk adjacent to the pulley area in question, and I believe it is reasonable to conclude that this is used as a means of access to the pulley. The evidence here establishes that a workman is in the area at least once a week while performing maintenance or cleanup around the pulley area, and I find that there was ready access to the pulley even though one had to climb a ladder or catwalk and remove several chains to get to it. Once there, I believe that the inspector's fear of exposure to the pinch point hazard while maintenance or cleanup were being performed was reasonable. Accordingly, I conclude that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

In this instance, the respondent did not dispute the inspector's contention that someone had to be in the area of the unguarded pulley at least once a week to perform cleanup work around the unguarded head pulley. I have concluded that the unguarded pulley was readily accessible, and given the

fact that a cleanup man would be cleaning material from under the belt in close proximity to the unguarded pulley, he would be readily exposed to the pinch point between the pulley drum and the belt. I believe that someone cleaning up around this area could become entangled in the unguarded pulley, and if he did, it is reasonably likely that he would suffer serious injuries. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Citation No. 2237055 - No. 47 Electric Screw Feed Motor Shaft

With regard to the unguarded shaft in question, Inspector McGregor believed that the condition was a violation of the guarding standard, but he conceded that "it was not reasonably likely to cause an accident" (Tr. 159), and he knew of no past instances where anyone has been injured by contacting such a shaft (Tr. 161). He was concerned that someone walking by during the course of an inspection, or a maintenance man who may be in the area once a shift, once a week, or possibly once a month, could contact the shaft (Tr. 161).

Superintendent Bradford testified that the shaft was located in an isolated area at the end of a catwalk, the motor is started by a remote control panel, and no one is routinely in the area on a day-to-day basis. He also confirmed that the shaft was smooth and had no protrusions (Tr. 253).

I have previously noted MSHA's "guides" concerning the guarding of drive shafts which have protrusions or universal joints. I also note page 8, figure 5, of those "guides," which states as follows: "Remote areas protected by location need not be guarded. However, if work is performed at such location as shown in figure 5, the equipment must be deenergized and locked out and a temporary safe means of access (ladder) provided before any work is started."

In the case of a smooth drive shaft which is guarded by location and where it is established that the equipment is energized and locked out before any work is started in that area, I believe one may reasonably conclude that there is no violation of the guarding requirements of the standard, particularly in a case where an inspector relies on the "guides" to interpret the standard.

In this case, while I cannot conclude that the shaft was guarded by location, Inspector McGregor made no determination whether or not the motor was locked out while any maintenance was being performed. Further, it seems clear to me that the

shaft was smooth and was not the type covered by the "guides" relied on by the inspector. Under the circumstances, I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

Citation No. 2237056 - Silo Dust Collector Motor Drive Shaft

Mr. McGregor confirmed that this shaft was similar to the ones testified to in the previous shaft citations. In this instance, he was concerned that someone greasing the shaft would get their clothing or hair caught in the moving shaft, and he believed that it was reasonably likely that an accident would occur. He conceded that he knew of no prior accidents concerning shafts of this kind, and he believed that someone would be in the area once a day, once a week, or once a month for greasing or cleanup (Tr. 163-167).

Superintendent Bradford testified that the motor in question was located on top of a 50 foot high silo and that one would have to climb up two ladders and over a hand rail to reach the location. He believed the motor was guarded by location, and he confirmed that the motor is started by remote control and is shut down when maintenance is performed. He also stated that personnel "have no business up in there" and that any silo measurements or valve actuations are accomplished by remote control (Tr. 255).

I conclude and find that the shaft in question was located and operated in such a manner (remote control) as to render it guarded by location. Since the shaft was similar to the previously cited one, I assume that it was smooth and had no protrusions, and petitioner has not established otherwise. Further, Mr. Bradford's testimony that the motor is remotely operated and is shut down when maintenance is performed is unrebutted. Under all of these circumstances, I conclude that the petitioner has failed to establish a violation, and the citation IS VACATED.

Citation No. 2237048 - 30 C.F.R. § 55.11-12

Respondent does not dispute the existence of the holes which were cut into the top of the storage bin, and it conceded that the holes were cut to facilitate the removal of material which spills from the belt to the storage bin below. During the hearing, respondent's representative argued that the area adjacent to the belt where the holes were discovered was not a regularly used travelway, and plant superintendent Bradford testified that workers were never in the area routinely. However, Mr. Bradford conceded that the holes were a

hazard and that persons were working at the location, but were secured by ropes or harnesses.

Inspector McGregor testified that persons would be in the area adjacent to the belt where the holes were discovered during clean-up or while greasing the belt pulley. He considered the adjacent area to be a travelway because people had to go there to work. Although Mr. McGregor could not document how frequently a person had to go to the area, respondent's representative conceded that someone would be in the area at least once a month. Given the fact that the holes were cut to facilitate the shovelling of the spilled materials into the holes, and the unrebutted testimony of the inspector that someone had to go to the area to grease the belt pulley, I conclude and find that the area was a regularly used "travelway" within the definition found in section 55.2.

Section 55.11-12, requires that openings above, below, or near travelways through which men or materials may fall shall be protected by barriers or covers. Mr. McGregor believed that someone could have inadvertently stepped through one of the holes. The respondent does not dispute this, but contends that the men who were working there were tied off or secured. While this may mitigate the gravity of the violation, it is no defense. With all of the spilled material from the belt in such a confined area, it is altogether conceivable that someone walking by the belt to grease it or to begin shovelling may not see the holes, and if he is not tied off, he could inadvertently step through one of the holes. In the case of Secretary of Labor v. Hanna Mining Company, 9 FMSHRC 2045 (1981), the Commission interpreted the language "through" an opening as stated in section 55.11-12, to encompass falling into, as well as completely through, a floor opening. The Commission stated as follows at 9 FMSHRC 2048: "30 C.F.R. § 55.11-12 is concerned with the hazard presented to miners by the presence of unprotected opening on travelways. In this regard, a worker is exposed to the risk of injury whether he falls completely through or only into unprotected openings."

In view of the foregoing, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

Although the respondent's representative stated that the men who were working around the area where the three holes in

the floor were discovered were tied off, the fact remains that someone falling through those holes, even though they are tied off, would be exposed to a hazard. The respondent conceded that the holes constituted a hazard, and the record here establishes that they were located adjacent to the unguarded flange tail pulley which was the subject of Citation No. 2237047. Even though someone was tied off, if they stepped in the hole, they could fall toward the unguarded flange pulley, or they could suffer leg or other bodily harm simply by falling into the hole. Given all of these circumstances, I believe it was reasonably likely that someone stepping into one of the exposed holes could suffer serious injuries. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Citation No. 2237057 - 30 C.F.R. § 55.20-3

The respondent does not dispute the existence of the clutter described by Inspector McGregor. Superintendent Bradford conceded that the conditions existed as described by the inspector, and that tools and hoses were apparently left in place when the work shift ended. Respondent's defense if that heavy rains contributed to the housekeeping problems, and that the decline pits were difficult to clean up. While I can understand a rainfall contributing to belt clogging and the like, I fail to understand how a rainfall can contribute to an accumulation of rocks, trash, tools, and hoses on walkways. I conclude and find that petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

Although Mr. McGregor stated on the citation form that one employee would be exposed to a hazard, he was asked to explain why he did not indicate that all 38 employees were so exposed, particularly since he concluded that the cited conditions constituted a plant wide trip and fall hazard. Mr. McGregor explained that in each instance, he considered only the person likely to be injured as the one exposed to any hazard.

While I find Inspector McGregor's description of the cited condition on the face of the citation, as well as his supporting testimony, to be rather brief in terms of detailing the specific locations where the hazards existed, the fact remains that the respondent did not rebut the existence of the accumulations or clutter on the walkways in question. Although I am not convinced that the inspector established a

plant wide hazard, I conclude and find that the cited accumulations constituted a tripping or falling hazard, particularly on the wet walkways and inclines. Should someone trip or fall over these materials, I believe it is reasonably likely that they would suffer some disabling injuries. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Citation No. 2237058 - 30 C.F.R. § 55.9-61

Section 55.9-61, requires that all stockpile faces be trimmed to prevent hazards to personnel. Inspector McGregor issued the citation because he believed that the cited barite stockpile had not been trimmed to prevent the material from caving in or sliding on the bulldozer operator working near the pile or on anyone else working near the pile. Mr. McGregor described the pile as 30 to 40 feet high, and he stated that the angle of repose was 80 to 85 degrees and that it would be hazardous to anyone cutting into the pile. He also stated that he had never seen the material stacked as high or undercut as much as the pile in question.

The respondent's defense is that the consistency of the barite material is such as to prevent it from sliding like sand or gravel, the bulldozer operators were experienced men and would not jeopardize their safety by working under a hazardous angle of repose, the employees were instructed not to walk or work near the stockpiles, and they are trained to avoid such hazards. Although these matters may mitigate the gravity of the violation, I am not convinced that the respondent has rebutted the inspector's testimony that the stockpile in question was not trimmed to preclude a cave-in at that point where the bulldozer digs into the pile.

Superintendent Bradford conceded that the material does slide down when it is cut into and removed by the dozer, and he admitted that it was not unusual to have "sheer faces" at the stockpile. It seems to me that a sheer face of material piled 30 to 40 feet high at an 80 to 85 degree angle presents a potential cave hazard to the equipment operator who may dig into it at its base while removing the material. The fact that the material may not slide as readily as sand or gravel in such a cave situation is not particularly important. Should the material cave-in from a height of 30 or 40 feet, I believe one may reasonably conclude that it will inundate the equipment and the operator working below it. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

There is no evidence in this case to support a conclusion that anyone other than the dozer operator would be exposed to any hazard resulting from a cave-in of the material. With regard to the dozer operator, I assume that when he is operating his equipment while digging into the pile he is in the machine and is protected by an overhead canopy. Under normal operating circumstances, one can reasonably conclude that a simple slide of material will not adversely affect the operator. However, on the facts of this case, the respondent has not rebutted Mr. McGregor's observation that the 30 to 40 feet high pile was the highest one he has ever seen. Coupled with Superintendent's Bradford's admission that "sheer faces" are common at this operation, and that the material will move if cut into by the dozer, I cannot conclude that Inspector McGregor's fears of an accident were unreasonable. I conclude and find that a cave-in of materials from a height of 30 to 40 feet, with a dozer operator directly beneath it while he is cutting into the pile, presents a hazard to that operator. In the event of a cave-in, I believe that it is reasonably likely that the operator could be pinned in the cab of his equipment, or if the dozer were completely covered, he could suffocate. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

History of Prior Violations

Petitioner's exhibit P-1, with an addendum, reflects the respondent's history of prior violations for the mine in question. The information contained in the print-outs reflects that for the 2-year period immediately preceding the issuance of the citations in this case (8/22/82 to 8/21/84), the respondent had 20 paid violation assessments for the facility in question. For a 5-year period, January, 1978 through July, 1985, a total of 23 citations were issued at the facility, five of which were citations for violations of section 55.14-1. The eight citations issued by Inspector McGregor, although included on the list, are not considered prior citations. Under the circumstances, I cannot conclude that the respondent's history of compliance is such as to warrant any additional increases in the civil penalty assessments made for the violations which I have affirmed. On the contrary, respondent appears to have a fairly good compliance record.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

Based on the stipulations concerning the respondent's mining operations, I conclude that the respondent is a large operator, but that the subject Raymond Mill operation is small-to-medium. I also conclude that the civil penalties assessed by me for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

Negligence

I conclude and find that all of the violations which have been affirmed resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

For the reasons discussed in my "S&S" findings, I conclude and find that all of the violations which have been affirmed were serious.

Good Faith Compliance

Inspector McGregor stated that all of the violations which he issued in this case were timely abated by the respondent and that it exhibited good faith compliance in this regard (Tr. 230). I adopt this statement by the inspector as my finding on this issue.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are appropriate and reasonable for the citations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2237047	8/22/84	55.14-1	$ 100
2237053	8/22/84	55.14-1	75
2237048	8/22/84	55.11-12	100
2237057	8/22/84	55.20-3	85
2237058	8/23/84	55.9-61	85

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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