January 1983

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

JANUARY

The following case was Directed for Review during the month of January:

Secretary of Labor on behalf of Phillip Cameron v. Consolidation Coal Company, Docket No. WEVA 82-190-D. (Judge Merlin, December 13, 1982)

Review was Denied in the following cases during the month of January:

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos. PENN 82-89-R, PENN 82-208(a). (Judge Melick, December 1, 1982)

Secretary of Labor, MSHA v. Allied Chemical Corporation, Docket No. WEST 82-97-RM. (Judge Kennedy, December 6, 1982)

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos. PENN 82-64-R, PENN 82-66-R, 82-109, 82-184. (Judge Broderick, December 6, 1982)

Secretary of Labor, MSHA v. Southwestern Illinois Coal Corporation, Docket No. LAKE 82-38. (Interlocutory Review of December 16, 1982 Order of Judge Broderick)

William Haro v. Magma Copper Company, Docket No. WEST 81-365-DM. (Judge Boltz, November 1, 1982)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 1983

JOSEPH W. HERMAN	:	
	:	
v.	:	Docket No. WEST 81-109-DM
	:	
IMCO SERVICES	:	

ORDER

On December 15, 1982, the Commission issued its decision in this case affirming the administrative law judge's dismissal of Joseph W. Herman's discrimination complaint as untimely filed under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On January 18, 1983, we received a document filed by Mr. Herman. We construe the document to be a request for reconsideration of the Commission's decision. 29 C.F.R. § 2700.75. We find no merit in the request and, accordingly, it is denied.

We note Mr. Herman's request for "an appeal ... to the next judicial court available to me." We can take no action regarding this request. If complainant desires to appeal the Commission's decision to a United States Court of Appeals, the appropriate procedures set forth in section 106(a)(1) of the Act (30 U.S.C. § 816(a)(1)) and the Federal Rules of Appellate Procedure must be followed by him.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, 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

January 27, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 81-136
UNITED STATES STEEL CORPORATION	:	

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of the surface coal standard, 30 C.F.R. § 77.1605(k). The standard states that "[b]erms or guards shall be provided on the outer bank of elevated roadways." 1/ In granting summary decision for United States Steel Corporation, the administrative law judge concluded that the standard was unconstitutionally vague and, therefore, unenforceable. 2/ For the reasons discussed below, we reverse and remand for further proceedings.

Following an inspection of U.S. Steel's No. 32 Mine in Lynch, Kentucky, an MSHA inspector issued a citation alleging that the company violated section 77.1605(k) by failing to install appropriate berms or guards at three areas along a mine roadway. At one location, the inspector observed a guard dislodged for a distance of 29 feet. At one of the other two cited locations there was a berm 6 to 8 inches high and 22 feet long, and at the remaining location there was a berm 16 inches high and 29 feet long. The inspector noted on the citation that the height of these berms was less than 22 inches, the axle height of what the inspector believed was the largest vehicle using the roadway, a Pettibone tractor. The relevant MSHA inspector's manual contains a policy providing that under section 77.1605(k) berms "shall be at

1/ "Berm" is defined in 30 C.F.R. § 77.2(d) as "a pile or mound of material capable of restraining a vehicle."
2/ The judge's decision is reported at 4 FMSHRC 563 (April 1982)(ALJ).

least as high as the mid-axle height of the largest vehicle using the roadway." 3/

At the hearing before the administrative law judge, the parties filed a joint stipulation in which they agreed that the citation stated that there were berms along the roadway except where the guard was dislodged. U.S. Steel claimed in the stipulation that it was replacing the guard when the citation was issued. The parties filed cross motions for summary decision.

The judge concluded that "the language of section 77.1605(k) ... is so vague and ambiguous as to render [the standard] unenforceable." 4 FMSHRC at 571. The judge also held that the Surface Manual guideline on mid-axle height, which he found formed the basis of the citation, was not part of the standard and could not be applied as though it were. 4 FMSHRC at 570-71. The judge accordingly vacated the citation. We directed review sua sponte. 30 U.S.C. § 813(d)(2)(B). The issues before us are the constitutional validity of the standard and the judge's treatment of the MSHA Surface Manual guidelines.

We first address the question of whether section 77.1605(k) is unconstitutionally vague. 4/ This standard is not detailed but, as we have observed previously in a similar context, "[m]any standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances.'" Alabama By-Products Corp., infra, slip op. at 3, quoting from Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Nevertheless, such broad standards must afford reasonable notice of what is required or proscribed. As we stated in Alabama By-Products, supra:

> In order to pass constitutional muster, a statute or standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning

3/ MSHA, Coal Mine Health and Safety Inspection Manual For Surface Coal Mines and Surface Work Areas of Underground Coal Mines, at III-338 (1978) ("the Surface Manual"). The Surface Manual is Chapter III of MSHA's Mine Inspection and Investigation Manual, Federal Mine Safety and Health Act of 1977 (1978)("the Inspection Manual"). The "Introduction," at vii, states that the primary purpose of the Inspection Manual is to provide MSHA inspection personnel with "definite guidelines" to aid them in their official duties.

4/ We reject the Secretary's contention that the Commission is without authority to pass upon the constitutional soundness of this standard. The standard was promulgated under the 1969 Coal Act, and we have held previously that challenges to the validity of a Coal Act standard, including a vagueness challenge, can be raised and decided in an adjudication before the Commission. Alabama By-Products Corp., FMSHRC Docket No. BARB 76-153, slip op. at 2 (December 9, 1982); Sewell Coal Company, 3 FMSHRC 1402, 1403-05 (June 1981).

> and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

Slip op. at 2. We resolved a vagueness challenge in Alabama By-Products by interpreting the standard at issue in light of a "reasonably prudent person" test (slip op. at 2-3), and we adopt the same approach in the present case.

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard. See Alabama By-Products, supra. See also Voegele Company, Inc. v. OSHRC, 625 F.2d 1075, 1077-79 (3rd Cir. 1980). 5/ The definition of berm in section 77.2(d) makes clear that the standard's protective purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." 6/

Under our interpretation of the standard, the adequacy of an operator's berms or guards should thus be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. When alleging a violation of the standard, the Secretary is required to present evidence showing that the operator's berms or guards do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person would do, such as the condition of the roadway in issue, the roadway's elevation and angle of incline, and the amount, type, and size of traffic using the roadway. In sum, we hold that section 77.1605(k), as construed herein, is not unconstitutionally vague and that it is therefore an enforceable standard. 7/

5/ On review the Secretary now proposes a similar test for judging the adequacy of a berm or guard. Brief for Sec'y at 14-16.

6/ "Restraining a vehicle" does not mean, as U.S. Steel suggests, absolute prevention of overtravel by all vehicles under all circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

7/ The Secretary is privileged under the Mine Act to write a more specific berm standard setting forth more detailed specifications for construction of safe berms and guards.

We agree with the judge that the citation in this case was issued and litigated by the Secretary largely, if not solely, on the basis of the Surface Manual's mid-axle "policy guideline." Although the citation makes no reference to the Surface Manual, previously we have cautioned the Secretary that informal materials like the Inspection Manual are not binding on the Commission and do not control over the language of standards. See Alabama By-Products, supra, slip op. at 5; King Knob Coal Co., Inc., 3 FMSHRC 1417, 1419-23 (June 1981); Old Ben Coal Co., 2 FMSHRC 2806, 2809 (October 1980). Reliance on the mid-axle guideline, without more, does not necessarily establish the berm or guard that a reasonably prudent person would have constructed under the circumstances. If the Secretary believes that a berm of mid-axle height is indeed what a reasonable person would provide in a particular case, the Secretary must prove that by a preponderance of credible evidence. We thus approve in result the judge's determination that the Secretary was not entitled to summary decision on the basis of his internal guideline alone.

Under our rules, a motion for summary decision may be granted only if the entire record shows no genuine issue of material fact and the moving party is entitled to a decision as a matter of law. 29 C.F.R. § 2700.64(b). Having found the standard invalid, the judge did not determine all factual issues necessary to a decision in this case. We have concluded above that the standard is valid, and our review of the record indicates to us that material factual issues remain to be decided before it can be determined whether a violation occurred.

To prove the allegation of "inadequate" berms requires evidence as to what type of berm or guard a reasonably prudent person would install under the circumstances. With respect to the area where the guard was dislodged, a prima facie case of violation may have been established, but the judge must make findings as to whether the guard was actually missing and whether U.S. Steel established a valid defense in its claim that the guard was being replaced. 8/ Without this kind of evidence and such findings, the entry of summary decision was inappropriate. Accordingly, we remand this proceeding in order to afford the parties the opportunity to present any additional evidence and argument with respect to the alleged violation in accordance with the principles set forth above.

8/ We express no view at this time on the viability of U.S. Steel's asserted defense to this aspect of the citation.

For the foregoing reasons, the judge's decision is reversed and the proceeding is remanded for proceedings consistent with this decision.

Rosemary M. Collyer, Chairman

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Frank F. Jestrab, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 28, 1983

WILLIAM A. HARO	:	
	:	
v.	:	Docket No. WEST 81-365-DM
	:	
MAGMA COPPER COMPANY	:	

ORDER

William A. Haro has petitioned for discretionary review pro se of a decision of an administrative law judge issued on November 1, 1982. Magma Copper has filed a motion requesting that the petition be dismissed as untimely. For the reasons that follow, the petition is dismissed as untimely.

The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., provides that "any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision." 30 U.S.C. § 823(d)(2)(A)(i) (emphasis added). Rules 5(d) and 70(a) of the Commission's rules or procedure provide that "filing of a petition for discretionary review is effective only upon receipt." 29 C.F.R. §§ 2700.5(d), 70(a). The decision of the administrative law judge becomes the final decision of the Commission 40 days after its issuance unless the Commission has directed review of the decision during that period. 30 U.S.C. § 823(d)(1).

The administrative law judge's decision in this case was issued on November 1, 1982. The fortieth day following the issuance of the judge's decision was December 11, 1982. The petition for discretionary review was not mailed until December 22, 1982. It was not received, and therefore filed, at the Commission until December 27, 1982, fifty-six days after the issuance of the judge's decision. Accordingly, the petition for discretionary review was not filed until after the decision of the judge became a final order of the Commission by operation of law. 30 U.S.C. § 823(d)(1).

In the petition, Haro states that he first learned of the judge's decision on December 6, 1982, and that the attorney who represented him in the proceedings before the judge can confirm the date of his notification of the judge's decision. Haro also states that the attorney did not petition for review of the judge's decision because of a potential conflict of interest with Magma Copper Company. We construe these

representations to be in effect a request for relief from a final Commission order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. P. 60 (Relief from Judgment or Order).

We have reviewed Haro's representations concerning the late filing of the petition against the standards set forth in Fed. R. Civ. P. 60(b)(1). 1/ Boone v. Rebel Coal Company, 4 FMSHRC 1232 (1982). See 7 Moore's Federal Practice § 60.22[2]; 11 Wright & Miller, Federal Practice and Procedure § 2858. Even if Haro's assertion that he first learned of the decision on December 6 is accepted as fact, Haro has not made any representations that his late receipt of the decision was due to factors outside of his control or that of his attorney. The potential conflict of interest that allegedly prevented Haro's attorney, who represented him at the hearing and filed a post-hearing brief on his behalf, from filing a petition with the Commission is not explained. In view of the extraordinary nature of reopening final judgments, lack of sufficient information substantiating a request for relief can be fatal to such claims. 7 Moore's at § 60.22[2], p. 257. Moreover, Haro waited more than two weeks after December 6 to prepare and mail a petition two paragraphs in length. This delay does not demonstrate diligence under the circumstances. Haro has had two previous cases before the Commission and should be familiar with its procedures. 2/

1/ Fed. R. Civ. P. 60(b)(1) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect....

2/ The present situation is not analogous to that involved in Duval Corp. v. Donovan & FMSHRC, 650 F.2d 1051 (9th Cir. 1981). In Duval the operator's petition for discretionary review was filed on the thirty-first day after the issuance of the administrative law judge's decision. Thus, although the petition for review was untimely filed under the Act and the Commission's rules, the judge's decision had not become a final order of the Commission because 40 days had not passed since its issuance. 30 U.S.C. § 823(d)(1). In a Duval situation, the inquiry is whether good cause for the untimely filing has been established. Valley Rock & Sand Corp., WEST 80-3-M (March 29, 1982); McCoy v. Cresent Coal Co., 2 FMSHRC 1202 (June 1980). In the present case, however, the judge's decision became a final order of the Commission and, therefore, the request for relief is appropriately addressed under Fed. R. Civ. P. 60(b).

Accordingly, we grant Magma's motion to dismiss the petition as untimely.

Rosemary M. Collyer, Chairman

Richard K. Lackley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, 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

January 28, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 81-51-M
A. H. SMITH STONE COMPANY	:	

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation and application of 30 C.F.R. § 56.4-35. The cited standard provides:

> Mandatory. Before any heat is applied to pipelines or containers which have contained flammable or combustible substances, they shall be drained, ventilated, thoroughly cleaned of residual substances and filled with either an inert gas or, where compatible, filled with water.

The administrative law judge concluded that A. H. Smith Stone Company ("Smith") violated the standard and assessed a $1,000 penalty. 1/ For the following reasons, we affirm the judge's decision.

On November 24, 1980, an accident occurred at Smith's Culpeper, Virginia crushed stone operation, when a miner attempted to cut with a welding torch a used 55-gallon oil drum. The drum exploded and the employee was critically injured. After an investigation of the accident, MSHA issued a citation charging a violation of the standard for a failure to have the drum purged of flammable substances before heat was applied to it.

Used drums that had contained flammable substances, such as fuel oil, lubricants, or antifreeze, were customarily stored at Smith's Culpeper plant behind a company trailer. The used drums were returnable for credit towards purchase of full barrels, and were picked up at the plant for that purpose by the distributor. Some drums were kept at the plant for re-use as trash barrels or as storage drums for fuel or lubricants. When a drum was to be re-used as a trash receptacle, Smith would have its employees cut off the drum top with a torch on company

1/ The judge's decision is reported at 3 FMSHRC 2927 (December 1981)(ALJ).

premises. Smith also had a practice of giving used drums to employees upon request for their personal use. 3 FMSHRC at 2931-32; Tr. 55-56, 85-86. The used drums at the Culpeper plant were not drained, ventilated, cleaned, or filled with inert gas or water before being put behind the trailer, and were stored with their plugs in place. 2/

On the day of the accident, the miner in question asked the plant superintendent for a used 55-gallon oil drum. Although it appears that the employee did not explain the reason for his request, the superintendent assumed that he wanted the drum for his personal use. 3 FMSHRC at 2931-32; Tr. 83-86. 3/ The superintendent gave the employee permission to take the drum. The employee then obtained from a fellow miner a torch for cutting the drum, but he did not remove the plug or purge the drum before using the torch. The drum exploded when he applied the torch to it and he received fatal injuries. A subsequent investigation revealed that a residue of petroleum distillate inside the drum had been ignited by the heat of the torch.

The judge based his conclusion that Smith violated section 56.4-35 on the evidence that "[the employee] applied a torch to a container which had contained combustible or flammable oil without draining, ventilating, and cleaning the barrel." 3 FMSHRC at 2932. In assessing the penalty, the judge also determined that Smith was negligent. The judge found that Smith knew or should have known that it was possible the miner would cut the oil drum on company premises. 3 FMSHRC at 2933. The judge emphasized that Smith permitted its employees to take used drums for personal use, and also at times instructed employees to cut drums on company property for such company uses as making trash barrels. Id. The judge concluded that "[w]hile [Smith] did attempt to instruct the employees as to the proper procedure for purging drums, management could have been more diligent in its attempts to insure that all drums were properly ventilated and cleaned." Id.

On review Smith, proceeding pro se, commingles liability and negligence arguments. Smith does not deny that the miner cut the drum without first purging it. The operator contends, however, that it is neither liable nor negligent in connection with the incident because it had previously instructed the employee in proper purging procedures, did not specifically authorize him to cut the drum on company premises, and could not have foreseen that he would do so. We are not persuaded.

2/ The plant superintendent testified that the plugs were not pulled (a procedure that would have allowed some ventilation of the drums) because the distributor had requested that the plugs not be removed on drums being returned for credit.

3/ Testimony at the hearing indicated that the miner intended to use the drum at his home as a receptacle for draining oil. Tr. 38, 56-57.

Concerning the question of liability for a violation, the standard's purging requirements are stated in mandatory terms: Before heat is applied to a container that has held flammable substances, the container "shall be" purged of those substances in the manner prescribed. There is no dispute that on mine premises Smith's employee applied heat to a container that had contained a flammable substance without first purging the container. Smith's various arguments that it should escape liability because the miner's actions were unauthorized and careless cannot be squared with either the broad and mandatory language of the standard or the liability without fault structure of the Mine Act. See Southern Ohio Coal Co., 4 FMSHRC 1459, 1462-64 (August 1982). See also Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982). We therefore affirm the judge's conclusion that a violation of the standard occurred.

Regarding negligence, section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs. The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. Southern Ohio Coal Co., 4 FMSHRC at 1463-64. See also Nacco Mining Co., 3 FMSHRC at 848, 850-51 (April 1981)(construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation). In light of these general principles, we affirm the judge's conclusion that the employee's conduct was foreseeable and that Smith did not meet its duty of care under the circumstances.

An employee's cutting of a used drum with a torch at Smith's mining operation was not an uncommon occurrence. Smith's employees performed that task to make barrels for storing or burning trash at the plant. The employee in question had previously cut drums on company premises for such business purposes, and that function was part of his job description. 3 FMSRHC at 2931; Tr. 76, 83, 85-86. As the judge found, Smith was also "liberal" in allowing its employees to take used drums for their own use (3 FMSHRC at 2932), and the same employee had been given drums in the past for his personal use. Tr. 55-56, 85. Cutting used drums to make receptacles was a common use of the drums. We thus affirm the judge's finding that on the day of the accident it was reasonably foreseeable that the employee might cut the drum on company property.

The used drum taken by the employee had not been purged nor had its plug been removed. A plugged, unpurged drum that has contained a flammable substance is a highly dangerous instrumentality given an ignition source and the consequent possibility of an explosion if heat is applied. An operator must address a situation presenting a potential source of explosion, as here, with a degree of care commensurate with that danger. Accordingly, it is incumbent upon an operator to maintain proper control over a dangerous instrumentality like an unpurged oil drum.

The judge found that in the past Smith had orally instructed its employees in the proper procedures for purging a used drum before cutting it to make a trash barrel. We conclude, however, that Smith's reliance on past oral instructions when it allowed the employee to take the unpurged oil drum did not amount to proper control of that dangerous instrumentality. There are a number of potentially appropriate precautions that an operator in Smith's position could have taken to maintain control over unpurged drums. For example, Smith could have marked unpurged drums, "purge before cutting"; it could have posted at the storage area a warning sign reminding employees of appropriate purging procedures; cutting could have been permitted only under proper supervision in designated areas. The record does not show that Smith took any such precautions. Indeed, the superintendent did not repeat company instructions on purging when he let the employee take the unpurged drum even though, as we have concluded, it was foreseeable that the employee might cut it with a torch on company premises. 4/

Thus, we agree in result with the judge that Smith was negligent in not discharging an appropriate duty of care under the circumstances of this case. In reaching this conclusion, however, we do not endorse the judge's reasoning that an operator in Smith's position should have purged all containers that held flammable substances before storing them. Although this may indeed be a safe practice to follow, the standard only requires purging before heat is applied. Thus, in this case Smith's duty of care could have been met by something more than mere reliance on past oral instruction, but less than the across-the-board purging procedure suggested by the judge. 5/

4/ Although the superintendent denied authorizing the employee to cut the drum on company property, he did not forbid any cutting and, indeed, testified that he would have given permission for cutting had the employee requested it. 3 FMSHRC at 2933; Tr. 87. This testimony reveals a managerial disposition to allow cutting for personal purposes and underscores our conclusion that insufficient care was taken when personal use of the drum was approved.

5/ We also reject two additional arguments posed by Smith. Smith complains that the transcript of the hearing was not made available to it. At the hearing, however, the judge specifically stated in response to Smith's request that transcripts could be obtained from the reporter. Tr. 133. Smith also complains of the Secretary's change of position from not pleading negligence to alleging negligence just before the trial. Smith fails to show how this pre-trial change of theory was prejudicial to it. Smith was informed prior to trial that the Secretary would attempt to prove negligence on the basis of new evidence. Tr. 8-9. A shifting of legal theories based on evidence revealed through discovery or other sources after the initial pleadings is certainly not

(Footnote continued)

For the foregoing reasons, we affirm the judge's decision.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Noa, Jr., Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

fn. 5/ continued

uncommon. The Secretary orally sought a continuance to prepare his negligence claim, and Smith did not oppose the motion. Tr. 8-12. Smith did not specifically explain to the judge how it would be legally prejudiced by the change of theory, did not state that it would need extra time to prepare any additional defense, and did not attempt to show bad faith or dilatory motive on the Secretary's part. Tr. 8-15. Finally, at no time during the administrative hearing did Smith object to the introduction of this evidence on the grounds that it was outside the scope of the pleadings. We find Smith's conduct tantamount to consent to trial of the negligence issue. See in general, Mineral Industries and Heavy Construction Group v. OSHRC, 639 F.2d 1289, 1293-94 (5th Cir. 1981).

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JIM WALTER RESOURCES, INC., Contestant	:	Application for Review
v.	:	Docket No. SE 82-34-R
	:	Order No. 0757586; 2/19/32
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 7 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 32-53
	:	A/O No. 01-01401-03041 F
v.	:	
	:	No. 7 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: Robert W. Pollard, Esq., Birmingham, Alabama, and H. Gerald Reynolds, Esq., Tampa, Florida, for Jim Walter Resources, Inc.; Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

On February 15, 1982, a fatal roof fall occurred at the No. 7 Mine of Jim Walter Resources (the operator). Following an investigation which commenced on February 16, 1982, MSHA on February 19, 1982, issued an imminent danger Order of Withdrawal under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(a) (the Act). The order also alleged that the practice described in the order was proscribed by the approved roof control plan and therefore violated 30 C.F.R. § 75.200.

Pursuant to notice, a hearing was held in the Review proceeding in Birmingham, Alabama, on September 21, 1982. William H. Pitts, an MSHA roof control specialist, testified for the Secretary. Ed Melhorn, an MSHA mine inspector, was called as a witness by the operator and Charles J. Hager, III and Frederick Carr also testified on the operator's behalf. A civil penalty case was subsequently filed. Because the civil penalty proceeding and the review proceeding involve the same order, and similar issues of fact and law, they are hereby CONSOLIDATED.

Both parties have filed posthearing briefs. On the basis of the evidence introduced at the hearing and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Jim Walter was the owner and operator of the No. 7 Mine in Tuscaloosa County, Alabama.

2. On February 15, 1982, a fatal roof fall occurred in the subject mine in the face area of No. 4 entry, No. 1 section.

3. An order of withdrawal was issued on February 19, 1982, which alleged that the following condition or practice occurring on February 15, 1982, constituted an imminent danger and a violation of the approved roof control plan:

> A fatal roof fall accident occurred on the No. 1 section at the face of the No. 4 entry and based on evidence and testimony, the victim was installing a support to install line curtain and while installing the support the victim was standing more than 5 feet inby the permanent roof supports and more than 5 feet from the rib or face. The approved roof control plan requires that workmen shall be within 5 feet of the face or rib or permanent supports while extending line curtain.

4. On February 19, 1982, a modification of the order of withdrawal was issued which permitted mining operations to continue "while the following sequence of roof supports are installed to advance the line curtain and to permit MSHA personnel to evaluate this system:" A minimum of two temporary supports are required when any work is performed inby the last row of permanent supports. One must be a jack or timber set no more than 5 feet from the rib and the other the miner head placed against the top. These supports shall be not more than 4 feet apart and not more than 5 feet inby the last row of permanent supports or last temporary support. Any work done inby the last row of roof supports shall be done between such supports and the nearest face or rib.

5. On February 15, 1982, the continuous miner dislodged the last inby safety jack to which the end of the line curtain was attached as the miner was tramming back from the face.

6. The miner operator and miner helper then proceeded inby the permanent supports to reset the jack and reattach the line curtain to it. They travelled on the left side (the "wide side") of the curtain after examining the roof visually and sounding it with a hammer. The miner operator was holding the jack to the right side of it and the helper began tightening the screw while standing on the left side. A roof rock fell brushing the miner operator and knocking him back against the right rib. It fell on top of the helper and killed him. The victim was approximately 7-1/2 feet from the right rib and 5 feet inby the last standing roof jack. He was 10 feet inby the last row of permanent roof supports.

7. The approved roof control plan in effect for the subject mine at the time of the fatality contained the following safety precautions among others:

> "4. When testing roof or installing supports in the face area, the workmen shall be within 5 feet (less if indicated on sketch) of a temporary or permanent support."
>
> "5. When it is necessary to perform any work such as extend line curtains or other ventilating devices inby the roof bolts or to make methane tests inby the roof bolts, a minimum of two temporary supports shall be installed. This minimum is applicable only if they are within 5 feet of the face or rib and the work is done between such supports and the nearest face or rib."

8. The approved ventilation plan in effect for the subject mine at the time of the fatality required that a line curtain be maintained to within 10 feet of the face. The mine liberated considerable methane which required an exceptionally high velocity and quantity of air to ventilate the face area. Because of this it was necessary to fasten the curtain to the top, the middle, and the bottom of the temporary support.

9. A fatal roof fall occurred at the No. 3 Mine of Jim Walters' on November 21, 1979, under circumstances similar to those involved in this case. A citation was issued in the prior case charging a violation of 30 C.F.R. § 75.200 because of failure to comply with the approved roof control plan. The citation was contested before the Commission. After a hearing, Judge James Laurenson found that paragraph 4 of the roof control plan (which is identical to the same paragraph in the roof control plan applicable in this case) did not require that miners travel between the temporary support and the nearest rib when setting supports to extend the line curtain. The Judge granted the notice of contest and vacated the citation. Jim Walters v. Secretary, 2 FMSHRC 3276 (1980).

10. The Secretary states that Judge Laurenson's decision involved circumstances "virtually identical" to those in the case before me.

11. The Secretary did not petition for review of Judge Laurenson's decision.

12. Subsequent to Judge Laurenson's decision, there were discussions between MSHA officials and the operator attempting to clarify the requirements of paragraphs 4 and 5 of the safety precautions in the roof control plan, but no changes were agreed upon.

13. Subsequent to the fatal roof fall involved herein, there have been discussions between MSHA and the operator relating to paragraphs 4 and 5 of the precautions in the approved roof control plan. Specifically, a rewriting of the above paragraphs permitting the use of the miner head as roof support has been discussed, but the plan has not yet been modified.

STATUTORY PROVISION

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

REGULATORY PROVISION

30 C.F.R. § 75.200 provides 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. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequately of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

ISSUES

1. Whether the condition or practice described in the order of withdrawal existed in the subject mine and, if so, whether it constituted an imminent danger.

2. Whether a violation of the approved roof control plan and therefore of 30 C.F.R. § 75.200 was established.

(a) Whether the Secretary is estopped or barred from asserting that the condition is a violation of the standard by reason of the decision in Jim Walters Resources Inc., 2 FMSHRC 3276 (1980).

3. If a violation of the mandatory standard was established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

Jim Walter Resources, Inc. was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the No. 7 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

IMMINENT DANGER

The existence of an imminent danger and the propriety of an imminent danger order of withdrawal do not depend upon the existence of a violation of a mandatory standard. Freeman Coal Mining Corporation, 2 IBMA 197. An imminent danger under the Act is not limited to situations involving "immediate danger" but includes conditions that "would induce a reasonable man to estimate that, if normal operations . . . proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 32 (7th Cir. 1975), quoting Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App. 504 F.2d 741, 743 (7th Cir. 1974).

The order under review here alleges that a miner was standing more than 5 feet inby the permanent roof supports and more than 5 feet from the rib or face, and the evidence introduced at the hearing establishes that such were the facts (Finding of Fact No. 6). MSHA roof control specialist Pitts considers this practice equivalent to travelling or working under unsupported roof and therefore an imminent danger. His opinion was based in part on the fatality which occurred here and the one which occurred in Jim Walters No. 3 Mine referred to in Finding of Fact No. 9.

I conclude that Mr. Pitt's opinion that the condition or practice which was shown to exist here would probably result in an injury was certainly a reasonable one. The evidence is clear that the condition or practice described not only could reasonably be expected to cause death or serious physical harm, but that in fact it did cause or at least contribute to the death of two of the operator's employees. The contention of the operator that the rib conditions may also present a hazard in no way negates the danger posed by unsupported roof. The fact that the condition or practice was permitted by the roof control plan (if it was) does not negate the existence of an imminent danger. Therefore, I conclude that working or travelling more than 5 feet inby permanent supports and more than 5 feet from a rib or face is an imminent danger and the withdrawal order was properly issued.

The operator argues that the practice cannot constitute an imminent danger since it has been followed for many years in the subject mine and in other mines in the district. Non sequitur. The fact that an imminently dangerous condition has existed and been tolerated is no argument for its continuance. The operator also argues that the 3 day delay between the investigation and the issuance of the order indicates that the condition was not imminently dangerous. MSHA's explanation for the time period is that there were discussions with State officials, Mine Management and Union representatives concerning the practice, and that when Mine Management stated that the practice would continue, it was decided to issue the withdrawal order. Clearly, the withdrawal order should have been issued immediately after the investigation, but the delay hardly establishes that the condition or practice was not imminently dangerous.

RES JUDICATA/COLLATERAL ESTOPPEL

Judge Laurenson's decision, which involved, as the Solicitor states, "virtually identical circumstances" to those in the case before me, held that paragraph 4 of the precautions in the roof control plan governs when roof supports are being installed to extend the line curtains. Since paragraph 4 does not require that miners stay within 5 feet of a rib or face, he vacated the citation and dismissed the civil penalty proposal. Judge Laurenson's decision followed a formal adversary hearing; both parties filed posthearing briefs. The government did not file a petition for discretionary review with the Commission. Counsel states "that some consideration was given to whether or not to file a [petition for review]" but in any event, it was not filed. Therefore, Judge Laurenson's decision was the final decision of the Commission.

Following that decision MSHA could have petitioned for review (and appealed to the Court of Appeals if the petition was denied) or it could have proceeded to modify the roof control plan. It did neither, but rather chose to ignore the decision and yet continue to enforce its interpretation of the roof control plan which had been rejected. The parties to the two proceedings are the same, the roof control plan has not been changed, the circumstances in the two cases are "virtually identical." It would appear that if res judicata is ever applicable to administrative proceedings, it is applicable here.

The Supreme Court stated in United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966) at 421:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.
>
> * * * * * * *
>
> In the present case, the Board was acting in a judicial capacity when it considered the . . . claims, the factual disputes resolved were clearly relevant to issues properly before it and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between the two parties.

See also Mitchell v. National Broadcasting Co., 553 F.2d 265 (2nd Cir. 1977); Atlantic Richfield Company v. Federal Energy Administration, 556 F.2d 542 (T.E.C.A. 1977); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1973); Continental Can v. Marshall, 603 F.2d 590 (7th Cir. 1979). In the Continental Can case, the court held (594-5) that the tests are whether the issue raised in the subsequent case is the same as that decided in the prior case; whether the issue was actually litigated; whether the decision in the prior case depended on the resolution of the issue; and whether the decision was final. The Secretary asserts in his brief that Judge Laurenson's decision was not "final" and refers to Commission Rule 73 which states that an unreviewed decision of a judge is not a precedent. This rule has nothing to do with finality or res judicata, but with stare decisis, a wholly different doctrine. I conclude, following the tests in Continental Can that Judge Laurenson's decision is res judicata and the Secretary is precluded from challenging it in the proceeding before me.

It is grossly unfair to assert, as the Solicitor does in his brief, that

> "What is at stake, as these two cases dramatically illustrate, is human life. However well intentional management may have been in relying on the prior decision, the cost of that reliance was a life. Such a result is not to be tolerated by a law the stated purpose of which is the preservation of life."

Judge Laurenson's decision was issued November 14, 1980. The fatal injury involved herein occurred February 15, 1982. Since the Secretary chose not to appeal, he had ample opportunity to effect changes in the roof control plan. He failed to do so.

Since I have concluded that Judge Laurenson's decision is res judicata as between the parties, I conclude that a violation of 30 C.F.R. § 75.200 has not been shown. Further discussion of the merits of the case or of Judge Laurenson's decision is unnecessary and inappropriate.

PENALTY

Since I have concluded that a violation of a mandatory safety standard was not established, the penalty proceeding must be dismissed. An imminent danger order of withdrawal will not per se support a penalty assessment.

ORDER

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

1. The withdrawal order issued under section 107 of the Act, as a withdrawal order is AFFIRMED.

2. The withdrawal order, insofar as it charges a violation of 30 C.F.R. § 75.200, is VACATED.

3. The penalty proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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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

JAN 6 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Applicant	:	Application for Review of Discrimination Docket No. PENN 81-209-D
v.	:	MSHA Case No. PITT CD 81-10
SHANNOPIN MINING COMPANY, Respondent	:	Shannopin Mine Sol No. 12874

FURTHER FINDINGS OF FACT
AND
FINAL ORDER

On November 30, 1982, a decision was entered on the issue of a violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The decision deferred a final order pending submissions from the parties as to the appropriate relief to be granted based on the decision.

FINAL ORDER

Having considered the parties' submissions with respect to a proposed final order, and a post-decision motion by the United Mine Workers of America to intervene for the purpose of submitting a proposed order for relief, it is hereby ORDERED:

1. The UMWA's motion to intervene is DENIED as being untimely and lacking good cause on the merits.

2. The Secretary's proposed supplemental stipulations are APPROVED and hereby INCORPORATED as FURTHER FINDINGS OF FACT in this proceeding.

3. Based on the record as a whole, and on the statutory criteria for assessing a civil penalty for a violation of the Act, Respondent is ASSESSED a civil penalty of $800 for its violation of section 105(c) of the Act as found in the above-mentioned decision; Respondent shall pay such penalty to the Secretary within 30 days from the date of this Order.

4. Respondent shall make payment to George Mateleska in the amount of $392.40, with interest at the rate of 12 percent per annum accruing from March 5, 1981, until paid, to compensate him for the 5 days lost pay incurred as a result of Respondent's unlawful suspension of him.

5. Respondent shall make payment to George Mateleska in the amount of $235.44, with interest at the rate of 12 percent per annum accruing from December 16, 1981, until paid, to compensate him for his expenses in connection with this litigation.

6. Respondent shall expunge from its records all references to the suspension of George Mateleska which has been found herein to have been a violation of section 105(c) of the Act.

7. Respondent shall post a copy of the decision of November 30, 1982, and a copy of this Order on the mine bulletin board, or at such other conspicuous place where notices are normally posted for employees of the Shannopin Mine, and keep such copies posted, unobstructed and protected from the weather, for a consecutive period of at least 60 days.

William Fauver

WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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JAN 11 1983

REX ALLEN,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. CENT 82-66-DM
UNC MINING AND MILLING,	:	
Respondent	:	MD 80-156
	:	
	:	Churchrock Operations

DECISION

Appearances: Grant L. Foutz, Esq., Gallup, New Mexico, appeared for Complainant;
Lindsay Lovejoy, Esq., Stephenson, Carpenter, Crout & Olmsted and Lea Brownfield, Esq., all of Santa Fe, New Mexico, appeared for Respondent.

STATEMENT OF THE CASE

The complaint filed herein alleges that Complainant was discharged on March 26, 1980, from the position he held with Respondent, as a result of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801. Complainant filed a complaint of discrimination with MSHA on August 9, 1980. MSHA denied the complaint by a letter dated January 6, 1982. The complaint was filed with the Review Commission on January 25, 1982. Pursuant to notice, the case was heard in Gallup, New Mexico, on October 19, 1982. Rex Allen, Gilbert MacLellan, Robert Robb and Ron MacLellan were called as witnesses by Complainant. No witnesses were called by Respondent. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the operator of the Northeast Church Rock Mine near Gallup, New Mexico.

2. Complaint was employed by Respondent beginning September 15, 1972, as an oiler. He was promoted to mechanic trainee and then journeyman mechanic in 1973. Later that year he became lead mechanic. In 1974 he was temporarily maintenance superintendent and then became general underground foreman. He supervised approximately 150 employees while in this position. For about 1-1/2 years he was placed in charge of planning and coordinating and in about 1976 became underground general maintenance foreman in which position he continued until January, 1980, when he temporarily did some surface projects. He returned to his underground duties in February 1980, and was classified as 1700 level foreman. He left the employ of Respondent on March 26, 1980. He was reemployed by Respondent in November 1980 washing and servicing cars. He was a journeyman mechanic at the time of the hearing.

3. In 1977 and 1978, Complainant received very few complaints regarding safety from those who worked under him--approximately 10 each year. In 1979, such safety complaints went up to perhaps 10 each day. At least two employees left the company because they were concerned about safety. The alleged unsafe conditions included loose rock, cave-ins, and improper ventilation. Complainant's employees were required to travel over muck piles and ground fall piles to get to equipment. A number of citations were issued by MSHA inspectors in 1979 for these conditions. Complainant reported these conditions to his supervisors and to the Safety Department "plenty of times."

4. On one occasion in April of 1979, a loader had been taken out of service by Complainant's crew because it did not have brakes. The loader was "red-tagged." However, the production crew ignored the red tag and put the loader in service. An MSHA inspector discovered that it had no brakes and issued a citation. Complainant was upset and voiced his feelings to his supervisors. In February, 1980, a haulage truck was taken out from the shop even though it had a faulty shift lever. An accident occurred when the truck jumped out of gear.

5. On many occasions, Complainant reported inadequate ventilation in his shops which caused dizzyness and disorientation in his employees. His supervisors told him they were trying to correct the condition and that if his employees didn't like it they could quit.

6. Production meetings attended by Complaint were held twice daily. Complainant brought up safety complaints at these meetings and was accused of complaining and griping.

7. In early 1979, Complainant reported that loose rock and ground falls affected part of the maintenance shop. The roof bolts had become loose. An attempt was made to correct the sitation but eventually the shop roof caved in.

9. In January 1980, Complainant was transferred to the surface and was under the supervision of Jack Miller. From January 25, 1980 until March 26, 1980, his supervisor was Mike Robb who took over as maintenance superintendent. For about 9 months prior to January 25, 1980, Robb had been resident engineer at the subject mine, but during that time, he had no supervisory duties with respect to Complainant. Complainant returned to underground duties in early February, 1980. His job title was 1700 level foreman and he was under the immediate supervision of Jerry Troxell who became general underground maintenance foreman.

10. In February or early March, 1980, Robb told Complainant that he thought the truck shop "was a complete mess" and that he would have to improve the condition of the shop.

11. During the time Robb was his supervisor, Complainant did not make any safety complaints, oral or written, to him, nor was Robb aware of safety complaints made to prior supervisors.

12. On March 25, 1980, Complainant was asked by Troxell to come in to Mike Robb's office. Robb, Troxell, Wayne Bennett, head of Respondent's Industrial Relations Department and Complainant were present. Robb informed Complainant that lack of water control had caused equipment to break down, parts were not being properly handled and Complainant "did a great deal of complaining and very little action." The complaints concerned lack of parts availability and production abuse of equipment. Robb told Complainant that his performance was not satisfactory and that henceforth he would confer with Robb and Troxell every Monday morning and discuss his job performance the previous week. A deadline of May 1 was set for Complainant to show improvement. Complainant did not bring up any safety complaints or concerns during this meeting.

DISCUSSION

There is sharp disagreement between Complainant and Robb as to what took place at the meeting. Neither Bennett nor Troxell was called as a witness. According to Robb both were employed by other companies out of the State of New Mexico. Complainant stated that Robb told him he (Complainant) was not doing his job, but was going around complaining all the time. Complainant took this to refer to safety complaining. Robb testified that he pointed out specific instances where Complainant's work was unsatisfactory. Complainant testified that at the conclusions of the meeting he was told that he could resign and have "layoff status, severance pay (and) insurance coverage" for a period of time, or he would be terminated. An answer was demanded by 8:00 the following morning. Robb testified that at the conclusion of the meeting, Complainant was told that he would in effect be placed on probation, would be counselled every Monday and would have to show improvement by May 1, 1980. I am generally accepting Mr. Robb's version of the meeting. This is based in part

on my assessment of the credibility of the two men as witnesses and on the interest or lack of interest in the outcome of this litigation. More importantly, it is based on the memorandum of the meeting prepared by Robb on March 27, 1980, which is part of Complainant's Exhibit 2 and which supports Robb's version of the meeting.

13. On March 26, 1980, Complainant met with Bennett and submitted a "resignation with layoff status." He continued on the payroll with severance pay to July 15, 1980. He also retained insurance benefits.

14. Complainant's mother was seriously ill in April and May, 1980, and was under intensive care and thought to be dying.

15. On August 8, 1980, Complainant filed his initial complaint with MSHA. An investigation was conducted and MSHA denied the complaint on January 6, 1982. Complainant filed his complaint with the Review Commission on January 25, 1982.

DISCUSSION

Complainant offered in evidence a copy of the MSHA Investigation file which he received from MSHA Dallas Office. Respondent objected and I excluded the documents primarily because substantial portion of the investigation report and of the transcripts of interviews had been excised. Complainant did not attempt to subpoena the record or the investigator. The exhibit as offered is to some extent unintelligible and possibly prejudicial. I conclude that it would be unfair to the parties and unhelpful to me to admit the exhibit.

16. Robb left Respondent's employ on March 30, 1980. He knew on March 25, 1980, that he was going to leave on March 30. He expected that the counselling of Complainant referred to in Finding of Fact No. 12 would be conducted by Troxell.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

> (c)(1) 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 of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any stautory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurrs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), 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 complainant 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, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter

shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever 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. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

ISSUES

1. Whether the complaint is barred by the statute of limitations or laches.

2. Whether Complainant voluntarily left his employment with Respondent on March 26, 1980, or was discharged, actually or constructively.

3. If Complainant was discharged, was it related to activity protected under the Act.

4. If Complainant was discharged for protected activity, what relief should be awarded.

CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The complaint is not barred by the limitations for filing claims set out in section 105(c) of the Act or by laches.

DISCUSSION

Complainant filed his complaint with MSHA on August 8, 1980, and his employment was terminated March 26, 1980. However, he remained on the payroll by reason of severance pay to July 15, 1980. He claims that he was distracted because of his mother's illness at the time. Respondent asserts that prejudice resulted from the delay because former supervisors Jack Miller, Wayne Bennett, Jerry Troxell and Mike Robb have left Respondent's employ, and all but Robb are now living and working outside of New Mexico.

It has been held that the statutory filing deadlines are not jurisdictional. Secretary/Bennett v. Kaiser Aluminun and Chemical Corporation, 3 FMSHRC 1539 (1981). See also Christian v. South Hopkins Coal Co., 1 FMSHRC 126 (1979); Local 5429 v. Consolidation Coal Co., 1 FMSHRC 1300 (1979); S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY of the FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, Committee on Human Resources (July 1978) 624 (hereinafter LEG. HIST.) ("It should be emphasized, however, that these time-frames [in 105(c)] are not intended to be jurisdictional.")

The questions to be considered here are whether Complainant showed justifiable circumstances for his delay in filing and whether the delay prejudiced Respondent. See Herman v. Imco Services, 4 FMSHRC _____ (December 15, 1982).

The fact that Complainant remained on the payroll and suffered no monetary loss is, I conclude, sufficient reason justifying a delay in filing. It is conceivable that Complainant feared that filing a claim could jeopardize his severance pay rights. Although Respondent claims prejudice, it did not show that an attempt was made to preserve testimony when it became aware that the claim was filed, or that it attempted to obtain the testimony of the former employees by deposition. Complainant cannot be blamed for the delay between the time he filed with MSHA and MSHA's decision 16 months later.

3. The complaints which Complainant voiced to his superiors concerning unsafe and unhealthful conditions under which he and his crew worked, such as those described in findings of fact 3 through 7, constituted activity protected under the Mine Safety Act. Any adverse action because of this protected activity would violate section 105 of the Act.

4. Complainant left his employment with Respondent on March 26, 1982, voluntarily. He was not discharged and the termination of his employment was not related to any activity protected under the Mine Safety Act.

DISCUSSION

In Finding of Fact No. 12, I accepted the testimony of Robb to the effect that the discipline imposed on Complainant at the March 25, 1980, meeting was to place him on a form of probation. He was not discharged. Apparently unwilling to accept the probationary status, he voluntarily resigned. The discipline was imposed solely by Robb. It resulted from Robb's evaluation of Complainant's work performance. Whether the evaluation was accurate or whether it was fair is not a matter for me to decide. I accept the testimony of Robb that Complainant made no safety related complaints to him and that he (Robb) was not aware of any such complaints having been made to others. Therefore, the discipline imposed by Robb, such as it was, was not related to activity protected under the Act.

5. Since Complainant failed to establish that he was discharged or otherwise discriminated against in violation of section 105(c) of the Act, he is not entitled to the relief sought in his complaint.

ORDER

On the basis of the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 82-33-M A.C. No. 29-00159-05018
v.	:	Tyrone Mine & Mill
PHELPS DODGE CORPORATION, Respondent	:	

DECISION

Appearances: Marigny A. Lanier, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Petitioner, MSHA; James G. Speer, Esq. and Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Phelps Dodge Corporation for an alleged violation of 30 C.F.R. § 55.9-2.

Section 55.9-2 provides as follows:

> Equipment defects affecting safety shall be corrected before the equipment is used.

The subject citation which is dated May 15, 1981 reads as follows:

> After talking with Kim Kersey, Maintenance Foreman, Kaye Staley, Driver, Milo Lambert, Miners Representative and Dave Kuester, Miners Representative, I have reason to believe there was a safety defect affecting safety on the #214 Muck Truck involving the front suspension in that prior to my arrival on the property there had been much controversy

about the suspension. The drive[r] went so far as to ask for a blue card in order to go to the doctor if not taken off the truck or the truck repaired. On 5/8/81 a telephone call was received by the MSHA Office in Carlsbad, N.M. to voice their complaint. They were advised to contact Milo Lambert or Dave Kuester the Miners Representatives. I arrived on the property at approximately 1800 hours on the 13th of May 1981 on other business. We returned the following morning to complete the other business and to serve other complaints. When we arrived we noted that the #214 Muck Truck was in the truck shop being repaired. The morning of the 15th of May 1981 we served the complaint on the #214 truck. We learned that the #214 truck had been put into the shop for a routine maintenance service on the same morning that we were driving to Silver City, N.M. in that the company was aware that we were on the way over, because of a phone call to the company made by Sidney R. Kirk, Supervisory Inspector MSHA concerning the investigation of an accident.

The inspector who issued the citation testified that a miner complained to MSHA that the suspension on the No. 214 haulage truck was bottoming out and represented a hazard to safety (Tr. 10-11). As a result of this complaint the inspector was told to visit the mine and check out the truck (Tr. 10-11). At the hearing the inspector was confused and inconsistent about when he visited the mine and talked to the drivers (Tr. 11, 14, 17, 25, 27-28, 33-34, 41-47, 55). After reviewing his testimony I find that on or about May 15 during the day he visited the repair shop at the mine and spoke to the repair shop foreman about the 214 truck (Tr. 27-28, 34, 43). When the inspector arrived the front suspension already had been removed and a new suspension had been installed (Tr. 14, 73-74). The shop foreman complained to the inspector about spending $6,000 to replace a front suspension that was still good but he said that the replacement was being done because it was called for under the company's preventive maintenance schedule (Tr. 15-16, 55-58). The old suspension was in the back of the shop where the inspector could have seen it but he did not (Tr. 191-192, 194). The inspector admitted that he had no personal

knowledge of the condition of the removed suspension and that he was not familiar with the company's preventive maintenance schedule (Tr. 31-33, 48-50). The inspector told the operator's safety inspector that he would decide whether or not to issue a citation after he had spoken to the drivers of the 214 truck (Tr. 21-22, 25).

That evening the inspector spoke to several drivers of the 214 truck including Kay Stailey, Pedro Mondragon, K. W. Donaldson, Emory Baker, Juan Verdugo, and Ramon Nava (Tr. 36-37, 45-46). According to the inspector they told him that because of worn out suspensions the truck bottomed out, was unstable and control of its steering could not be maintained (Tr. 17-18, 36). They also advised the truck rode rough and Ms. Stailey who told the inspector she drove the truck on May 8, said she had hurt her back because of the bad suspension (Tr. 46-48). Based upon what the drivers told him the inspector decided to issue a citation, wrote it up 2 days later and then mailed it to the operator (Tr. 20-22, 54). However, the inspector erroneously put down the issuance date as the day he had spoken to the foreman and the drivers (MSHA Exh. No. 1).

Five of the drivers who had operated the 214 truck testified at the hearing. The first and most important was Ms. Stailey. It was she who complained to MSHA that on May 8 when driving the truck she injured her back due to the bad suspension (Tr. 47-48, 85). She repeated these complaints at the hearing, testifying that on May 8 the truck drove like a jackhammer due to bad suspension (Tr. 85-86, 92). She also contended that the cab and back of the truck were loose (Tr. 86, 93). She said she had complained three times that night and finally because her back hurt she asked for a blue card which would have enabled her to go to the hospital (Tr. 87-88). On cross examination Ms. Stailey agreed that according to established procedures the drivers fill out a checklist for each truck they drive (Tr. 95). If more than one truck per shift is driven by a driver, the driver must fill out a checklist for each truck (Tr. 128). The checklist sets forth several items including suspension, with respect to which the driver is supposed to report any problems or deficiencies (Tr. 96, Optr's. Exh. Nos. 2-8). There is also a place on the form for driver comments. The checklist which Ms. Stailey filled out for May 8 indicates she drove the 219 truck, not the 214 (Optr's. Exh. No. 2). Ms. Stailey contended that she made her 9's like 4's but the operator produced her checklists for the period April 1 through May 16 (Tr. 103-104, Optr's. Exh. Nos. 2 and 3). It is clear

from an examination of these lists that Ms. Stailey does not make her 9's like 4's and at the hearing MSHA did not produce any evidence or even argue in support of Ms. Stailey's contention. I find that on May 8 Ms. Stailey drove the 219 truck. I also find in accordance with the checklist that the last day she drove the 214 truck was April 6 (Optr's. Exh. Nos. 2 and 3). Ms. Stailey admitted that the April 6 checklist did not indicate any problem with the suspension but she said she orally told her foreman the suspension was bad (Tr. 109).

In addition, on cross examination Ms. Stailey admitted that on May 4 she had an accident driving the 217 truck when she ran into a berm (Tr. 109). She also admitted that on May 5 she received a written warning from the operator for her failure to report the accident and for damage to the 217 truck from the accident (Tr. 112). At first she denied there was any damage, but subsequently she acknowledged there had been some to the truck's ladder (Tr. 110, 118, 121). Finally, when asked whether she had visited a doctor on May 6 on her own volition, Ms. Stailey first stated it was for allergies but when confronted with the medical report of that visit agreed it was for back pain (Tr. 112-114).

Based upon the foregoing I do not find Ms. Stailey a credible witness in any respect. I conclude she last drove the 214 truck more than a month before she complained to MSHA. Moreover, she complained to MSHA only a few days after she had an accident with another truck, received a warning from the operator and visited a doctor for back pain. These circumstances demonstrate that her assertions regarding the alleged lack of safety on the 214 truck due to bad suspension cannot be accepted.

As already noted, four other drivers of the 214 truck testified. Mr. Mondragon who according to the checklist drove that truck only on April 5 and April 25, stated it rode rough and fishtailed although he did not indicate this on his checklist (Tr. 125-126, 131, Optr's. Exh. No. 4). He said he orally told the dispatcher in the tower about the rough riding and fishtailing and that the dispatcher was supposed to tell the foreman (Tr. 132). However, he admitted that management "chewed out" drivers who did not complete accurate lists (Tr. 134).

Similarly, Mr. Baker testified that when he drove the 214 truck, it rode rough but his checklist for May 3, the only date he drove it after April 1, did not contain anything about the suspension (Tr. 141, Optr's. Exh. No. 5). He said it must have slipped his mind but alleged that he orally told the dispatcher about the suspension (Tr. 147-148). I conclude the weight to be accorded the allegations of these two witnesses regarding the suspension on the 214 truck is greatly diminished because they did not put anything on their checklist although they knew this was required. Moreover, these two drivers drove the 214 truck on few occasions.

A third driver, Mr. Verdugo, did indicate a suspension problem on his checklist for May 2 when he drove the 214 truck (Optr's. Exh. No. 7). However, he acknowledged he did not drive the 214 truck very often since his assigned truck was the 216 (Tr. 174). Even more importantly, Mr. Verdugo's complaints regarding the rough riding of the 214 truck must be viewed in light of the fact that he had a severe back problem, was operated on for a ruptured disc on July 28, 1981 and was out of work for this condition from June 17, 1981 to October 7, 1981 and from November 7, 1981 to January 4, 1982 (Tr. 183-184). Finally, Mr. Verdugo continued to complain about rough riding on the 214 truck after the suspension had been replaced (Tr. 180-182). In light of the foregoing circumstances, I do not find Mr. Verdugo's testimony persuasive regarding alleged safety hazards and the nature of the ride on the 214 truck.

The fourth driver who testified was Mr. Donaldson. He was assigned to the 220 truck but because he traded shifts with a driver named Dave Brown, he drove the 214 truck around the time Ms. Stailey made her complaint (Tr. 150-151). Mr. Donaldson said that the 214 truck rode rough compared to the other trucks but the only checklist he completed for the 214 truck which mentioned the suspension was dated May 12, 4 days after Ms. Stailey complained (Tr. 151-152, Optr's. Exh. No. 6). Mr. Donaldson admitted he did not always fill out the lists accurately (Tr. 157). He stated that he did not know for sure whether he had noted the suspension as a problem on May 12 because Ms. Stailey had spoken to him about her complaint, but he readily admitted he wished to help her (Tr. 167, 171-172). Even more importantly, Mr. Donaldson admitted that he did not consider the 214 truck unsafe for him when he was driving it (Tr. 171). I find Mr. Donaldson's opinion regarding the safety of the 214 truck which was given with candor to be persuasive and I accept it.

The operator submitted copies of all checklists for the 214 truck from April 1 to May 13 (Optr's. Exh. Nos. 2-8). Many items needing repair were noted on these lists but the front suspension was identified as a problem only three times. Even rough riding, without specifying the cause, was noted only eight times (Optr's. Exh. Nos. 2-8). Also the drivers who testified did not use the 214 very often. The checklists for the 214 truck reveal other drivers used that vehicle with greater frequency than those who testified.

The operator's repair shop foreman, Mr. Kersey, testified that haulage trucks are given priority in maintenance and repairs because they are essential to production (Tr. 66-67). Suspensions are changed on haulage trucks every 9,000 to 10,000 hours (Tr. 70, 201). On April 17 a work order was issued to change the suspensions on the 214 because it was the truck whose suspensions had the most hours (Tr. 68-70). On April 21 and May 2 the operator received rebuilt suspensions which were installed on the 214 truck on May 13 (Tr. 78, 83). The foreman looked at the suspensions before and after they were changed and he saw no defects (Tr. 211). As already noted, the inspector did not see them. In addition, x-rays of the suspensions taken off the 214 truck showed no cracks (Tr. 204). The foreman stated that when the suspensions were removed, "donuts", which are rubber cushions in the suspensions and which would have disintegrated if there had been a bottoming out of the truck, were found to be intact (Tr. 198, 204-205, 216). The foreman further testified that the suspensions were being replaced pursuant to the company's maintenance program and he said that up to the time of the inspector's visit he did not know of any miner complaint to MSHA about the 214 truck (Tr. 69-70, 203, 208-209). I find the foreman credible and I accept his testimony. I conclude therefore, that the suspensions were being replaced pursuant to the regular preventive maintenance program and I reject any suggestion they were changed in order to avoid issuance of a citation because a complaint had been made to MSHA. I further conclude that the suspensions were free from defect and that there was no bottoming out on the 214 truck.

Mr. Chandler, the parts and service consultant for the manufacturer of the 214 truck, testified that he had driven every truck Phelps Dodge had and that trucks like the 214 tend to drive bumpy (Tr. 230). Both Mr. Kersey and Mr. Chandler listed a number of factors which would cause a rough riding truck including speed and road conditions (Tr. 209, 230-231). Finally, the 214 truck as described by

Mr. Kersey and as shown by photographic evidence is a massive off-the-highway vehicle designed for hauling heavy loads over rough terrain (Tr. 194-196). Its enormous dimensions are apparent when it is pictured next to an ordinary sized pick-up truck (Optr's. Exh. No. 10).

Based upon all the evidence I conclude that there were no defects in the suspension of the 214 which affected safety. For reasons already noted, the principal complainant upon whom MSHA relied is not credible. But to the extent that some of the other drivers believe the 214 was unsafe because of the suspension, I find more persuasive the contrary evidence of the operator which demonstrates that there was nothing wrong with the suspensions and that they were being replaced pursuant to routine maintenance procedures. I already noted the opinion of one of the drivers, Mr. Donaldson, that the 214 truck was not unsafe but only rough riding and I rely also upon the infrequency with which the checklist for the 214 identified suspension as a problem.

I recognize that under the Act miners are strongly encouraged to participate in the preservation and maintenance of health and safety in the mines. They are after all, the ones whose lives are on the line. But the positions miners take and the complaints they make must be supportable and prevail over contrary evidence produced by operators accused of violations. In this case MSHA failed to prove a violation. The great weight of probative evidence favors the operator.

ORDER

Accordingly, it is ORDERED that Citation No. 173586 be Vacated and that the petition for the assessment of civil penalty be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail.

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JAN 13 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. PENN 82-177 A.O. No. 36-00970-03 120
v.	:	Maple Creek No. 1 Mine
U. S. STEEL MINING CO., INC., Respondent	:	Docket No. PENN 82-220 A.O. No. 36-03425-03104
	:	Maple Creek No. 2 Mine
U. S. STEEL MINING CO., INC., Contestant	:	Contest of Citations
v.	:	Docket No. PENN 82-73-R Citation No. 9901282; 1/20/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Maple Creek No. 1 Mine Docket No. PENN 82-76-R Citation No. 9901285; 1/22/82
	:	Maple Creek No. 2 Mine

DECISION AND ORDER

These consolidated review-penalty cases are before me on the parties' waiver of hearing and cross motions for summary decision on stipulated facts. The dispute centers on the proper interpretation of the facts and applicable law. The core issues are:

1. Whether a sample of respirable dust taken on a single shift by a duly certified representative of the Secretary (a coal mine inspector) is in accord with the procedure prescribed by the statute.

2. Whether a sample of respirable dust taken on a single shift was, as a matter of scientific fact, sufficient to determine the average concentration of respirable quartz present in the atmosphere of the mechanized mining units sampled.

3. Whether the violations charged "could have contributed to a significant and substantial" mine health hazard.

Findings and Conclusions

The fundamental requirement of the respirable dust standard is that the average concentration be continuously maintained at or below 2 milligrams per cubic meter of air ($2mg/m^3$). Section 202(a), 30 C.F.R. 70.100. The two milligram standard must be lowered, however, whenever the total respirable dust mass in the mine atmosphere contains more than 5% quartz. Section 205, 30 C.F.R. 70.101. Consequently, when sections 202(a) and 205 are read together the statutory respirable coal mine dust standard is 2 milligrams (not to exceed 5% quartz) per cubic meter of air.

When the presence of an excessive concentration of quartz is detected, the operator is thereafter required to maintain the respirable dust mass below an average concentration of 2 milligrams of air cubed. The applicable standard is determined by dividing the percentage of quartz into the number 10. 30 C.F.R. 70.101. The formula for determining the applicable respirable dust standard when quartz is present was prescribed by the Secretary of Health Education and Welfare, now the Secretary of Health and Human Services. It was derived from

the Threshold Limit Values (TLV) first published for free silica by the American Conference of Governmental Industrial Hygienists in 1968.

In these cases, the percent of quartz present on the mechanized mining units in question was 11%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with the two units had to be thereafter maintained at 0.9 milligrams of respirable dust per cubic meter of air (10/11 equals 0.9 mg/m^3).

I

Samples for determining the percent of concentration of quartz in the respirable dust mass present in the mine atmosphere are taken by the Secretary of Labor through duly certified coal mine inspectors. Such single shift samples are not used to determine compliance with the mine dust standard in effect at the time the sample is taken. The percent of quartz is merely used to set the standard for future sampling. But if the percent of quartz in the sample analyzed is more than 5 the Secretary will give the operator notice of a lowered standard which will thereafter be used to establish compliance or noncompliance on the basis of averaging multi-shift samples taken by the operator during his next bi-monthly sampling period. 30 C.F.R. 70.201, 207.

The operator says this procedure is contrary to the Act which, it contends, requires all respirable dust samples be taken by the operator. MSHA, the operator claims can only

take dust samples for the purpose of checking "on the accuracy of the operator's sampling program". For this reason, the operator asserts the respirable dust samples taken by certified persons who are not employed by the operator are not samples that can be used to lower the 2 milligram standard.

I find the contention without merit.

Section 202(g) specifically authorizes the Secretary of Labor or his delegate to "cause to be made such frequent spot inspections as he deems appropriate of the active workings of coal mines for the purpose of obtaining compliance with /the respirable dust standards/ of /Title II/. Legislative History, Coal Act, 1124 (1970). This authority is complemented by that found in section 104(f) which sanctions use of "samples taken during an inspection by an authorized representative of the Secretary" to determine whether the "applicable limit on the concentration of respirable dust required to be maintained under this Act is exceeded", and, if so, for issuance of a "citation fixing a reasonable time for abatement."

The broad underlying authority, of course, is section 103(a)(1) and (4) which authorize inspections, and therefore sampling, to obtain "information relating to health conditions and the causes of diseases" and to determine "whether there is compliance with the mandatory health standards . . . or other requirements of this Act". The cumulative import of this authority provides compelling support for the view that Congress intended the Secretary have power, independent of

the operator, to police compliance with the quartz limitation mandated by section 205. 1/

II

Under section 205 of the Coal Act the Secretaries of Interior and of Health, Education and Welfare were delgated authority to develop and promulgate a formula that would permit a reduction in the applicable respirable dust standard whenever the quartz content of respirable dust in the atmosphere exceeded 5 percent. 2/ The formula, which issued in March 1971, 30 C.F.R. 70.101, required that whenever the "concentration of respirable dust in the mine atmosphere" contained "more than 5 percent quartz" the applicable respirable dust standard for that working place should be reduced by an amount computed "by dividing the percent of quartz into the number 10". 3/

1/ The operator has withdrawn its improvident assertion that as a "practical matter" the trial judge should take notice of the fact that the integrity of the entire sampling program may be jeopardized by allowing federal coal mine inspectors to take samples. Counsel for the operator admit they have no evidence to support such inflammatory assertions.

2/ Section 205 constitutes a legislative recognition of the fact that epidemiological studies show that the different components of inhaled dust such as quartz and coal dust as well as its total atmospheric concentration or density are factors which affect the formation of fibrotic lung tissue and the development of pulmonary massive fibrosis.

3/ Quartz (crystalline silicon dioxide) is classified as a fibrogenic dust that causes scar tissue (fibrosis) to be formed in the lungs when inhaled in excessive amounts. In 1968, the American Conference of Governmental Industrial Hygienists established a Threshold Limit Value (TLV) of 100 micrograms (.1 milligrams) per cubic meter of air over an eight hour period. This (footnote 3 continued on page 6)

For many years the threshold limits for dust containing quartz have been based on the concept that the magnitude of the toxicity of the dust is proportional to the concentration of quartz in the dust. Based on studies done in 1929 and 1935, it was determined the toxicity limit (TLV) for quartz dust was 0.1 milligrams per cubic meter of air. The formula developed by the National Institute for Occupational Safety and Health (NIOSH) for applying this limit was: TLV equals 10 divided by the percent of respirable quartz found in a sample of respirable dust. 4/

Thus, if the quartz component of the average concentration of respirable dust during a single shift is 5 percent of a 2 milligram mass, the concentration of quartz is 100 micrograms (.1 milligrams) per cubic meter of air and no reduction in the total concentration of respirable dust (2mg/m3) is mandated. (10/5 equals 2). On the other hand, if the respirable mass standard was 3 milligrams of air cubed, the 5 percent limit would still require it be lowered to 2 (10/5 equals 2) if the quartz content exceeded 5 percent.

---

is the airborne concentration of quartz to which it is believed most workers, including miners, may be repeatedly exposed day after day without adverse effect. NIOSH has recommended that the concentration level be reduced to 50 micrograms (.05 milligrams) but thus far MSHA has declined to adopt this as the basis for its formula for reducing the applicable respirable dust standard. 45 F.R. 23995 (1980).

4/ Documentation of the Threshold Limit Values for Airborne Contaminants, ACGIH, 1981 Supplement 364-365. This report notes that because the "percent quartz in respirable dust is often quite different from the percentage in ... total airborne dust, ... the percent quartz for use in the respirable-mass TLV formula must be determined in a sample of respirable dust. Id.

In the instant case, it was found that the quartz component had increased to a concentration level of 11 percent. Consequently, the miners were being exposed to approximately 190 micrograms of concentrated quartz dust which was almost twice the permissible dosage-exposure for each shift. The record shows this exposure which began some time in September 1981 continued until abated in January 1982.

The quartz standard issued in March 1971 and was reissued without substantive change in April 1980. 45 F.R. 23995. 5/ From the inception of the enforcement program to February 1981, the procedure for evaluation of respirable quartz concentrations was known as the Standard Method A7, or KBr (Potassium bromide) method. To perform the necessary chemical analysis and infrared spectrophotography a sample of respirable dust weighing 1 to 4 milligrams was required. Because samples collected during a mine health inspection usually contained less than this amount it was often necessary to combine from 10 to 30 samples to make a composite sample of 1 to 4 milligrams. The composite sample was then ashed, combined with potassium bromide, pelletized and analyzed for quartz content by making an infrared spectrophotograph of the absorbance traces for crystalline silicon dioxide.

5/ Apparently through inadvertance the phrase "concentration of" was deleted before the words "respirable dust" in the rule as reissued. Since no notice was given of any proposal to change the statutory definition found in section 202(e), it seems obvious the Secretaries did not intend to change the "average concentration" standard.

Collecting and making composite samples was not only time consuming but also severely limited the number of mines on which quartz determination could be made. For example, in 1980 approximately 59,000 samples were collected and submitted for quartz analysis. From these, only 1,500 quartz analyses could be performed.

To increase the number of samples available for testing, MSHA modified its analytical method in February 1981. The new method permits a quartz content determination to be made on a single sample containing as little as 0.5 milligrams of respirable mine dust. It was first developed by the National Institute of Occupational Safety and Health (NIOSH) in 1977.

Under the new method, the sample is ashed in a low-temperature, radio-frequency (RF) asher, the ashed residue is combined with potassium bromide, pelletized and analyzed for quartz using infrared spectrophotometry. Use of the RF asher affords the advantage of being able to make a quartz analysis of a sample containing as little as 0.5 milligrams of respirable mine dust. The new method, which is capable of detecting about one percent quartz in an ashed sample weighing 0.5 milligrams is known as the Single Sample, Low Temperature Ash (LTA) method of quantifying the quartz in a single valid sample of respirable mine dust. Mine Safety and Health Administration's Procedure for Determining Quartz Content of Respirable Coal Mine Dust (Unpublished 1982).

Equivalency between the "old" and the "new" methods was demonstrated by analyzing replicate samples of respirable dust using both methods and comparing the analytical results. This showed that quartz determinations with the "new" method were within approximately 1 percent of the determinations obtained with the "old" method (i.e., for a determination of 8 percent with the "old" method, the determination with the "new" method would be 7, 8 or 9 percent). In addition, a number of single samples were analyzed to quantify the intersample variability of the "new" method. This showed the coefficient of variability was 17 percent as compared to the "old" method which was 10.8 percent. The difference in variability was of no practical significance since the results of quartz determinations are truncated and reported as whole percentages, that is, an analysis that results in a determination of 5.9 percent quartz is reported as 5 percent.

The variability of disparate samples is admittedly based on a limited amount of data. Samples to determine the day-to-day or multi-shift variability were collected from five mines and 17 sections. From a quantitative standpoint, 80 percent of the time the average standard deviation about the mean, determined from at least five samples, was 2 percent. For single shift samples, i.e., those collected from the same face on the same day, the variability was within a range of plus or minus 1 percent. The evidence shows, and the operator does not dispute, that the variability between and among the analyses

of single and multi-shift samples of respirable mine dust for quartz content is relatively low. Ibid.

The operator claims all this is irrelevant because, the single sample method fails to comply with the requirement that the quartz determination be based on averaging five samples of respirable dust. 30 C.F.R. 207.

The dispositive issue, therefore, is whether the limit on respirable quartz dust can be enforced on the basis of a single shift gravimetric sample of the atmosphere of the mechanized mining units cited or must be a composite of the five multi-shift samples taken to determine compliance with the total respirable mine dust concentration.

Support for the operator's position is found, it is claimed, in MSHA's determination that "a single-shift respirable dust sample should not be relied upon for compliance determinations when the respirable dust concentration being measured" is near 2 milligrams. 45 F.R. 23997 (1980). Pointing out that each of the samples in question was less than 2 milligrams, the operator argues the sampling procedure followed to determine quartz content was not a valid statistical technique because it violated the long-established requirement for multiple sample averaging. 30 C.F.R. 207.

The Secretary's answer is that the statute does not mandate multi-sample averaging to determine the concentration of respirable quartz dust. Section 202(f)(2). MSHA further claims that all the regulation requires is that enforcement

of a lowered standard be based on operator samples collected on five consecutive production shifts or five production shifts worked on consecutive days. 30 C.F.R. 207. Neither Congress, nor the Secretary, it is argued ever intended the pre-compliance quartz sample, i.e., the sample used to establish the lowered dust standard, be derived from a statistically valid sample of the average concentration of the total airborne respirable dust to which the miners were exposed. The Secretary carries his burden, it is claimed, if he shows persuasively that, after applying valid statistical techniques, a single shift sample of respirable mine dust pictures, with scientific accuracy, the concentration of respirable quartz dust in the atmosphere during the shift on which the sample was taken.

Since a single shift sample of each of the continuous miner operators (high risk occupations) cited showed a quartz concentration of 11 percent, the Secretary claims he had a non-discretionary duty to lower the total respirable dust standard to .9 milligrams of air cubed and thereafter to enforce that standard on the basis of multi-sample averaged "compliance" samples. 6/

6/ While the Secretary claims single shift samples are never used to find a violation, one of the "Enforcement Examples" given in the directive to inspectors states that where an analysis of a single sample from an area subject to a lowered standard has generated an even higher concentration or percentage of quartz, "the inspector should issue a citation upon receipt of the quartz analysis because there was a violation at the time the sample was collected". Coal Mine Safety & Health Memorandum No. 81-183-H, p. 8.

Resolution of the parties' dispute requires an analysis and interpretation of sections 202(e), 202(f), and 205 of the Mine Safety Law.

Section 205 provides:

> In coal mining operations where the concentration of respirable dust in the mine atmosphere of any working place contains more than 5 percent quartz, the Secretary of Health, Education and Welfare shall prescribe an appropriate formula for determining the applicable respirable dust standard under this title for such working place and the Secretary /of Labor/ shall apply such formula in carrying out his duties under this title.

Section 202(e) provides:

> References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education and Welfare.

Section 202(f) provides:

> For the purpose of this title, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the /Secretaries/, and (2) as measured thereafter, over a single shift only, unless /the Secretaries/ find, in accordance with the provisions of section 101 of this Act, that such single shift measurements will not, after applying valid statistical techniques, to such measurement, accurately represent such atmospheric conditions during such shift.

The legislative history of section 202(f) shows there was a sharp disagreement between the Senate and House over the most reliable method for sampling atmospheric conditions to determine the "average concentration" of respirable dust.

The Senate bill mandated single shift sampling and prohibited the averaging of dust measurements over several shifts. As the operator points out, however, Congressmen representing the operators' interests succeeded in persuading the House to adopt an amendment that would have required multi-shift sampling to determine the "average concentration". The matter was finally resolved in the Conference Committee. Its report states:

> The substitute adopted by the conference requires the operator to maintain continuously the average concentration of respirable dust in the mine atmosphere during each shift to which each miner is exposed at or below the established maximum standard or the permitted maximum standard. It also provides that the term "average concentration" means that for a maximum period of 18 months after enactment, measurements of a minimum number of the same production shifts in consecutive order are authorized to obtain a statistically valid sample. At the end of this 18-month period, it requires that the measurements be over one production shift only, unless the Secretary and the Secretary of Health, Education and Welfare find, in accordance with the standard setting provisions of section 101, that single-shift measurements will not accurately represent the atmospheric conditions during the measured shift to which the miner is continuously exposed. H. Rpt. 91-761, 91st Cong., 1st Sess., 75; Legislative History Coal Act 1037 (1970).

From this, it is clear that the legislative preference is for single shift sampling and that multi-shift averaging is the exception, not the rule. The operator, in fact, concedes that "the Secretaries have never expressly determined that a single shift sample will not accurately represent /the average concentration of respirable quartz dust/ after

applying valid statistical techniques". All the Secretaries have determined is that application of valid statistical techniques mandates continued use of the exceptional method, i.e., multi-sample averaging as the basis for the issuance of citations to enforce a lowered standard. 45 F.R. 23997.

I find that as a matter of law, section 202(f) of the Act plainly authorizes use of single shift samples as the basis for determining the concentration of quartz and that the best available scientific evidence supports use of such a procedure.

The operator has chosen not to challenge the evidence adduced by the Secretary to show that, after applying valid statistical techniques, a single shift sample of respirable mine dust can be analyzed by a method which accurately measures the concentration of respirable quartz dust in the atmosphere during that shift. 7/ Instead it has generally cited studies relating to the validity of gravimetric measurements of respirable coal mine dust masses.

There is, of course, no dispute about the fact that personal gravimetric samplers were used to collect the respirable mine dust in question. Furthermore, the relevant literature shows that true dust concentrations in coal mines vary from

7/ The operator's claim that the standard as applied arbitrarily reduces the total dust level no matter how insignificant the amount of quartz present is demonstrably incorrect. (Exh. 2). The operator makes no claim that exposure to more than 100 micrograms of respirable quartz dust for eight hours a day, day-after-day, is a biologically benign atmospheric condition. The purpose of section 205 is to insure that concentrations of quartz in the workplace atmosphere will be maintained at or below 100 micrograms per cubic meter of air.

shift to shift with a coefficient of variation between 30 and 70 percent. Indeed, it is not unusual to find that the dust concentration in the atmosphere of a continuous miner operator has a standard deviation of 70 percent. IC 8753, Respirable Dust Measurement 13-14 (1977).

But, says the Secretary, all this is irrelevant because after applying valid statistical techniques to the infrared spectroscopy method of analyzing single shift samples for quartz it was found that the variability between and among single and multiple samples was relatively low, plus or minus 1 or 2 percent. Indeed, this conclusion seems to be corroborated by a study done by the operator's own industrial hygienists in 1970 or 1971. This study found it was possible using an x-ray diffraction technique to "estimate the quartz and calcite on individual filters where the dust loading was 0.20 mg." The same report recommended that infrared techniques being used in England and Germany be carefully studied to "determine whether this analytical procedure can be applied to individual respirable dust samples". MSHA claims, and I find its evidence supports the conclusion, that by 1981 the infrared technique had been perfected to the point where it could be applied to samples with as little as 0.5 milligrams of dust with the reproductibility error (coefficient of variation) between single and multiple samples so small as to be negligible.

From the standpoint of scientific reliability, it makes no difference whether the quartz analysis is made from a composite of the operator's five samples or an inspector's single sample because only 0.5 milligrams of dust is analyzed in either instance to determine the quartz content. As a practical matter, of course, it makes quite a difference because of the time and effort required to work with five rather than one sample. 8/

The percent quartz content, as previously indicated, is not used as a standard but only as a factor in the formula for reducing the total respirable dust mass. The object is to keep the quartz exposure within the permissible limit. The fact that a 7% quartz content of a .7 milligram sample might be used to reduce the 2 milligram standard to 1.4 milligrams does not mean that a 49 microgram standard for quartz is being enforced. A simple calculation shows the quartz content of the .7 mg sample would have to reach 14% before it would equal 100 micrograms (.7 mg equals 700 ug X 14% equals 98 ug). The formula, on the other hand, is designed to ensure that the quartz content of the reduced standard (mass) does not exceed 100 micrograms or 0.1 mg quartz/m^3 (1.4 mg/m^3 X 7% equals 0.1 mg/m^3 quartz). Obviously, if the operator is achieving a .7 mg/m^3 concentration of respirable dust he will have no difficulty in complying with the lowered 1.4 mg standard.

8/ It is estimated that the use of the single sample procedure will result in "an annual decrease of about 2 inspector years in sampling". CHS&H Memo 81-183 H.

Accordingly, I conclude that the Secretary has carried his burden of showing that the single shift samples of respirable mine dust in question provided scientifically valid samples (representative samples) of the average concentration of quartz dust in the relevant atmosphere during the shifts in question. The operator's contest of the validity of the pre-compliance samples, i.e., those used to lower the total dust standard is, therefore, denied.

III

The operator claims the violations in question were not "significant and substantial" because there is no probative evidence that exposure of miners to free silica (quartz dust) generated "naturally in mining" is a significant health hazard. The Secretary responded with a report and supporting documentation from the National Institute for Occupational Safety and Health (NIOSH). This report concluded that an "intermittant or continuous" exposure to more than 100 micrograms per cubic meter of respirable quartz dust, regardless of the size of the total respirable dust mass, "constitutes a serious and substantial hazard to the health of miners." (Exhibit 3). 9/

9/ As the Goldberg affidavit and the NIOSH report point out, the operator has failed to understand that the threshold limit of 100 micrograms per cubic meter of air for quartz is not a standard but the resultant of the formula adopted to reduce the 2 milligram standard when the free silica content of an analyzed sample exceeds 5 percent. The 100 microgram limit is a constant that does not vary with the size of the sample analyzed and is used solely as a regulator of the permissible respirable dust mass of 2 milligrams. The purpose is to insure that the concentration of respirable quartz in the atmosphere is maintained at or below 100 micrograms. (footnote 9 continued on page 18)

Based on the expert opinion expressed in the NIOSH report and the accompanying medical literature, the Secretary contends that exposure to high levels of silica dust (100 plus micrograms) in the presence of coal dust results in a synergistic effect that exacerabates the health risk involved in exposure to respirable mine dust. The Secretary argues Congress intended a finding of "significant and substantial" be made whenever an "incipient" health hazard can, on the basis of the best available evidence, be said to pose a significant risk of material health impairment over the long run. Finally, it is claimed that a finding of "significant and substantial" is warranted wherever the fraction of free silica in the mine

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For example, if a single analyzed sample weighs .5 milligrams and the free silica content is 6 percent, the 2 milligram standard will be reduced to 1.6 (10/6 equals 1.6 mg). Thereafter compliance is measured against the reduced respirable dust standard of 1.6 mg, not the threshold limit of 100 micrograms for quartz. The fact that the quartz content of the sample analyzed weighed only 25 micrograms (.5 mg equals 500 ug x 5% equals 25 ug) is irrelevant and does not mean that a 25 ug "standard" is being enforced when the limit is 100 ug. It simply means that since the compliance or enforcement standard is 1.6 mg the actual amount of quartz in the environment may regress to 100 micrograms or 20 percent of the total mass (.5 mg equals 500 ug x 20% equals 100 ug) before the reduced standard (1.6 mg) would be violated. In the cases at hand, it appears the analyzed samples were 1.7 milligrams and contained 11 percent quartz. This means the analyzed sample had 190 micrograms of quartz ((.11) (1.7)) equals 0.19 mg per meter cubed or 190 ug per meter cubed). The enforcement or compliance samples averaged 1.3 mg and 1 mg respectively. This means that in the case of the 1.3 mg sample the quartz content may have been approximately 15 percent (1.3 mg/.19 mg equals 0.146%) and in the case of the 1 mg sample approximately 19 percent (1 mg/.19 equals 19%).

atmosphere exceeds 5 percent of the total respirable dust mass because such a condition can, standing alone, contribute to a serious health hazard, namely silicosis.

As noted, the NIOSH report found that "intermittant or continuous" exposure to any concentration of quartz dust in excess of the established hygientically safe level of 100 micrograms per meter of air cubed and more particularly a concentration of 11 percent (190 micrograms) in a respirable dust mass of 1.7 milligrams "constitutes a serious and substantial hazard to the health of a worker". 10/ (Exhibit 3). The operator offered no fact-specific rebuttal to this evidence. Thus, the matter is before me on the operator's claim that the Secretary's evidence is, as a matter of law, insufficient to establish the violations charged were "of such nature as could have significantly and substantially contributed to the cause and effect" of a mine health hazard. 11/ Section 104(e).

10/ 1.7 milligrams was apparently the weight of the single samples analyzed for quartz (11% x 1.7 mg equals .19 mg or 190 ug). Inasmuch as the compliance samples averaged 1.3 and 1 milligrams, respectively, it appears that the concentrations of quartz involved in the violations charged ranged from 190 to 200 micrograms. This was substantially in excess of the permissible exposure limit value of 100 micrograms.

11/ Although the matters are before me on the parties' cross motions for summary decision, each has the burden of showing the indisputability of the facts which warrant judgment in his favor. Moore's Federal Practice Par. 56.13. The Secretary's evidence clearly establishes that the 100 plus microgram limit is indisputably accepted by the scientific and medical community as the safe limit for exposure to free silica. The operator does not challenge this but claims such an exposure does not constitute a "significant and substantial" health hazard
(footnote 11 continued on page 20)

The NIOSH report is probative of the realtionship between quartz exposure and the severity of the resultant health hazard. Well-reasoned expert testimony and opinion based on what is known and uncontradicted may in and of itself be substantial evidence when first-hand evidence on the question is unavailable. Industrial Union v. American Petroleum Institute, 448 U.S. 607, 707 (1980), Dissenting Opinion; Richardson v. Parales, 402 U.S. 389 (1971). I note that while the NIOSH report and its supporting documentation are not part of the stipulated record the operator, in the face of that report, continues to stand on its cross motion and has offered no evidence to contradict the report. With the matter in this posture, I am free to infer there is no evidence other than the pleadings and supporting instruments

because there is no evidence that the inhalation of quartz dust generated naturally increases the risk of developing silicosis or black lung in either the short or long term. This bald assertion is unsupported by any medical or scientific evidence. It apparently depends upon a claim that an examination of studies conducted in Great Britain concerning the relationship between quartz dust and the development of coal-workers' pneumonocoiosis shows there is no correlation. These studies are unidentified and were not submitted for the record. The NIOSH report, on the other hand, deals specifically with this issue and concludes the weight of reputable scientific and medical thought is that "a key factor in the development of silicosis is the duration of exposure multiplied by dust concentration". (Exhibit 3, Para. 8). The studies submitted by NIOSH, and not disputed by the operator, also show that quartz must be regarded as a possible cause of black lung, "especially where mixed dust exposure may be low, but the proportion of quartz high". (Exhibit 3, Reference 7, p. 1275; Reference 11, pp. 123-125, Reference 14, p. 191).

to be considered, and so need only examine those materials to ascertain whether an issue of material fact exists. S.E.C. v. Am Commodity Exch., 546 F.2d 1361, 1365-66 (10th Cir. 1976); Manetas v. International Petroleum Carriers, Inc., 541 F.2d 408, 414 (3d Cir. 1976); Commission Rule 64. My review of the parties materials leads me to conclude there is no triable issue of fact with respect to the charge that the violations cited were "significant and substantial".

I deal first with the Secretary's claim that any concentration of quartz in excess of the 100 micrograms allowed by section 205, 30 C.F.R. 70.101, is per se a significant and substantial violation.

Silicosis is a condition of massive fibrosis of the lungs marked by shortness of breath. It results from inhalation of silica dust, is dose and time dependent and medically incurable. Only technical preventive measures in the workplace can control or eliminate the problem. A description of silicosis, extracted from a primer prepared for workers, graphically illustrates the disease's progress.

> The main symptom is shortness of breath, at first occurring only during physical activity, but soon appearing after less and less exertion, until eventually the victim is short of breath even at rest. This is caused by many small round lung scars that develop from irritation by silica dust. These hard inelastic scars -- just like those on skin that result from an operation -- make the lungs stiff, so that it takes more work to inflate them with air. The scars also thicken the walls of the air sacs, blocking transfer of oxygen into the blood; tired blood is

> a characteristic finding in silicosis. The area surrounding each scar becomes stretched and distorted, breaking down the normally tiny, delicate air sacs so that they form larger thicker-walled sacs, a form of localized emphysema. Further reaction to the silica may cause scars to join into larger scars; some may occupy the entire lung. This process, progressive massive fibrosis, is frequently accompanied by increasing susceptibility to tubercuolsis and other infections. Finally, the heart, which must pump blood through these stiff, inelastic lungs, becomes weakened and enlarged and fails to pump effectively. 12/

Silicosis is a "continuum" or progressive disease. The amount of silica estimated to be inhaled in 50% of those who die from silicosis is 5 grams. (Exhibit 3, Reference 5). This is about one-half a teaspoon. While there is some uncertainty over the manner in which the disease progresses from its least serious to its disabling stage, it is certain that prolonged exposure above safe limits contributes to the progression. It also appears that a severe stage of the disease may result from brief as well as intermittant or interrupted exposure. (Exhibit 3, References 5, 6). In its most serious form, silicosis is a chronic and irreversible obstructive pulmonary disease that like black lung or in association with black lung can create an additional strain

12/ Stellman and Daum, Work is Dangerous to Your Health, Vintage Books, New York (1973), 168. Only dust containing free (uncombined) silica can cause silicosis. The disease is one of the pneumonoconioses, a group of lung diseases which result from inhalation of excessive amounts of respirable dust in industrial environments such as mining, quarrying, foundrys and textile mills. See, American Textile Mfgrs. Inst. v. Donovan, 452 U.S. 420 (1981).

on cardiovascular functions and can contribute to death from heart failure. While there is some disagreement in the scientific and medical community over the true role of quartz in the development of black lung, the present consensus in reputable medical and scientific thinking is that quartz dust exposure in excess of the established and accepted threshold limit of 0.1 milligrams per cubic meter of air may be an important factor in the development and rapid progression of coalworkers' pneumonoconiosis. In fact, there is no discernable disagreement over the fact that exposure of miners to high concentrations of free silica (in excess of 5%) may, standing alone, or when mixed with coal mine dust trigger over the short or long run, depending on individual susceptibility, adverse pathogenic or fibrogenic reactions in lung tissue. 13/

13/ Contrary to the operator's contention, the statute does not restrain MSHA from acting to prevent irreversible health damage until miners actually suffer the early symptoms of silicosis or black lung. Instead the law is a mandate to reduce the risk of that irreversible damage--especially for those miners who have regular exposure to the causal agent, respirable mine dust. In the present case, MSHA and NIOSH have adequately documented the risk of such damage attributable to continued exposure to quartz dust. The medical evidence shows that the acute symptoms of silicosis alone or in conjunction with black lung (anthracosis) weaken the miner's pulmonary system and increase his or her susceptibility to the adverse effects of subsequent pathogenic exposure. See sections 106(a)(6), (7), 202, 205 and relevant legislative history together with Exhibit 3 and its attached References and Bibliography. For these reasons, I hold MSHA is authorized to categorize as significant and substantial any level of exposure to quartz dust that passes the threshold of the medically permissible exposure level of 100 micrograms.

IV

A series of studies of mining and other dusty occupations in the second decade of the twentieth century revealed that silicosis was a severe health problem in the United States. In 1933, the United Mine Workers of America and the Pennsylvania Department of Labor and Industry surveyed pulmonary disease among anthracite miners. 14/ This study confirmed that the threshold or permissible quartz concentration of a respirable dust mass should not exceed 5 percent.

In 1950 the U. S. Department of Interior, Bureau of Mines, reviewed the literature on dusts, with emphasis on the relationship to dust diseases. Efforts to control industrial dusts have historically relied on the medicolegal principle of dose response. This principle holds there is a systematic relationship between the severity of a response to an industrial dust hazard such as quartz and the degree of exposure. This in turn is based on the concept that the magnitude of toxicity of quartz dust is proportional to its concentration in the total respirable coal mine dust mass. Thus, as the level of exposure decreases there is a decrease in the risk of injury, and the risk becomes negligible when exposure falls below certain tolerable (threshold or permissible) levels or concentrations. (Exhibit 3, Reference 3).

14/ Sayers, Anthraco-Silicosis Among Hard Coal Miners, U.S. Public Health Service Bulletin #221 (Dec. 1935).

Utilizing this principle and concept, the American Conference of Governmental Industrial Hygienists (ACGIH) adopted a formula known as the Threshold Limit Value-Time Weighted Average (TLV-TWA) respirable-mass formula. Under this formula as the percent of quartz increases the allowable total respirable coal mine dust mass is decreased. 15/ This is the type of formula which Congress had in mind in enacting section 205 and from which the Secretary of HEW derived the formula promulgated in 30 C.F.R. 70.101. 42 F.R. 59294 (1977). It is specifically designed to accommodate the 2 milligram limit on the total respirable dust mass in surface and underground coal mines.

NIOSH and the ACGIH continuously review and monitor the toxicity of airborne contaminants to determine the safe concentrations to which most workers can be exposed without endangering health. TLV-TWA's and NIOSH's criteria papers (Exhibit 3, Reference 8) are based on the best available evidence from industrial experience, from experimental human and animal studies, and, when possible, from a combination of the three. 16/ The medical and scientific basis for the

15/ Documentation of Threshold Limit Values, (ACGIH, 4th ed.) 364-365 (1981). The formula was first adopted in 1968 based on work done by Ayer. See, Ayer, H.E., The proposed ACGHI mass limits for quartz: Review and Evaluation. Am. Ind. Hyg. Assoc. J. 1968; 29:336-342; Id. 30:117 (1969).

16/ TLV's Threshold Limit Values for Chemical Substances and Physical Agents in the Workroom Environment (1982), at 2.

quartz limit is carefully documented in the ACGIH's publication entitled "Documentation of Threshold Limit Values". (Exhibit 3, Reference 8). Since the TLV respirable mass formula for quartz dust has been incorporated in an improved health standard, 30 C.F.R. 70.101, it has the force and effect of law.

Applying the formula to the cases in question, the Secretary reduced the applicable 2 milligram standard to .9 milligrams. Thereafter compliance or enforcement sampling showed the lowered standard had been violated. The operator does not dispute this. It is clear that the violations charged did, in fact occur.

Further a preponderance of the evidence shows that for many years the medical and scientific communities have accepted as established fact that the exposure of miners to free silica in concentrations that exceed 5 percent of the total respirable dust mass in their environment poses a significant risk to their short and long term health. 17/ (Exhibits 2, 3).

It is obvious that in enacting section 205 Congress made a conscious decision to call upon the expertise of NIOSH and MSHA and to delegate to them the authority to make a policy determination that would strike a balance between what is and is not the safe upper limit of quartz exposure.

17/ In fact, NIOSH has urged that the limit be reduced to 2.5 percent or 50 micrograms. 42 F.R. 23995 (1980).

They have done that by promulgating the TLV-TWA respirable mass formula for use wherever the free silica in the atmosphere of a single production shift exceeds 5 percent of the total respirable dust mass. All of this was done with prudence and deliberation in a lengthy public rulemaking proceeding. The operator's suggestion that the formula was plucked out of thin air and arbitrarily applied is clearly mistaken.

I find there is an indisputable correlation between the level and duration of exposure of the respiratory tract to free silica and the development of fibrogenic tissue in the lungs. Where, as here, the exposure substantially exceeded the threshold limit for an extended period of time all doubts as to the significance of the risk of a material health impairment must be resolved in favor of the miners. 18/

18/ When Congress enacted section 101(a)(6) of the Act in 1977, it recognized that the validity and enforceability of health standards should be judged by criteria that are different than those applied to safety standards. The Supreme Court has confirmed this. See Industrial Union Dept. v. American Petroleum Institute, 448 U.S., supra, 649, n. 54; American Textile Mgfrs. Inst. v. Donovan, 452 U.S. 490, 512 (1981). Indeed in the Benzene case the Court held that so long as an agency's findings as to the safe level of a toxic or carcinogenic substance or physical agent are supported by a body of reputable medical and scientific thought "the agency is free to use conservative assumptions in interpreting the date . . . risking error on the side of overprotection rather than underprotection". Industrial Union, supra, at 656. It is axiomatic that occupational health legislation is to be liberally construed to effectuate the Congressional purpose. Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980).

This postulate, I find, was recognized by Congress when it defined in section 205 the basic relationship between the level of quartz concentrations that do and do not present significant risks of material health impairment. I further find the Secretaries' complementary determination of the line between the safe and the unsafe while not demonstrable with mathematical nicety accords with the best available medical and scientific evidence. This, I believe, is all that is required. Compare American Textile Mfgrs. Inst. v. Donovan, 452 U.S., supra, 495-504, 509. Indeed in view of the legislative determination that the dose response curve is to be set at a 5 percent concentration in a total respirable dust mass of 2 milligrams (0.1 mg) any attempt to alter that curve and thereby reduce the protection afforded the miners by the existing standard would fall afoul of section 101(a)(9) of the Act unless and until it can be shown that a less stringent standard will provide the same protection. 19/

The operator's reliance on Consolidation Coal Company v. Secretary, 4 FMSHRC 1559 (1982) is misplaced. There the trial judge vacated an S&S charge on the ground the Secretary failed

19/ Section 101(a)(9) provides that "No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard". A rejection of the S&S charge would be tantamount to a finding that exposure to quartz dust above the threshold or safe level is insignificant or de minimis and the risk insubstantial. This would vitiate the deterrent effect of the S&S charge and run counter to the Congressional purpose that underlies section 104(e).

to prove any relationship between the dose exposure and a significant risk to the health of the miners. That deficiency was cured in this case.

A preponderance of the probative medical and scientific evidence in these cases shows there was a measurable relationship between the concentrations of respirable quartz found and the pulmonary disorders of miners regularly exposed to such concentrations. There is therefore substantial evidence to support the conclusion that the concentrations in question "could be a major cause of a danger to . . . health". Secretary v. National Gypsum Company, 3 FMSHRC 822, 827 (1981).

I am mindful that the statute does not require that an exposure to fibrogenic concentrations of quartz dust present an imminent health hazard, only a "reasonable likelihood of an . . . illness of a reasonably serious nature" during a miner's normal working life as the result of such exposure. National Gypsum, supra, 828. It is undeniable that silicosis is an illness of a "reasonably serious nature". Further, the undisputed medical and scientific evidence shows that even intermittant exposure creates a "likelihood" or possibility that a one-time (single shift) exposure could lead to a serious health impairment or functional disability. Indeed, unless the threshold limit is to be rendered meaningless it must be accorded the status of the determinant between what is and is not significant and substantial. A statute may

not be construed to impute to Congress a purpose to paralyze with one hand what it sought to promote with another.

V

Section 101(a)(6) of the 1977 amendments to the 1969 Coal Act adopted almost in haec verba the language of section 6(b)(5) of the Occupational Safety and Health Act. 20/ Under section section 101(a)(6), the validity of procedures and standards designed to attain "the highest degree of health and safety protection for the miner" are to be judged by whether the Secretary has shown by the "best available evidence" that "it is more likely than not" that the permissible exposure limit (100 plus micrograms) presents a significant risk of material health impairment. Industrial Union v. American Petrol. Inst., 448 U.S. 607, 653 (1980). This standard constitutes a recognition by Congress of special problems in regulating health risks as opposed to safety risks. Id. at 649, n. 54; American Textile Inst. v. Donovan, 452 U.S. 490, 512 (1981). As the Court noted, in the case of safety hazards the risks are generally immediate and obvious, while in the case of health hazards the risks may not be apparent until

20/ The only difference was the omission of the "feasibility" requirement found in the first sentence of section 6(b)(5). A "feasibility" requirement is, however, to be found in the third sentence of section 101(a)(6). The operator does not claim that the 100 microgram standard is technologically or economically infeasible.

a worker has been exposed for a long period of time. 21/

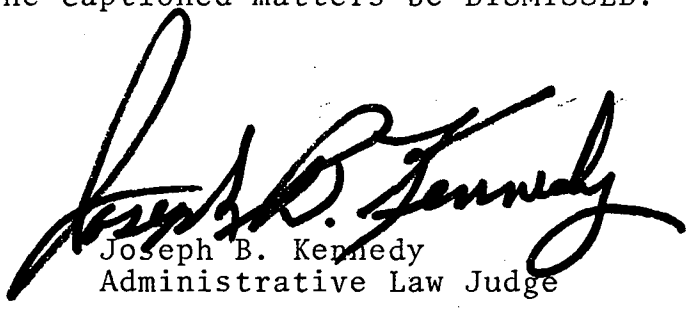
In both the Benzene and Brown Lung cases, the Court took notice of the fact that to protect workers from material health impairment, a regulatory agency must rely on predictions of possible future events and extrapolations from limited data. Industrial Union, supra, at 655-656; American Textile Mfgrs., supra, at 495-505, and n. 25. This does not mean that MSHA is clothed with unreviewable discretion. What it does mean is that MSHA's mandate necessarily requires it to act, even where information is incomplete, when the best available evidence indicates a serious threat to the health of miners. At the same time, to support a finding that a health hazard is significant and substantial MSHA has a duty to pinpoint the factual evidence and the policy considerations upon which it relied. This requires explication of the assumptions underlying predictions and extrapolations and of the basis for its resolution of conflicts and ambiguities. Thus, as I view the matter a Commission trial judge must examine not only MSHA's factual support, but also the "judgment calls" and reasoning that contribute to its final decision. American Federation of Labor, ETC. v. Marshall, 617 F.2d 636, 651 (D.C. Cir. 1979), affd. 452 U.S. 490 (1981); Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 475-476 (1974).

21/ Congress wanted the Secretary to protect miners not only against known harms, but also against risks of harms not wholly understood. Comparable provisions in the OSH Act have been construed to embrace protection from the "subclinical effects" of a toxic substance. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1251-1252 (D.C. Cir. 1980). Use of the S&S charge to deter violations is obviously in furtherance of MSHA's authority to control not only actual symptoms but to prevent early symptoms from becoming chronic.

This I have, to the best of my ability, endeavored to do. And having done so, I conclude that the latest and best scientific and medical evidence available supports the view that the violations in question were significant and substantial. Accordingly, I find the report and documentation supplied by the Secretary and NIOSH are legally sufficient to support the S&S charges.

Order

The premises considered, it is ORDERED that the contest of the citations in question be, and hereby are, DENIED. It is FURTHER ORDERED that for the violations of 30 C.F.R. 70.101 found the operator pay a total penalty of $198 and that subject to payment the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1983

ROGER L. HALL, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket Nos. VA 79-128-D VA 80-170-D
B & B MINING, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

This proceeding involves two complaints of discharge, discrimination, or interference filed by Roger L. Hall against B & B Mining, Inc., pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. The complaint filed in Docket No. VA 79-128-D alleges that respondent discharged Hall on or about June 4, 1979, in violation of section 105(c)(1) of the Act. Respondent alleges that it discharged Hall because he missed 2 or more days of work without obtaining permission to be absent, whereas Hall contends that he was discharged because he requested that the Mine Safety and Health Administration conduct a special inspection of respondent's mine. Hall requested an immediate arbitration hearing with respect to his discharge of June 4, 1979, and, as a result of that hearing, Hall was reinstated to his prior position and awarded back pay.

The complaint filed by Hall in Docket No. VA 80-170-D alleges that respondent again discharged him on or about April 7, 1980, in violation of section 105(c)(1) of the Act. Hall claims that respondent's mine was closed for 1 week and 2 days. When the miners were called back to work, Hall alleges that he asked that the mine be inspected before the miners returned to work. The primary reason for requesting the inspection related to Hall's claim that respondent was using 12-inch roof bolts which had been falsely labeled as 36-inch bolts. Management denied Hall's request. Hall then asked for 2 days of personal leave which, Hall says, were granted. Hall then claims that when he returned to work, he was discharged. Respondent's answer to the complaint in Docket No. VA 80-170-D alleges that Hall was discharged for illegal picketing activities.

These cases were first assigned to Administrative Law Judge James A. Laurenson who convened a hearing in Abingdon, Virginia, on November 5, 1980, to consider the issues raised by the complaints. At the hearing, counsel for respondent stated that respondent had filed a petition in bankruptcy on February 21, 1980, and that the filing of a bankruptcy action automatically stays all proceedings against a corporation until a party has obtained permission from the bankruptcy court to proceed. Judge Laurenson ruled at the hearing that he was required by the provisions of 11 U.S.C. § 362 to continue the cases until counsel for complainant had obtained permission from the bankruptcy court to proceed.

Subsequently, the counsel who had represented respondent at the hearing on November 5, 1980, withdrew as counsel in this proceeding because a dispute among respondent's stockholders had created a conflict of interest which made it improper for him to represent respondent in this proceeding.

Judge Laurenson rescheduled a hearing after permission to proceed had been obtained from the bankruptcy court, but that hearing had to be canceled because of budgetary constraints. Judge Laurenson again scheduled the cases for hearing, but that hearing also had to be canceled when Judge Laurenson became one of the judges who were subject to a reduction in force.

The cases were thereafter reassigned to me and I issued a prehearing order on February 12, 1982, requesting that the parties provide answers to basic factual and procedural questions by March 12, 1982, but the time for answering had to be extended so that respondent's newly assigned counsel could obtain records from the former counsel who had withdrawn. Thereafter, additional extensions of time had to be granted because complainant's counsel was forced to undergo surgery for a serious back problem which involved a long period of post-operative recuperation.

The cases were finally scheduled for hearing on January 11, 1983, in Abingdon, Virginia. Before a formal hearing had begun, I asked counsel for the parties if they had discussed settlement. Complainant's counsel stated that he had not tried to settle the cases with the lawyer who was now representing respondent, but that he had tried unsuccessfully to settle the cases with respondent's former attorney. Counsel for respondent indicated that he was quite willing to discuss settlement. Therefore, the parties were given an opportunity to discuss settlement. Shortly thereafter, counsel for complainant advised me that the parties had reached a settlement agreement under which respondent had agreed to pay complainant an amount of $1,300 with respect to the complaint filed in Docket No. VA 79-128-D and an amount of $700 with respect to the complaint filed in Docket No. 80-170-D, or a total of $2,000 for both cases, including attorney's fees.

I find that the settlement agreement should be approved. Complainant had obtained a job with another employer after his second discharge and there was not a long period for which back pay could have been required even if a hearing had been held on the merits and an outcome favorable to complainant had resulted. Additionally, in view of the fact that respondent is now involved in formal bankruptcy proceedings, the usual relief of reinstatement of complainant to his former position would not be possible.

WHEREFORE, for the reasons hereinbefore given it is ordered:

(A) The parties' settlement agreement is approved.

(B) Within 30 days from the date of this decision, the complaint filed in Docket No. VA 79-128-D shall be considered satisfied and dismissed upon payment by respondent of $1,300.00 to complainant and the complaint in Docket

No. VA 80-170-D shall be considered satisfied and dismissed upon payment by respondent of $700.00 to complainant. The total payment of $2,000.00 includes allowance for attorney's fees.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. PENN 82-63 A.O. No. 36-02695-03001 F E24
v.	:	Docket No. PENN 82-33 A.O. No. 36-02695-03012 F
AUSTIN POWDER COMPANY, DOAN COAL COMPANY, Respondent	:	Doan Strip Mine

DECISIONS

Appearances: Robert Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner; William M. Hanna, Esquire, Cleveland, Ohio, for the respondent Austin Powder Company; Robert M. Hanak, Esquire, Reynoldsville, Pennsylvania, for the respondent Doan Coal Company.

Before: Judge Koutras

Statement of the Proceedings

These proceedings involve proposals for an assessment of civil penalties brought by the petitioner against the respondents pursuant to § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978), for three alleged violations of 30 C.F.R. § 77.1303(h). The citations were the result of a blasting fatality which occurred at the Doan Strip Mine on July 30, 1981, and a resulting MSHA accident investigation with regard to that fatality. One of the citations was issued on July 31, 1981, and was served on the respondent Doan Coal Company, the operator of the mine in question, and the other two were issued on July 31 and August 6, 1981, and were served on the respondent Austin Powder Company, an explosives company who MSHA claims was performing blasting activities on the mine property.

The cases were heard in Pittsburgh, Pennsylvania, and all parties appeared and were represented by counsel. All parties were afforded an opportunity to file posthearing proposed findings, conclusions, and briefs. MSHA and respondent Austin Powder filed post-hearing arguments, but respondent Doan Coal Company did not, but has opted to join the arguments advanced by Austin Powder. All arguments presented by the parties, including those made at the hearing on the record, have been considered by me in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.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. Commission Rules, 29 CFR 2700.1 et seq.

Issues

The issues presented in these proceedings include (1) whether the named respondents have violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against each respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Additional issues, as stated by petitioner MSHA in its post-hearing brief, are as follows:

1. Do the facts in this case support the conclusion that Austin Powder performed services at the Doan Strip Mine and therefore is liable under the Act for any violations resulting from the actions of its agents? Can Austin Powder limit its liability under the Mine Act pursuant to its service contract with Doan Coal?

2. Is the concept of strict liability applicable to the alleged violations of 30 CFR 77.1303(h) at issue?

3. On July 30, 1981, were the miners at the Doan Strip Mine given ample warning that a blast was about to occur?

4. If the violations of 30 CFR 77.1303(h) did occur, were they caused by the negligence of either Austin Powder and/or Doan Coal?

The issues, as stated by respondent Austin Powder Company in its post-hearing brief, are as follows:

1. No violation of 30 C.F.R. § 77.1303(h) in fact occurred.

2. Austin Powder was not, at the time of the alleged violations, and is not now, an operator, agent, or independent contractor within the meaning of the Act, and is not subject to the jurisdiction of MSHA with regard to the actions and events alleged in this proceeding.

3. All individuals allegedly committing violations were, as a matter of law, not employees or agents of Austin Powder at the time of the alleged violations.

4. The regulation which Austin Powder is charged with violating is unenforceably vague and ambiguous, as applied to the facts here.

Discussion

On Thursday, July 30, 1981, a fatal blasting accident occurred at the Doan Coal Company's strip mine, No. 1 Pit (stock pile area). Dennis Alvatroha, a laborer employed by Doan Coal Company, was observing the blasting operation from a stock pile, and while seated at, or running from that location, was struck by flyrock and other debris from the blast. The actual blasting work was being performed by Austin Powder Company, in the person of a licensed blaster, Jeffrey Lucas and his crew, and the blasting work was performed at the specific request of Doan Coal Company, who had no experienced blasters of its own. MSHA conducted an investigation of the accident, and at the conclusion of same issued the three citations in question. All of the citations charge the named respondents with violations of mandatory safety standard 30 CFR 77.1303(h), which provides as follows:

> Ample warnings shall be given before blasts are fired. 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.

The citations which were issued in these proceedings were issued after the investigation conducted by MSHA to determine the facts and circumstances surrounding a fatality which occurred when a miner was struck by flyrock during blasting of overburden. None of the conditions or practices cited as alleged violations were actually observed by the inspectors, and they issued the citations on the basis of information which came to their attention during the investigation. Two of the citations served on respondent Austin Powder Company by MSHA Inspector Lyle F. Bixler are as follows:

Section 104(a) Citation No. 1041342, July 31, 1981, which states the following conditions or practices:

> All persons were not cleared and removed from the blasting area and suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting at the No. 1 Pit in that the contracted Austin Powder Co. blaster, Jeffery A. Lucas stated during testimony that flyrock fell across him and up to 30 feet behind him while he was detonating a charge. This citation will not be terminated until all persons are instructed on the hazards of flyrock. This citation was issued during an investigation of a fatal accident.

Section 104(a)-107(a) Citation/Order No. 1041345, August 6, 1981, which states as follows:

> The proper warning was not given by the contract blaster Jeffery A. Lucas, Austin Powder Co., prior to detonation of a shot at Pit 010 of Doan Coal Co. according to the posted requirements. This is a violation of § 77.1303(h) Part 77, 30 CFR. The blast signals which were posted at the mine entrance were: 3 ten second signals, 5 minutes before blasting and short pulsating signals 1 minute before blast, all clear, 1 prolonged 30 second blast (air horn) according to testimony given during the investigation of a fatal blasting accident that occurred on 7/30/81 Pit 001, Doan Coal Co., the signal given was three blasts (air horn) that were sounded 30 seconds to 1 minute before the shot was detonated. This Order will not be terminated until this unsafe practice is eliminated by the employees being properly instructed on the safe procedures of blasting and such procedures are observed by an authorized Representative of the Secretary at Doan Strip mine I.D. 36 02695.

The third citation was served on the respondent Doan Coal Company by MSHA Inspector Michael Bondra, on July 31, 1981, and the conditions or practices cited are as follows:

> All persons were not cleared and removed from the blasting area and suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting at the No. 1 Pit (001) in that Dennis Alvatrona, laborer was fatally injured by flyrock when blasting was done. This citation was issued during a fatality investigation and will not be terminated until all persons are instructed on the hazards from flyrock when blasting is done and remove themselves to a safe area. Dave Doan was Supervisor.

Testimony and evidence adduced by MSHA

Jeffrey A. Lucas testified that he is employed by the Austin Powder Company as a licensed blaster for approximately a year and a half, and that prior to that time he worked as a laborer helping on shots and loading trucks. He was licensed by the State of Pennsylvania at the time of the shot in question on July 31, 1981, and he gained his experience as a blaster while working part time with Austin Powder while he was in school. He stated that he was faimilar with Doan Coal Company's strip mining operation, and he confirmed that he went to the mine site on July 30, 1981, for a "shot", and he did so after being requested to go there by Doan Coal. He stated that the mine site is some 20 to 25 miles from his office, and that prior to the shot in question he had been at the Doal strip mine four or five times a week with other blasters. During 1981, he spent 50% of his work time at the Doan strip mine performing blasting, and that he usually spends from two to five hours a day there, or as long as it takes to get the job done (Tr. 23-26).

Mr. Lucas stated that when he goes to the Doan strip mine he does so in response to a specific telephone or other request from Doan. He has a two or three man crew who assists him during the blasting operation, and he is in charge of his crew. He gives them their work assignments, and depending on the job, two or three vehicles are taken along with the crew. The vehicles are driven off mine property at the end of the day and are not left there. He explained that the first thing he does when he arrives at the mine site is to locate the shot area so as to determine whether the drilling has been completed. The site of the shot is given to him by Doan Coal, and his job is to load and shoot the shot. This entails the wiring of the shot, and one of his drivers will notify Doan Coal's employees where the shot will be fired, and this is usually done approximately ten minutes before the shot is fired so that everything is shut down (Tr. 26-29).

Mr. Lucas stated that blasting signs are posted "coming into" the Doan property, but not at every shot blasting area. After the shot is wired and the circuits tested, all mine machinery is shut down, and it is the usual practice for one of his truck drivers to sound a signal. The usual procedure calls for him to tell the driver to sound a signal, and he does so by means of an air horn. At the time of the shot in question, the signal used was three 20-second blasts immediately prior to the shot. The siren would be sounding for at least a minute prior to the blast, but prior to that signal, no horns would be sounded. He believed this was enough time for anyone to get out of the area because the area is actually cleared before these signals are given. He explained that it was his responsibility to clear the blasting area, and he indicated that he did so by notifying everyone initially by radio and visually. The radio notification is usually given 10 to 15 minutes before the actual detonation, and everyone at the mine who has a radio is on the same frequency. Those not in radio contact are notified personally (Tr. 29-33). However, he acknowledged that prior to a shot he does not actually ascertain what every employee on mine property happens to be doing before he notifies them all individually by telephone, but that a call is made to the mine superintendent's office (Tr. 26).

Mr. Lucas defined the "blasting area" as "an area that is safe when the blast goes off" (Tr. 37). He indicated that this area would vary depending on the size of the shot and how it is loaded, and the terrain. He also indicated that he has "a good idea" as to what this area is before blasting (Tr. 38). He stated that since the events of July 30, 1981, the signalling procedure has changed so that five minutes before any shot is fired, three 20-second blasts of a horn are sounded, and one minute prior to the actual shot there is a one minute blast (Tr. 29). He examined a photograph (exhibit G-7-k), of a sign, and he indicated that he believed, but was not sure, that such a sign was posted on July 30, and that it calls for three 10-second signals five mintues before detonation and short pulsating signals one minute before the blast, and that it also calls for an "all clear" signal (Tr. 41). He believed that an all-clear was given, but again was not sure since he indicated that the actual signalling responsibility is delegated to his truck driver (Tr. 41).

Mr. Lucas confirmed that he detonated the blast in question, and that he was positioned about 300 feet away when he set it off. He indicated that he was positioned "behind the blast", and he explained that the blast is put into an open space or cut, and that the blast "is going the opposite direction from me" (Tr. 44). He examined several exhibits, but could not state where he was located at the time of the actual shot, but did state that it was "in from the scale house" (Tr. 47).

Mr. Lucas stated that after the shot was wired, five to ten minutes elapsed before it was actually shot, and that he observed no one inside the blasting area during this time. He further defined the "blast area" as "anywhere that you suspect rock might fall", and he conceded that he was responsible to make sure that anyone in that area is in a safe location or protected (Tr. 50). He confirmed that he spent three hours at the Doan mine on July 30, and that he is paid by Austin Powder Company (Tr. 51).

On cross-examination, Mr. Lucas stated that when he arrived at the blast scene, and before setting off the shot, he secured the area by making a determination that no one was in the foreseeable danger area of the blast, and as far as he knew the area where the victim was found had been cleared. Part of the procedure for securing the area included calling the mine office over the telephone and his truck driver went to the scale house to notify persons of the blast. All mine equipment was shut down prior to the blast, and while he did not personally hear the radio announcement, he is sure it was made (Tr. 51-52). He indicated that Austin Powder's policy is to give radio warnings of impending blasts, and that policy is still in use. This is in addition to the sounding or air horn signals and personal contact (Tr. 55). He secured the area on the day in question and he did not see the victim when the area was secured.

Mr. Lucas confirmed that as a result of the accident, the State of Pennsylvania suspended his blaster's license for 90 days, and it was restored after he took a test before the 90 days were up. He does not

know the specific reasons for the suspension, but he confirmed that he had a license when the blast in question was set off (Tr. 58).

Mr. Lucas stated that a dragline was located some 75 feet from the shot, but that several loaders and the scale house were three to four hundred feet away and he could not see them from where the blasting took place (Tr. 60). In his view, the loaders and scale house were out of danger, but whether they were in the "blast area" would depend on the definition of that term. The drag line was shut down and the operator was secure before the blast, and the other locations would normally be advised personally to shut down and secure (Tr. 62).

Mr. Lucas stated that at the time of the blast they were using Austin 80% extra gel dynamite and Austinite 15 ammonium nitrate blasting agents and that 24 holes were charged to a depth of some 45 to 50 feet. Each hole contained approximately 400 or 450 pounds of explosives, but each hole was detonated on a delayed basis, and did not go off all at once (Tr. 64). When asked how one determines what is a safe distance from such a shot, he stated that "there is no set formula for figuring the safe distance, * * * it is pretty much from experience you know where the shot is going" (Tr. 66). He also indicated that a drill rig, a shot truck, and a driller's maintenance truck were all present near the blast site and that these constituted suitable blast shelters. If one is at a safe distance, there is no reason to crawl under these vehicles. The shot was triggered electrically, and he confirmed that during 1981 he was at the Doan Coal site three or five times a week performing blasting, and that 20 to 40 holes are usually charged at any given time (Tr. 69). He also confirmed that he is paid by Austin Powder Company, and that Austin Powder also provides and pays for other benefits such as vacation and insurance (Tr. 70). He does not belong to any union, and has performed blasting work for other strip mine operators similar to the work performed for Doan (Tr. 71).

Mr. Lucas stated that he was "surprised" by the blast of July 30, in relation to other shots that he had in the same cut, and a lot more fly rock came out of the holes than he had expected. Some rock weighing approximately a pound or so, and four inches diameter landed near him, but most of the material was mud. He and his crew were around the truck, but no one was under it, and he was 20 feet from the truck while the closest rock fell about six feet from where he was standing. Everyone had hard hats on, and no none from his crew advised him that any rocks had fallen near where they were standing (Tr. 73). He confirmed that he was standing some 300 feet from the blast itself, and he stated that the charged holes were vertical and that the shot went out from the open cuts that had been charged (Tr. 74). Mr. Lucas stated that Doan Coal Company does not have any licensed blasters, and since he has been working at the Doan Strip Mine they have never had any licensed blasters of their own (Tr. 74-75).

Theodore R. Williams, Blasting Inspector, State of Pennsylvania Department of Environmental Resources, testified that is a qualified blaster, and he described the types of blaster classifications and the training required by the State. He stated that warning signs concerning blasting are usually posted at the entrance to the job site, and on occasion he has observed such a sign posted in the blast area itself. The purpose of such signs is to warn people entering the mine site or to control the blasting area. He believed that information on the warning signs should be the same as the actual warning signals given. He identified exhibit G-7(k) as a photograph of a warning sign showing the blasting signals which are to be used, and he believed the exhibit depicted a proper or adequate warning system. He believed it was adequate since the signal system depicted gives a signal five minutes before any blast, provides for pulsating blasts before the actual blast, and this sequence would be ample time for anyone to get clear of the blast. He did not believe that a one minute signal before the actual blast would be adequate (Tr. 84-93).

On cross-examination, Mr. Williams conceded that in a noisy strip mining operation where a horn blast signal possibly could not be heard, he would personally contact people to warn them of any impending blast (Tr. 95). He also agreed that personal contact or radio contact would be sufficient notice to employees of any blasting. He also agreed that means other than a posted sign would be adequate notice to employees in any given circumstances (Tr. 96-97), and he explained this further when he stated (Tr. 98-99):

> Q. So, what is posted on a sign is not determinative, is not adequate notice in a particular factual situation?
>
> A. The sign itself should be proper as far as signals; however, to have communication with your employees with equipment on the site, there is no doubt in my mind that this would have to do with communication to the operator, however, the signals should be sounded properly for people on the job that are not on equipment and otherwise.
>
> Q. The important factor is to make sure that those employees do have notice that a blast is about to take place, right?
>
> A. This is my concern. I think they should be notified.
>
> Q. The method by which those employees are notified will carry from one situation to another, depending on the factual circumstances?

A. Definitely.

Q. You cannot say here as based on your experience as a blaster that there is one particular method which is mandated to be followed in all instances everywhere?

A. No.

Mr. Williams also indicated that any posted sign signals should be followed, and ever though hand signals or radio communications are used, the posted warning signals should definitely be followed (Tr. 99).

David Potempa, testified that at the time of the blast in question he was employed by Doan Coal doing "a little bit of everything", but that he is no longer employed there. He was at the mine site at the time of the blast, and he stated that he arrived there in a pick-up and went to the scale house. He arrived at the mine property "about less than five minutes before the blast" and was on the main road and driveway to the scale house. No one told him to take cover, but he knew there would be a shot, and when he got out of his truck he went to the scale house to get a can of pop, but he did not go there for the specific purpose of getting out of the blast area (Tr. 100-102).

Mr. Potempa stated that the scale house is a "good 300 to 400 feet" from the area where the blast was fired, and when asked whether he believed the scale house is a designated "safe area", he replied "it depends on what you are hiding from". He believed it was probably safe from any blasting, but indicated that the scale house was not posted with any blasting warning signs. He also stated that a member of mine management, in the person of the owner's grandson, told him to go to the scale house. In addition, Mr. Potempa stated that he heard the blast warning signals as soon as he pulled up in front of the scale house and he shut off the pick up. The blast went off "probably less than a minute after the last warning signal was given, and he was in the scale house when the blast went off. He looked out the window and saw "all kinds of rock and debris thrown all over the place", but none hit the scale house, and none came close enough to cause any danger (Tr. 105).

Mr. Potempa stated that when the blast was over, he drove his truck to the stockpile area which he described as being "off to the right" of the blast area, and while he was there he observed the accident victim lying on the roadway leading to the stockpile. His hard hat was off, and he was at the edge of the stockpile. Mr. Potempa stated that he did not believe the accident victim's body was "inside the blasting area", which is described as "probably about 300 feet away", but that the victim was found "probably close to 300 feet" (Tr. 107).

Mr. Potempa testified that he was familiar with the posted blasting warning signs which were on the mine property, and he indicated that the signals given on the day in question were the "same type as the sign", but he could not specifically recall how many signals were sounded because he did not pay that much attention to it because "it is really

like an everyday thing to me" (Tr. 107). The roadway he used to get to the scale house was not barricaded, and he knew that there would be a blast because he observed the trucks coming on to mine property and he also saw the victim earlier in the day. He knew when the blast was going off when he drove up to the scale house and heard the warning signals go off five minutes before the blast, and one minute before it was actually detonated. He believed that he received adequate warning of the blast and he also believed that he was in no danger because he was not in the blast area (Tr. 109). He observed no trucks driving around immediately before the blast, and he confirmed that he saw rock into and around the coal pile where the victim was found. He also confirmed that he could not see the blaster from the scale house (Tr. 110).

On cross-examination, Mr. Potempa confirmed that he knew the accident victim, and that when he first discovered him he was about 300 feet from the actual location of the blast. He knew that the victim was working near the stockpile on a crusher, and his normal work station would be "the back part of the stock pile" (Tr. 112). His normal work station was farther from the blasting area than where he found him (Tr. 113).

Mr. Potempa stated that he went to the scale house for some shovels for Mr. Doan's grandson Mike Stiles, and the scale house was located "on the other side of the hill from the blasting area". He heard no call over his pick-up radio because he had turned off the motor and was outside the truck. He also stated that "there wasn't a bit of danger over there" (Tr. 114). He described his normal procedure for shutting down prior to a blast as follows (Tr. 116-118):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: Had you just been out on the road when you heard the last one minute signal prior to the blast, what would you have done?
>
> THE WITNESS: I would have stopped and shut the pickup off.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Why would you have shut the pickup off?
>
> THE WITNESS: It is a natural thing. We always do it when they are going to shoot. If you are within so much range, because you know, the vibration, well, not too much in the pickup, but the dozer when it is run, it will crack the crank on it.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: You are saying regardless of where you are on the mine site, if there is a blast, the normal procedure for all equipment is to stop it even though you are outside the danger zone?

THE WITNESS: Yes, it depends what job you are on or how close you are, but everyone shuts down.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Back up a little bit. Prior to this particular blast, had you been on the mine property when other blasts were shot by Austin Powder?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: And is the procedure that you followed on those other occasions approximately the same as on this date?

THE WITNESS: Right, right.

MSHA Inspector Michael Bondra confirmed that he conducted an investigation of the blasting fatality on July 31, 1981, and he identified exhibit G-4 as a copy of the report he prepared. He stated that he measured the distance from the actual blasting location to where the accident victim was last seen and it was 223 feet. He observed large rocks and clay in the area where the victim was found, and his investigation disclosed that the victim was struck by a single large rock weighing approximately 39 pounds (Tr. 125-129).

Mr. Bondra stated that based upon interviews and measurements, he determined that there was a clear view from the area where the victim was last seen and the location where the blast occurred. The distance from the shot to the blasting portion was 300 feet, and Mr. Bondra believed that if the blaster were looking where the victim was last seen he should have seen his yellow hard hat (Tr. 130).

Mr. Bondra stated that the distance from the blasting location to the scale house was 400 feet, and that the house did not have a sign on it designating it a "safe area". In his opinion, the persons inside the house would not have been protected from a rock the size of the one which struck the victim in the event that it hit the roof (Tr. 131). The scale house had a metal roof and framed material, and he believed the rock would have gone through (Tr. 132).

Mr. Bondra identified a sketch which he made as part of his investigative report, and in which he labeled an area 100 feet long by 100 feet wide as the "blasting area". He stated that this was a mistake, and that this area should have been labeled "blasting location". The "blasting area" is defined by section 77.2, and it means "the entire area around the blasting location where the blasting is being done shall be cleared in which concussion or flyrock material can reasonably be expected to cause injury" (Tr. 136).

Mr. Bondra believed that the victim, the scale house, and the blaster and his crew were all within the "blasting area", and he reached this conclusion because flyrock and debris from the blast went beyond the areas where they were all located (Tr. 137).

Mr. Bondra testified that during his investigation, a truck driver (Martz) from another company who had just driven to the scale house told him that he saw the victim near the stockpile prior to the blast. Mr. Martz knew that there would be a blast when he came to the scale house (Tr. 143). Mr. Bondra confirmed that he observed a blast warning signal sign posted on the property, and he also confirmed that such a sign is not required by any MSHA standard (Tr. 145).

Mr. Bondra confirmed that he issued the citation charging a violation of section 77.1303(h), and he did so because the victim, the blaster, his crew, and the people in the scale house were not removed from the blasting area. He determined there were no suitable shelters by the scale house, and he considered the violation to be very serious. He issued the citation to Doan Coal because as the mine operator, Doan has the responsibility to comply and cannot delegate to this to an independent contractor. He believed that Doan should have been aware of the fact that all of the individuals mentioned were in the blasting area, and Doan should have seen to it that they were all removed. When asked what he believed to be a "safe haven for miners", he replied "out, say 500 feet" (Tr. 148-150).

Mr. Bondra confirmed that he interviewed loader operator Bloom who told him that he had received the blast warning over the radio and that he in turn gestured to the accident victim. The victim then started to go back to the scale house, and Mr. Bloom assumed that's where he was going (Tr. 153). Mr. Bloom told Mr. Bondra that his motion to the victim was to "shut down your equipment" (Tr. 155).

Mr. Bondra believed that Mr. Bloom should have seen to it that the victim went to a safe place, and that his negligence in failing to do so is Doan Coal's negligence, and that Doan Coal should also have blocked the road to and from the scale house and posted someone there to secure the area (Tr. 156, 160).

On cross-examination, Mr. Bondra testified that he is not a licensed blaster and is not trained in the use of explosives or in geology. He stated that his opinion that 500 feet would be a "secure area" was "an arbitrary stab" on his part, and that he does not have the background in explosives to say it is safe or unsafe (Tr. 161).

Mr. Bondra conceded that his investigation report abstract, at page 4, contained a statement that "the accident occurred when Dennis Alvatrona went to observe blasting operations" (Tr. 166). Mr. Bondra also conceded that it was his reasonable belief that the victim, Mr. Alvatrona, walked in to view the blasting operation" (Tr. 167). He also conceded that Mr. Alvatrona must have been notified of the impending blast because he went in to view it (Tr. 167).

Mr. Bondra confirmed further that he has never had a blaster's license, has never taken a blaster's test, had had no training or education in blasting, has never read any blasting literature, and does not hold himself out as an expert in explosives or blasting (Tr. 171).

Mr. Bondra confirmed that at the time he conducted his investigation none of the people he interviewed were under oath, they were not given an opportunity to sign any statements, no transcript was prepared, and the persons interviewed did not review their purported statements. He also confirmed that his accident report was compiled from notes made by him and others, that the purported statements made by individuals interviewed are not verbatim (Tr. 171-173).

Mr. Bondra stated that a piece of equipment can be a blasting shelter, and he confirmed that a drill rig was near the blaster. He also stated that the rig would be a sufficient shelter if the blaster were under it or very close to it(Tr. 182). He believed that the blaster should be in a safe position in a sheltered area so he can jump back where no flying material will strike him (Tr. 182). He indicated that his investigation did not determine where the trucks were located, and as far as he is concerned the only safe area within the 500 blast area was under the drill rig (Tr. 185).

Mr. Bondra confirmed that there would be no violation if the blasting crew were under the trucks, and while he also confirmed that he heard Mr. Lucas testify that his crew took cover by or under the trucks, he stated that he was not aware where the crew was (Tr. 188).

In further response to questions from the bench, Mr. Bondra stated as follows (Tr. 193-196):

> Q. You were influenced by the fact that you had some testimony by the blaster himself that the debris went sailing over his head, right?
>
> THE WITNESS: Yes.
>
> Q. You came to the conclusion that these guys were in the blasting area and were not safe and were exposed to a hazard, right?
>
> THE WITNESS: In a sense, yes.
>
> Q. Well, I mean that is a fact, is it not?
>
> THE WITNESS: Yes.
>
> Q. Had the fact shown that no debris went as far as the scale house and no debris went as far as the blaster, then those two people would not have been in the blast area, would they have, in your opinion? You would not have concluded that in your report?
>
> THE WITNESS: According to the definition of blasting area, no.

Q. So, the definition of blasting area that you applied in this case was directly related to the force of the blast and how far the material went, right?

THE WITNESS: In this case.

Q. In any case? What I am suggesting to you, sir, is that the only way a blaster can guarantee what the blasting area is is to blast first to find out how far the debris goes, and then blast again to make sure everybody is out beyond that; is that correct?

THE WITNESS: No. Would his experience tell him what the blast area is?

Q. Did you hear Mr. Lucas' testimony in this case that based on his experience he felt he had his men removed from the blasting area; and, later on in his testimony, he said that this was an unusual blast?

THE WITNESS: Was that an opinion?

Q. Well, do not the regulations put the responsibility on the blasting man to determine what a reasonable distance is?

THE WITNESS: Yes.

Q. I am trying to determine what is the blasting area. What if the blaster came to you and said, Mr. Inspector, I would like you to give me your opinion of what you believe the blasting area is. I have 24 holes loaded, and we are ready to shoot. Before I shoot, I want to make sure I am in compliance with the standard. I need some technical advice from you, and I would like you to tell me how far I have to remove these guys, my crew, to make sure that none of them are hurt by flying debris. What would you tell them, or what would you in a position like this advise him?

THE WITNESS: I am not really in a position, but the State has a ruling of 500 feet, and we have accepted that for a long time.

Q. The State has what?

THE WITNESS: They have a rule in effect approximately 500 feet. They have issued that situation, and I think -- I don't know how -- like I said, I'm not a state inspector.

Q. The State has some specific standard that has set down in some kind of regulatory language what would be a safe distance from a blast?

THE WITNESS: Not in the regulations, I don't think.

MSHA Inspector Lyle F. Bixler, confirmed that he was at the mine on July 31, 1981, to assist in the accident investigation. He stated that he has underground blasting experience, and he indicated that a sketch labeled "Doan exhibit 4" fairly depicts the area he observed on July 31, except for the presence of a crusher near the stock pile. He indicated that the distance from the blast to where the victim was sitting was 223 feet, and that the distance from the blast to where the blaster was located was 300 feet (Tr. 204-208).

Mr. Bixler confirmed that he issued a citation to the Austin Powder Company, exhibit G-2, and he did so because of MSHA's policy to serve both the contractor and mine operator when their personnel are involved. He believed that Doan Coal Company depended on Austin Powder to provide a service safely. Austin Powder had a continuing presence at the mine because "they would be there pretty much of the time" on six or seven blasting jobs for Doan Coal (Tr. 212).

Mr. Bixler confirmed that he issued the citation to Austin Powder because the blasting crew was not out of the blasting area, and he determined this fact "because of the flyrock and debris that fell around the blasting area". He also stated that he did not know whether it was unusual for a blaster to be within 300 feet of a shot area, and he "guessed" that the size of the explosive shot and the terrain would have a bearing on this question (Tr. 214). He believed that the citation was very serious in that more people could have been killed or injured, and he also believed the citation was "significant and substantial" because it was likely that serious injuries could have occurred because of the flying debris and rock that fell around the blaster (TR. 216).

Mr. Bixler stated that he considered Mr. Lucas to be an employee of Austin Powder, and he believed that Austin Powder was negligent for not removing the blaster and his crew from the blasting area. He confirmed that he filled out an "inspector's statement", and that he indicated that he stated that Austin Powder, as the "operator", was responsible for the blast and for clearing the area. As the employer of the blaster, he considered that Austin Powder was responsible for the blaster's actions. He also believed that three or four people were exposed to a hazard, namely, the blasting crew, the blaster himself, and the people in the scale house (Tr. 219-221).

Mr. Bixler also confirmed that he issued a second citation to Austin Powder on August 6, 1981, for a separate violation of section 77.1303(h), namely, that portion that requires an ample warning to be given before any blast (Tr. 222). He made the determination that no ample warning was given on the basis of statements made by persons during his investigation.

Those statements indicated that the actual warning signals which were given were different from those posted on a sign on the mine road. He did not believe that three 2-second blasts within a minute or less gives any one ample time to get to a safe area, but that following the warnings shown on the sign would have (Tr. 223).

Mr. Bixler stated that during his investigation Mr. Bloom stated that he motioned the accident victim that a shot was going to be fired, but that he (Bixler) did not follow up and ask Mr. Bloom what he meant by his motions to the victim (Tr. 224). Mr. Bixler also concluded that since the victim was only 223 feet from the blasting location, "he probably wasn't warned" (Tr. 225). Mr. Bixler believed that the blaster was negligent in not following the posted warning sign (Tr. 228).

On cross-examination, Mr. Bixler confirmed that most of the findings made in MSHA's accident investigation report were made by Inspector Bondra, and that he (Bixler) assisted in the making of the measurements reflected in the report (Tr. 228). Mr. Bixler conceded that at the time he issued the citation to Austin Powder, he did not take into account Mr. Lucas' assertion that he believed 300 feet to be a safe distance from the blast. Mr. Bixler also stated that he could not recall discussing this with Mr. Lucas, and that he did not take into account any geological or atmospheric conditions which may have been considered by Mr. Lucas prior to the blast (Tr. 231). Mr. Bixler also conceded that Mr. Lucas did have the safety of his crew in mind prior to the blast, but probably did not anticipate the actual force of the blast (Tr. 234).

In response to further cross-examination, Mr. Bixler confirmed that he is not a blaster and has never held a blaster's lincense. He also indicated that he has never done any surface blasting, is not a blasting expert, and that in the event he has need for information concerning blasting techniques or procedures he would have to consult a blasting expert (Tr. 236). In this case, he indicated that he spoke with Austin Powder's licensed blasting technical representative Ray Thrush, but he was not aware of the fact that Mr. Thrush holds a certificate from MSHA qualifying him to train other blasters. He could not recall Mr. Thrush telling him that Mr. Lucas acted in a normal and prudent manner at the time of the blast in question, nor could he recall Mr. Lucas and Mr. Thrush advising him that the particular flyrock shot in Mr. Lucas' direction could not have been anticipated (Tr. 237).

Mr. Bixler identified a copy of his "inspector's statement" which he filled out on July 31, 1981, with respect to citation no. 1041342, (exhibit AP-8). He confirmed that he marked the first block under the heading "negligence" to show that the condition or practice cited "could not have been known or predicted, or occurred due to circumstances beyond the operator's control". He also confirmed that he explained this under the "remarks" column of the form where he indicated that "the blaster notified all persons of the impending blast about 10 minutes before

blasting and again half to one minute prior to blasting. Blast holes do not normally blow out". He explained the last remark as "that meant that it was not anticipated or capable of being anticipated that this blast hole would blow out and send fly rock back that far away from the front of the face" (Tr. 238-240).

Mr. Bixler confirmed that when he submitted his inspector's statement of July 31, 1981, it was returned to him by his supervisor who advised him that the form had been returned by someone in the "Washington Solicitor's Office" who advised his supervisor that he (Bixler) could not conclude that Austin Powder was not negligent (Tr. 242). Mr. Bixler did not know the identity of the solicitor, and on the basis of instructions received from his own supervisor, Mr. Bixler prepared another form stating that Austin Powder was negligent (exhibit ALJ-1), and that form was resubmitted on November 16, 1981. He reached his "new" opinion that Austin Powder should have cleared everyone from the area on the basis of his observations on how far the flyrock went after the occurrence (Tr. 243; 257-261).

Mr. Bixler stated that he did not have the technical background or expertise to question Mr. Lucas' judgment that he believed he was at a safe distance prior to the blast (Tr. 244). Mr. Bixler believed that the drill rig at the blast area was a "safe area" if men were under or in it (Tr. 244). He also believed that the blaster "should be at least close enough to it that in the event he needs to get under it, he could" (Tr. 244). In the instant case, he believed that Mr. Lucas "should have been closer to the drilling rig", and did not think that he could have gotten under it from a distance of 25 or 30 feet. Mr. Bixler also stated that Mr. Lucas probably thought he was at a safe distance, and when asked what advice he would give someone who may ask him how far back from a blast would be "safe", he replied "on the side of safety; and, from what we found out here, I would say at least 500 feet. That's a rough guideline" (Tr. 245-246). However, he also stated as follows (Tr. 246):

> Q. You would say that in very instance blasters should be at least 500 feet?
>
> A. Not necessarily, no.
>
> Q. It could vary depending upon a number of factors?
>
> A. Sometimes 500 feet, it wouldn't be enough.
>
> Q. Other times it would be more than enough?
>
> A. That's right.
>
> Q. And you really do not have the technical expertise or background to give advice to someone on whether he would be in violation of the law or whether he would be safe at a certain distance?

A. That's why I would go on the side of safety.

Q. Because you really do not know enough about blasting techniques and safety factors to know how far back would be safe under particular factual circumstances?

A. Under normal conditions, yes, but under extreme conditions, no.

With regard to his conclusions that an adequate blast warning was not given to employees in this case, Mr. Bixler testified as follows (Tr. 247-250):

Q. The purpose of this statute is to make sure that those employees who were in the area would be given a sufficient opportunity to go to a safe place; isn't that correct?

A. That's correct.

Q. And any warning device which is understood by the blaster and the other employees and which provides that type of notice would be adequate under the statute, would it not?

A. Would you repeat that again, please?

Q. Any warning, technique or procedure which is understood by the blaster and by the employees on the premises and which gives the employees that notice so that they can go to a safe area would be sufficient under the statute, would it not?

A. In this case, it was posted, and I would think that the signal given could be misleading.

Q. But do you know whether or not Mr. Alvatrona relied upon the sign?

A. That I couldn't say.

Q. You have no way of knowing that one way or the other?

A. No.

Q. You have no way of knowing what Mr. Alvatrona understood by the motion from Mr. Bloom?

A. I have no way of knowing that either.

Q. And you did not follow up with Mr. Bloom and ask him what that motion meant and whether based upon his working relationship with Mr. Alvatrona he could testify to what Mr. Alvatrona understood the motion to mean?

A. Mr. Bloom stated that he motioned Mr. Alvatrona to shut down.

Q. You were satisfied at that point that those employees at Doan understood that motion to mean he was supposed to shut down because the blast was going to take place?

A. Yes.

Q. That is why you did not feel it necessary to ask Mr. Bloom any further questions about the motion and the meaning of the motion?

A. That's right.

Q. And any warning device or procedure or technique which furnishes an employee with the information the blast is about to take place and sufficient time to find a safe haven does satisfy the statues, does it not?

A. I would say so, yes.

Q. And certainly direct personal knowledge to an employee given to him either over the radio or in person would be sufficient notice?

A. Probably would be, yes.

Q. You do not have any factual basis for any opinion on whether Mr. Alvatrona would be alive today under any different hypothetical circumstances with regard to notice of hypothetical conduct on the part of anyone else who was on that property, do you?

A. Would you repeat that, please.

Q. Surely. Do you have any factual basis for drawing any conclusion as to whether Mr. Alvatrona would be alive today based on any hypothetical actions or conduct by anyone else who was on the Doan Coal Company property on that day in July of 1981?

A. That I wouldn't know.

Q. It is complete speculation?

A. That's right.

Testimony and evidence adduced by Respondent Doan Coal Company

Albert Bloom, testified that he is employed by Doan Coal Company as a loader operator and was so employed on the day of the accident. He confirmed that he and the victim Dennis Alvatrona were co-workers and on the day of the accident Mr. Alvatrona was operating the crusher near the coal stock pile and Mr. Bloom was operating a loader. Mr. Bloom stated that ten minutes before the blast he received notice of this over the company radio installed in his loader. He was called by the dragline operator, and told to shut the equipment down. Since the crusher had no radio he motioned and signaled Mr. Alvatrona to shut the crusher down. The hand signal he used is a standard procedure which everyone understands. He had used them before and he believed Mr. Alvatrona understood them and he shut the crusher down. After he shut down, Mr. Bloom observed Mr. Alvatrona heading in the direction of the scale house, and he indicated that he habitually spent most of his time there (Tr. 272-279).

Mr. Bloom stated that it was company policy to warn employees of impending blasts personally or over the radio. He confirmed that he heard three airhorn blasts immediately before the blast on the day in question, but it was his view that such warning sounds cannot be heard over the noise of back-up alarms and loaders (Tr. 281).

On cross-examination, Mr. Bloom stated that he never saw Mr. Alvatrona or any other employees inside the blast area prior to the blast. He had no idea as to why anyone would walk into a blast area "unless it fascinated you to watch it" (Tr. 284). Mr. Bloom stated that no barrier was on the road coming onto mine property, that he had never seen such a barrier in the past, and he did not believe it possible that Mr. Alvatrona was serving as a guard the day of the blast (Tr. 286). He confirmed that five to seven minutes, and at most 10 minutes, elapsed between the time he received the radio information about the blast and the actual blast (Tr. 286). He confirmed that the "blow out" surprised him because there was more fly rock than usual. He had no contact with the blaster prior to the shot, and when he saw Mr. Martz driving into the area he stopped him and told him to shut his truck down by means of a hand signal, and this was before the warning signals were sounded (Tr. 288).

In response to further questions, Mr. Bloom stated that he stayed inside his loader where it was parked and that he did not consider himself to be in danger. Since he saw Mr. Alvatrona heading for the scale house he assumed that is where he was going and did not speak to him further (Tr. 291). He believed he was safe, and if he observed fly rock going over him after the blast, he would not stay in the same location the next time a blast was fired (Tr. 293). Other similar shots had been fired the same day of the accident (Tr. 294). He had never known Mr. Alvatrona to go and observe shots in the past, and he did not know what he was doing the day he was killed since "after he got passed a a certain point I couldn't see him" (Tr. 296).

Mr. Bloom confirmed that it was normal procedure to shut down all equipment as soon as notice of a blast is received, and if others around him did not have radios, he would notify them personally (Tr. 300). He also confirmed that he determined the safe blasting area for himself, no supervisor told him what it was, and he did not know how much explosives were going to be set off since he did not speak with the blaster (Tr. 301).

Alvin Mitchell, testified that he is an engineer and safety director for Doan Coal Company, and was so employed at the time of the accident. He confirmed that the company has a qualified training program, that he is in charge of it and is certified to conduct training, and that he trained Mr. Alvatrona. He identified exhibit R-1 as a copy of Mr. Alvatrona's training certificate, and indicated that he was trained in hazards identification as well as in the use and danger of explosives (Tr. 312). Mr. Mitchell testified as to the company's blasting signal policy and procedure, and confirmed that there are 33 mobile radio units at the mine on most of the equipment. He also confirmed that he was present during the accident investigation, and stated that the distance from the shot area to where Mr. Alvatrona's body was found was 260 feet, and he indicated the normal route he would have taken to get to the scale house from the stock pile area.

Mr. Mitchell confirmed that the location of the blast where the drill holes were at was at the edge of the pit and that Mr. Alvatrona would have no reason to be in the area where he was found (Tr. 319). Mr. Mitchell stated that part of Mr. Alvatrona's training included procedures concerning the shutting down of equipment and blasting signals (Tr. 322). Mr. Mitchell also indicated that the procedure followed by Mr. Bloom in notifying Mr. Alvatrona about the blast, as well as the mine procedure for notifying other employees was normal and no different from any other day (Tr. 323). Mr. Mitchell identified several photographs depicting the spoil pile where it is believed Mr. Alvatrona was sitting at the time of the blast, and the general scale house area (Tr. 323-328; exhibits AP-1 through AP-7).

Mr. Mitchell testified that he was at the blast scene after the accident, and in his opinion had Mr. Lucas been looking in the direction of the spoil pile he could have seen Mr. Alvatrona (Tr. 333). Mr. Mitchell identified exhibit G-7(k) as a photograph of a typical blasting signal sign posted at the entrance to the mine property, but could not say whether that particular sign was posted on the day of the blast. However, he did indicate that a similar sign was posted, and that the men are instructed to listen for the signals depicted on the sign (Tr. 334). He did not know whether the mine road is normally barricaded because he is not at the mine when blasting takes place (Tr. 335). Mr. Mitchell stated further that the spoil pile was 13 to 14 feet high, and that Mr. Alvatrona's work would not require his presence there (Tr. 338).

Mr. Mitchell considered the scal house, the drill truck, and the loader and crusher to be suitable blasting shelters (Tr. 343). Mr. Mitchell conceded that Mr. Lucas may not have followed the literal blasting

warning signals shown on the sign posted on mine property, and he explained this by stating that Austin Powder's personnel are not trained at the same time as Doan's employees (Tr. 357). Mr. Mitchell stated that on the particular shot in question, a distance of 200 feet would probably not be a safe distance, and had he known that 24 holes were loaded with 400 pounds of explosives that he would have ordered men to be removed 200 feet since there was a chance that flyrock would reach that distance. However, the blaster was 300 feet away and he believed this was safe (Tr. 362).

David G. Doan, testified that he is the managing owner of Doan Coal Company and that he has been in the coal business since 1944. Mr. Doan stated that all mine equipment except for bulldozers are equipped with radios and that everyone on the site is given actual notice, either personally or by radio, before a blast is fired. Everyone on the site is notified to shut down and await the shot regardless of how far away from the actual blast they are located. Mr. Doan confirmed that he is experienced in the use of explosives, and as far as he is concerned the use of air horns is not effective because of the roar of the equipment and that is why mine procedure calls for the shut down of all equipment before a blast and personal notification given to all employees (Tr. 365-371).

Mr. Doan stated that the scale house was a secure area and that "there is no way that a rock could go through the scale house" (Tr. 372). He also indicated that the crusher is made of structural steel and would make "a wonderful shelter" (Tr. 372), and that since he has been in the coal business he has never had any problems with notifying employees and clearning out blast areas. He confirmed that the accident in question was his first fatality, and that there have never been any explosive related injuries at the site since he has been in business (Tr. 373-374). With regard to the signals given and the definition of "blast area", Mr. Doan testified as follows (Tr. 376-377):

> Q. Mr. Doan, you mentioned that the victim was personally told that there was going to be a blast.
>
> A. Well, he was personally notified with the signals.
>
> Q. There is a distinction between personally told and personally signaled; would you not agree?
>
> A. Well, that depends on how fine a little thin line you want to draw. He personally understood the signals because he had been taking them and giving them up until then. It was nothing new that he got. The signals that he got that day were the same as he always got.
>
> Q. Do you mean he never got them before on the radio?

A. If he was at a machine with a radio he got them. If not, he got them from Mr. Bloom, his buddy that he worked with. Because Mr. Bloom always had a radio where he was.

Q. You heard the safety director testify or state that he believed that the victim at the time of the blast was in the blast area. Would you agree with that?

A. No. It has not been defined to me yet where the blast area is. I have sat in this Court for two days now. I haven't heard anybody define the blast area. It seems that the blast area, according to MSHA, is anyplace a man can get hurt. There doesn't seem to be any regulation to it that I can understand from what I have listened to.

Austin Powder Company's Testimony

Jeffrey A. Lucas confirmed that he is a licensed blaster and holds a college B.S. degree in mathematics. He stated that the warning signals used before and during the blast in question consisted of radio contacts ten to fifteen minutes before the blast and three signals immediately prior to the blast, and no one ever requested that this be changed. To his knowledge he has never known of any Doan employee to ignore the signals, and he had no reason to believe that anyone did not understand them. He believed he was in a safe location on the day of the incident, that the shot was laid out to go away from where he and the crew were located, and that he had previously made five to six previous shots at that location (Tr. 400, 412). There were no blowouts from the previous shots, and had the one in question gone the same as the others no one would have been in danger 100 feet from the shot. There was nothing unsual about the size of the shot in question, and in relation to the others they were all the same, including the amount of explosive used (Tr. 402).

Mr. Lucas stated that he believed his crew was in a safe location and he also believed that the scale house was safe because it was further from him and away from the shot location. He confirmed that he was looking at the blast area and he indicated that he prefers not to be under a truck because he wants to view the blast and can always move away from any flyrock. On the day in question, he never expected the flyrock to come as far as it did and he was not aware that anyone was on the spoil bank and saw no one in the area that he considered to be the blast area (Tr. 408). After the incident, MSHA suggested to him that he move further back, seek some sort of protection, and suggested a 500 foot distance as a guideline. He personally would not like to be 500 feet from a shot and would prefer to be somewhere where he can see it (Tr. 409).

Mr. Lucas testified that from where he was standing at the time the blast was set off he was unable to see the crusher because it was behind the coal stock pile and there was line of trees in the area. He personally

did not walk to the crusher area, but he sent the truck driver to notify anyone in the area and he believed the area was a safe area (Tr. 415). Mr. Lucas identified a copy of exhibit G-8 as a company blast report which he filled out immediately following the shot, and he confirmed that. He concluded the scale house as a "possible hazard" on the form. He explained that this was done because the State requires buildings and houses to be identified on the form (Tr. 420).

Mr. Lucas explained the characteristics of a "blowout", and he confirmed that he checked all of the holes for potential signs of such an incident. He explained the wiring and detonation of the shot, and he confirmed that since the accident he has changed his signaling procedure to comply with the blast warning sign which is on the property, but that the radio signal system is also being used (Tr. 441-446).

Ray Thrush, testified that he has been employed with Austin Powder for approximately eleven years as a sales and technical representative. He confirmed that he has been a licensed blaster since 1967 and is licensed in the States of Pennsylvania, Maryland, and West Virginia. He also indicated that he is an MSHA certified surface and underground blasting instructor. Mr. Thrush confirmed that he has been going to Doan Coal's property since 1971, and prior to his employment with Austin Powder he was on the site doing blasting work with the National Powder Company. He also indicated that prior to July 30, 1981, and before radios were obtained, the warning signals which were used were "personal contact with all machinery". Since that time radio contact is used, and the three-blasts on an air horn was also used as a signal within the past several years and before July 30, 1981 (Tr. 454-458).

Mr. Thrush confirmed that he was at the mine the day after the accident during the investigation and was familiar with where Mr. Lucas was positioned at the time of the blast. In his opinion, Mr. Lucas was at a safe distance, and he indicated that based on the number of holes and the amount of the powder used, he could have been 100 feet closer and still been safe. Mr. Thrush described the 24 charged holes as a "small one", and he also indicated that as a blaster, he would like to be positioned so that he can observe a shot. He also indicated that during his conversation with Inspector Bixler, Mr. Bixler indicated to him that he could not find anyghing wrong with what Mr. Lucas had done (Tr. 458-462).

Mr. Thrush indicated that he was present when MSHA Inspector Zangary terminated the citation and he indicated that he did so by coming to the mine to observe the manner in which another shot was fired. The shot was in front of the spoil pile and the crew and the inspector were by an old equipment trailer when the blast was fired. Inspector Zangary indicated that this was sufficient coverage. However, the shot could not be seen, and after the blast two boys on trailbikes came out of the nearby woods, and Mr. Thrush stated that when he asked Mr. Zangary how he would characterize the event if the boys had ventured into the shot area and been killed, Mr. Zangary replied that it would have an "accident" (Tr. 464).

Mr. Thrush confirmed that Mr. Lucas was not reprimanded or disciplined by Austin Powder and he stated that had he been there he would have acted just as Mr. Lucas did in firing off the shot (Tr. 469-470). Mr. Thrush believed that the "sphere of danger" on the day of the accident was about 200 feet from the blast site, and that would be the area he would have been concerned about keeping secured (Tr. 471). Mr. Thrush confirmed that he has had some 30 years experience working in coal mines and gas fields "shooting gas and oil wells and stripping" (Tr. 472).

The Jurisdictional Question

Apart from any factual disputes concerning the alleged violations, there is no jurisdictional dispute between MSHA and the respondent Doan Coal Company. Doan Coal is a Pennsylvania strip mine operator and it concedes that its mining operations are subject to the Act and to MSHA's enforcement jurisdiction. The jurisdictional dispute in this case is between MSHA and the respondent Austin Powder Company.

The Nature of Austin Powder's Business

In its posthearing brief, Austin Powder states that it is a manufacturer and supplier of explosives to a number of different industries, including the coal mine industry (Tr. 466, 507). To ensure the safe use of its products and safety of both its customers and the general public, Austin Powder, at no charge, provides technical expertise and advice to those customers who desire such assistance (Tr. 465, 476). As one component of the assistance which is available to the customer, Austin Powder has licensed blasters who may be loaned to a customer upon request, but Austin Powder is not obligated to provide a blaster to a customer, nor is there any guarantee that at any particular time a blaster will be available (Tr. 508). Austin Powder maintains that this situation must be contrasted with that of a contract blaster who enters into a contract with an individual to perform blasting services. In such arrangements, the contract blaster is contractually obligated to provide blasting services and is paid for such services. In contrast, there is no obligation whatsoever upon Austin Powder to provide blasting services for customers, and if a blaster is made available no charge is paid for such service (Tr. 465-466).

Austin Powder maintains that in instances where a customer desires to utilize Austin Powder's technical expertise, the parties enter into a service agreement. Under the agreement, Austin Powder agrees to lend the customer the temporary use of Austin Powder's employees and equipment free of charge (Tr. 465, 476). In return, Austin Powder states that the customer agrees that while it is using such employees and equipment, the employees are under the sole supervision and control of the customer and that all work and services performed by such individuals are at the sole risk and responsibility of the customer.

Austin Powder states that on January 19, 1981, it entered into a service agreement with the respondent Doan Coal (A.P. Exh. No. 11).

Doan Coal would periodically order explosives from Austin Powder and would utilize Austin Powder's technical expertise to detonate the explosives it purchased from Austin Powder. However, Austin Powder asserts that Doan Coal determined the number of holes to be drilled, the location of the holes, and the holes' depth, and the coal company drilled all the holes (Tr. 340-342, 366, 410-411). Moreover, Doan Coal decided when to blast and had the right to control the details of the blast (Tr. 410-411).

Whether Austin Powder is an "Operator" within the Meaning of the Act

Austin Powder maintains that before MSHA can assert jurisdiction in this matter it must establish that Austin Powder is an "operator" within the meaning of 30 U.S.C. 802(d). Austin Powder states that it is abundantly clear, and that MSHA has conceded as much, that Austin Powder does not own, lease, operate, control or supervise a coal mine. Although MSHA does allege that Austin Powder was an independent contractor performing blasting services for Doal Coal on the day in question and as such was subject to MSHA's jurisdiction, Austin Powder asserts that MSHA's position is wholly untenable because the clear evidence establishes Austin Powder was not an independent contractor performing blasting services.

Austin Powder argues that before it can be found to be an independent contractor under the Act, MSHA must establish the existence of a contract between Austin Powder and Doan Coal whereby Austin Powder contracted to provide services for Doan Coal. Austin Powder maintains that MSHA has failed to introduce any evidence that such a contract existed. In fact, it states that MSHA has not even tried to establish the existence of such a contract.

Austin Powder maintains that it is not, and was not a contract blaster, has no drilling capacity, and does not contract blasting services. Rather, it is a manufacturer and supplier of explosives to numerous industries, including the coal industry, and that it entered into a sales agreement with Doan Coal in which Doan Coal purchased a quantity of explosives. To ensure the safe use of its products, Austin Powder, pursuant to a service agreement voluntarily entered into by the parties, allowed Doan Coal to draw upon its technical expertise to assist in detonating the explosives. The agreement is a legally binding, valid document whereby Austin Powder loaned Doal Coal its employees for Doan Coal's use. Citing: New River Crushed Stone v. Austin Powder, 210 S.E.2d 285 (N.C. 1974); Fralin v. American Cyanamid Co., 239 F. Supp. 178 (W.D. Va. 1965); Oregon Portland Cement Co. v. DuPont, 118 F. Supp. 603 (D. Ore. 1953); Hercules Powder Co. v. Campbell & Sons Co., 144 Atl. 510 (Md. App. 1929). No charge was made for this technical expertise (A.P. Exh. No. 11; Tr. 466, 512). Moreover, Austin Powder states that it had no obligation under the service agreement to provide such technical service, and if its people were not available, Doan Coal could not require that Austin Powder furnish blasters. In short, Austin Powder maintains that the loaning of its employees to Doan Coal to ensure safe use of its product was a gratuity and not required by contract.

Austin Powder concludes that since the record is absolutely void of any evidence even suggesting the existence of an implied or express contract between Austin Powder and Doan Coal requiring the provision of services, MSHA has failed to establish Austin Powder was an independent contractor as defined by the Act. Since Austin Powder does not otherwise fall within the Act's definition of "operator," it maintains that it was not subject to MSHA's jurisdiction.

Austin Powder argues that on the facts of this case, those individuals who allegedly committed the cited violations were, as a matter of law, Doan Coal Company employees, and not employees of Austin Powder. In support of this argument, Austin Powder argues that the express terms of the service agreement clearly and unambiguously state that while the Blaster Lucas and his crew were on Doan Coal property they were for all intents and purposes Doan Coal employees. Doan Coal had the sole right to supervise and control the activities of Lucas and his crew, and Doan Coal performed all the drilling and decided how many holes to drill, the depth of the holes and the location of the holes (Tr. 410). Doan Coal had the right to supervise the details of the blasters' work and when a question arose, the blaster looked to Doan Coal for direction (Tr. 411).

Austin Powder asserts further that Courts have long held that the paramount consideration in determining whether an independent contractor or an employer-employee relationship exists is who has the right to control and supervise the details of the work activity. See e.g. Joint Council of Teamsters No. 42 v. N.L.R.B., 450 F.2d 1322 (D.C. Cir. 1971); Assoc. Independent Owner-Operators, Inc. v. N.L.R.B., 407 F.2d 1383 (9th Cir. 1969). In this case, given the service agreement's clear language and the actual uncontradicted testimony of the witnesses, Austin Powder concludes that it is clear that Lucas and his crew were, as a matter of law, Doan Coal employees and accordingly, Austin Powder cannot be held subject to MSHA's jurisdiction.

Finally, Austin Powder maintains that MSHA's latest policy memorandum concerning the identification of independent contractors under the Act makes it clear that Austin Powder falls outside the scope of an "operator" as defined by the Act. Under this memorandum, before a company will be considered an independent contractor for the purposes of the Act, it must, inter alia, perform both drilling and blasting services, the precise services which a contract blaster provides. Austin Powder notes that it is significant that MSHA chose the conjunctive in this subsection, but in all other subsections where more than one factor was listed chose the disjunctive, thereby clearly intending to include the definition of an independent contractor only to those companies which provide both drilling and blasting services. Since it is not a contract blaster, Austin Powder concludes that it falls outside of MSHA's own criteria for determining whether an individual is an independent contractor and is not subject to MSHA's jurisdiction.

MSHA's Arguments

In its posthearing brief, MSHA denies Austin Powder's assertion that the its service agreement with Doan Coal somehow transforms blaster Jeffrey Lucas into an employee of Doan Coal under Doan's direct control and supervision. MSHA maintains that the evidence in this case supports the opposite conclusion. Namely, that the blaster, Jeffrey Lucas, was a full time employee of Austin Powder, whose services were paid for by Austin Powder as part of the price from selling explosives to mining companies.

MSHA argues that as a private business, Austin Powder has a right to conduct its business in a manner which it finds the most convenient in accordance with general industry practice, and that MSHA has no objection to "service contracts" per se, between companies providing services to coal mining companies, like Doan Coal. However, MSHA maintains that it should be obvious that the Secretary of Labor and the Federal Mine Safety and Health Review Commission are not bound to accept, on face value, the so called "gratuitous nature" of a service contract, especially if its intended purpose is to limit liability which would otherwise be imposed under the Act. MSHA asserts that to follow Austin Powder's viewpoints with regard to its attempt to award liability in this matter would amount to a total disregard of the Congressional intent expressed in the 1977 Mine Act, of placing liability for violations according to actual conduct.

MSHA maintains that a review of the service contract entered into between Austin Powder and Doan Coal indicates that it has little to do with any actual services performed by Austin Powder, and that it is merely an indemnification agreement which Austin Powder requires its customers to sign prior to allowing them to use its blasting services. MSHA states that the customer is really not given any choice and is required to assume all the risks and responsibilities inherent in an extremely dangerous occupation.

MSHA points to the fact that Jeffrey Lucas, the blaster, testified that he considered himself a full time employee of Austin Powder, was never told anything to the contrary, believed that he was in charge of the blasting area, and acknowledged that it was up to him to make sure that everyone in the blasting zone was notified (Tr. 29). It was his function to check the wiring for the explosives prior to the blast and notify members of his crew when to give the signal that a blast was going to occur, after he checked the pit area visually.

MSHA also points out that Mr. Lucas' presence at the Doan Strip Mine was long term and continuous, and that Mr. Lucas testified that at least 50% of his blasting work was at the Doan Strip Mine and he was generally on the property four to five times a week for up to five hours a day. Also, Mr. Lucas usually brought a crew of men with him to assist them with the blasting operations and proceeded directly to the pit area without waiting for any instructions from the supervisory personnel employed by Doan Coal. Under the circumstances, MSHA submits that

Austin Powder's argument that blaster Lucas was under the direct control of Doan Coal is totally without merit and should be rejected.

In addition, MSHA submits that Austin Powder's attempt to limit its liabilities and responsibilities under the Mine Act is against public policy. Recognizing that private parties can contract between themselves to limit their respective liabilities to each other, MSHA asserts that the courts have frowned on attempts by private parties to limit their public duties under Federal law and generally will not enforce ageeements of that nature. MSHA concludes that companies like Austin Powder who perform vital services for mining companies on mine property have specific responsibilities and liabilities under the 1977 Mine Act, and that their statutory obligations cannot be contracted away or limited since the duty to the public is paramount. Citing: Southwestern Sugar and Molgasses Company, Inc. v. River Terminals Corporation, 360 U.S. 411 (1959), Headnote 9, Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253 (1965), and Conco, Inc. v. Andrews Van Lines, Inc., 526 F.Supp. 720 (1981).

Findings and Conclusions

The Jurisdictional Question

Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervisors a coal or other mine or any independent contractor performing services or construction at such mine;" (emphasis added).

Section 3(g) defines "miner" as "any individual working in a coal or other mine", and section 3(h)(1) defines "coal or other mine" as including, inter alis, "lands, excavations, structures, facilities, equipment, machines, tools, or other property * * used in, or to be used in * * * the work of extracting such minerals from their natural deposits * * *".

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14: Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

Doan Coal's mine engineer and safety director Ray Mitchell testified that Doan conducts its own drilling of the blast holes, and determines the specific locations of the holes, including the depth and diameter of the holes. After the drilling is completed, Doan then calls Austin Powder to come in and do the actual blasting. If Doan Coal decided not to blast on any given day, it would send Austin Powder away and instruct them to come back another time. Doan has also used other blasters, and if Doan had a preference it may determine the direction that it wishes the blast to go. While Doan may prefer that the blast be directed away from equipment, the direction of the blast would be left to the blaster (Tr. 340-342). Mr. Mitchell stated that during his three and one-half years at the mine Austin Powder conducted 90 percent of the blasting which was done at the mine site (Tr. 353). The only thing he is required to do insofar as Austin Powder's employees are concerned is to insure that they have signed the hazard recognition sheet before they enter the mine site (Tr. 355).

Blaster Jeffrey Lucas confirmed that Doan Coal Company determines the number of blast holes to be drilled, as well as the diameter and depth of the holes. Doan Coal also determines when the holes are to be loaded and then notifies Austin Powder. Should a hole be plugged, Austin Powder will attempt to take care of the problem, but "if there is anything out of the ordinary Doan Coal will tell us how they want things done" (Tr. 411).

Mr. Lucas testified that he considered himself to be an employee of Austin Powder Company and has never considered himself to be employed by Doan Coal (Tr. 416). None of his supervisors have ever advised him to the contrary, and he considered the services he was performing at the mine to be an important part of the mining process. He conceded that he was at the Doan site performing a service, but he denied that Doan Coal paid for his services. He explained this by stating that Doan buys powder from Austin and he makes up the billings for the shots and there is no specific charge for his services. He had no knowledge that the charges for his services, which are paid for by Austin, are included in the price that Doan pays for the powder which is used (Tr. 418).

Austin Powder's technical representative Ray Thrush identified exhibit AP-11 as the "service agreement" between Austin Powder and Doan Coal, and he confirmed that he signed it on behalf of Austin Powder, and that it was the only agreement between the two companies. */ He denied that Austin Powder is a "contract blaster", and he defined

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*/ A copy of the "Service Agreement" is included herein as an attachment to this decision, and the document is incorporated herein by reference.

that term as someone who "goes and shoots for other people" (Tr. 466). When asked to explain the difference between what Austin Powder does and what a "contract blaster" would do, he stated "we manufacture and sell and we assist the customer in his blasting procedures" (Tr. 466). Mr. Thrush indicated the agreement was in effect in the summer of 1981, and he indicated that Austin Powder's invoices and price quotations to a customer is for the amount of powder used and that there is no separate charge for blasting. He could not state for sure whether or not other powder manufacturers have similar agreements.

Mr. Thrush confirmed that the term "blaster" means "the man who is in charge of detonating the explosive, securing the area, making sure everything is done right", and confirmed that his technical expertise is relied upon in firing the shot and removing the overburden. He also indicated that as part of the selling of the powder, Austin Powder provides its technical experience or advice in detonating the powder which it sells, and the electronic detonating devices are owned by Austin Powder (Tr. 466-468). He also confirmed that the blaster is responsible for the safety of the blast (Tr. 468).

Mr. Thrush could not state how much business Austin Powder did with Doan Coal in 1981, and he had no knowledge as to any prior business volume between the two companies. He indicated that Austin Powder probably has no more than ten blasters working in the State of Pennsylvania, and that customers are not charged for their services. When asked about the cost of trucks and blasting equipment, he answered "the same setup" (Tr. 476). When asked whether these costs are passed on to the customer as part of the purchase price of the dynamite he replied "I guess" and "that is very possible" (Tr. 477).

With regard to the service agreement, Mr. Thrush stated that a new one is executed every year, and that it is not done on a job-by-job basis. The services performed under the agreement are on a continuing basis for a year (Tr. 477). Mr. Thrush indicated that when he worked for the National Powder Company, there were no such service agreements in effect, but he did not know why "because I was not involved" (Tr. 478). Mr. Thrush confirmed that the Austin Powder agreement is signed every year on the advice of the company's counsel (Tr. 479).

Contrary to Mr. Thrush's testimony that his previous employer did not have a "service contract" with its customers, Austin Powder's counsel asserted that "virtually all" of its competitors have such contracts and that "it is an industry practice" (Tr. 512). Counsel also contended that when the blaster, Mr. Lucas, goes to Doan Coal's property to perform his blasting chores under the service agreement he is Doan Coal Company's employee (Tr. 513-514). However, counsel conceded that Austin Powder still pays all of Mr. Lucas' regular benefits, such as health coverage for his family (Tr. 514). With regard to the right of Doan Coal to supervise Mr. Lucas, Austin Powder's counsel took the position that mine operator Doan believed that he may exercise supervision or control over

anyone that is on his property, and that Mr. Lucas is not an employee of Mr. Doan for lawful purposes until he comes on the property (Tr. 515). With regard to any supervisory control by mine operator Doan over blaster Lucas, counsel stated as follows (Tr. 515-519):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: When he comes on the property to do blasting Mr. Doan is not sitting there looking over his shoulder as to how he loads the holes and wires up the shots, is he?
>
> MR. WALL: I am not aware that he commonly does. He could if he wanted to.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Do you mean that he could supervise Mr. Lucas in the manner he wires up and loads the shots and puts them off?
>
> MR. WALL: He certainly could.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Why doesn't Mr. Doan do the blasting himself? He could save a little bit of money.
>
> MR. WALL: Mr. Doan does not want to do the blasting anymore. He has other things to do. He started out with a small operation. Now he has some ten pits. He has a larger operation and has other people doing lots of things that he used to do himself.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Wall, if you know, with regard to the activities of Austin Powder, is this a common arrangement in strip mining in this area to have the manufacturer of the explosives do the actual blasting for the mine operator?
>
> MR. WALL: It is not at all unusual, no. I cannot say that it is the normal practice in every instance. Because I am not familiar with the practices here. But I know that most of the larger manufacturers also have similar arrangements.
>
> ADMINISTRATIVE LAW JUDGE KOUTRAS: Again, I am not making light of this service agreement. In the section where it says Austin Powder Company is not engaged in blasting work. How can one say that Austin Powder is not engaged in blasting work when, in fact, they set the wheels in motion? They dispatch three people when the call comes. Three people, vehicles, equipment and the product come. They charge the holes, the blast goes off. Now, you say that is not blasting? Is that blasting work, setting the charge and blasting?

MR. WALL: Certainly.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That is blasting work?

MR. WALL: Absolutely.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Under this service agreement the blasting work is performed by Doan not Austin Powder?

MR. WALL: That is correct. It is an arrangement which is made in our industry as well. It is not uncommon for example, for heavy equipment with its operator to be loaned to another employer. A crane, for example, could be loaned to some particular employer with its operator for use during a particular period of time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Yes, but usually in those kinds of arrangements they pay for them, do they not? In this case had MSHA opted not to cite Austin Powder as a respondent in this case and decided only to go against Doan Coal Company and issued the citations only to Doan and sought the maximum civil penalties in this case on the theory that Mr. Lucas as an employee of Doan Coal Company was negligent and, therefore, that negligence is imputed to his employer Doan Coal Company. How do you think Mr. Hanak sitting next to you would be arguing in that case?

MR. WALL: I cannot speak to that.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Hanak, does your client realize that this service agreement, when those people and equipment come in the Government would consider those people to be his employees from now on?

MR. HANAK: We have never thought of the impact as far as any criminal action like here.

During the course of the hearing, Austin Powder's counsel indicated that the company sells explosives "in about 37 states" (Tr. 507). He also indicated that in terms of sales volume, Austin Powder ranks second or third in terms of national sales volume, but emphasized the fact that there are only "a handfull of explosives manufacturers" (Tr. 507).

During the hearing, Doan Coal's counsel took the position that in the event that it is decided that Austin Powder is not subject to MSHA's enforcement jurisdiction and are found not to be liable because of the service agreement, this would serve as a basis for immediately imputing Austin Powder's liability to Doan Coal simply because of the agreement (Tr. 479). Austin Powder's response was that "Austin is not within the reach of MSHA's inspectors because they are not in the mining business and they are not subject to the act as operators or independent contractors" (Tr. 480).

Austin Powder's counsel agreed that the reason Doan Coal Company utilizes Austin Powder's expertise rather than conducting its own blasting operations is that Doan Coal would prefer to have "an expert" do the job rather than to subject itself to possible citations for violations of MSHA's blasting regulations (Tr. 508-509). Austin Powder's counsel also conceded that it was not unique for a mine operator to utilize experts in the field of drilling or blasting (Tr. 509). In summarizing his position concerning the blaster's "independent contractor" status in this case, Austin Powder's counsel argued as follows (Tr. 510-512):

> MR. WALL: There are two reasons. One is that under the service agreement it is the intention of the parties that Mr. Lucas and others be loan servants in essence of Doan Coal. Loan servants is a well established common law concept. It has been accepted in the industry in every state. The normal detriment of the status of the particular individual is the intention of the party at the time. That intention is clearly explained here in that document. The intention of the parties is that Mr. Lucas be, for lawful purposes, freed as an employee of Doan Coal Company at the time so that Austin Powder as a corporate entity would not have liability.
>
> Mr. Lucas while at Doan Coal Company is under the control of Doan Coal Company. When Mr. Lucas is at a mine operator's property Austin Powder does not have control over those operations. It does not have insurance for those operations. It does not anticipate having liability for those operations and seeks to be protected from that, is willing to furnish that service to a customer in exchange for the customer's agreement to be responsible for any of the actions and to be responsible for that employee while he is on the property.
>
> The second factor is that there are very few guidelines in the statute for the regulation for what constitutes an operator. One goes back to the history of the 1977 Amendment of the Bituminous Coal Association's argument. Because they were upset with construction companies who were coming on to their property and committing violations for which the mine operators were held responsible. If one looks at the limited guideline that is available and that limited guideline is in the regulation. The regulatory definition of an operator there is that there is a requirement that there be a contract for services.
>
> In this instance there is no such contract wherein Austin Powder is contractually bound to provide any services. Hence, within the strict technical means of

> that regulatory definition from MSHA Austin Powder is not in the position as a contract driller who comes in and for a fee will drill holes. Some companies use contract blasters. That is a common practice. Some use contract drillers. Some use consultants and a variety of things. In each instance normally there is a charge for those people and they come in on a contract basis and are paid for this. This is not an arrangement of that type.

I take note of the fact that MSHA considered Austin Powder as an "independent contractor" subject to the Act, and in fact assigned Austin Powder a contractor Identification Number. While the assignment of such an identification number does not ipso factor bestow "contractor" status on any company, I find nothing in the record to suggest that Austin Powder has protested MSHA's characterization of its activities in this regard. MSHA's Independent Contractor regulations found in Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines an "independent contractor" as follows at section 45.2(c):

> "Independent Contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *

Although Part 41, of the regulations dealing with the application of the requirements of section 109(d) of the Act that mine operators submit certain "legal identity" information to MSHA does not apparently cover "independent contractors", Part 45 does. Further, other regulatory requirements such as those found in Parts 48 and 50, Title 30, Code of Federal Regulations, require contractors to comply with certain training and recordkeeping requirements of the law. As a matter of fact, in this case Austin Powder's technical representative Ray Thrusy is an MSHA certified blasting instructor, and the blaster Lucas testified that he regularly performed blasting at Doan's mine. This being the case, I assume that Mr. Lucas is "MSHA certified" to perform the duties required by blaster's under Part 77, Title 30, Code of Federal Regulations, and that Mr. Thrush also has MSHA's stamp of approval to train blaster's in accordance with MSHA's requirements.

In addition to the foregoing, I take note of the fact that in response to my Order directing MSHA to submit any evidence concerning Austin Powder's history of prior violations, MSHA submitted a copy of a Decision and Order by Judge Kennedy on November 26, 1980, approving a settlement between Austin Powder and MSHA providing for the payment of $20,000, for five violations served on Austin Powder in 1979 for five violations of several mandatory blasting standards found in Part 56, Title 30, Code of Federal Regulations. Although a copy of the "compromise settlement agreement" executed by Austin Powder's counsel Wall and MSHA's counsel contains a

"disclaimer" as to MSHA's jurisdiction, counsel Wall nonetheless indicated his understanding that "the agreement to pay the proposed settlement amounts will be considered a history of prior violations in future proceedings (if any), brought by the Secretary of Labor under the provisions of the Mine Safety and Health Act" (pg. 2, settlement agreement), MSHA v. Austin Powder Company, Docket No. YORK 80-82-M.

Although the aforesaid "settlement agreement" also contains a statement that it is the "intent of the parties" that the settlement approved by Judge Kennedy shall not be "offered, disclosed, used or admitted in evidence" in future litigation involving the parties except for the limited purpose of showing prior history by Austin Powder, I am not bound by the parties intent in that case. It seems to me that the payment of $20,000, by a company who vigorously disclaims it is covered by the Act is somewhat contradictory. If Austin Powder is not subject to the Act as a mine operator or independent contractor, the question of prior history is totally irrelevant. Further, in at least one decision concerning the approval by a judge of a settlement entered into by the parties, the Commission has not recognized the use of "disclaimers" or "exculpatory language" in its review of approval or disapproval of settlements in such settlement negotiations when it appears that the use of such language is for the purpose of insulating an operator from further enforcement jurisdiction. See: MSHA v. Amax Lead Company of Missouri, 4 FMSHRC 975 (1982). See also, Co-Op Mining Company, 2 FMSHRC 3474 (1980), where the Commission rejected a Judge's approval of a settlement when it appeared that no violation of any mandatory standard had occurred.

In my view, Austin Powder is more than a mere sales conduit for blasting powder and explosives used in the removal of overburden by mine operators for the express purpose of mining the coal which lies immediately below of the surface. Austin Powder is directly involved in the coal removal process when it provides the blaster, trucks, equipment, and trained personnel to do the actual blasting and removal of overburden. Under these circumstances, Austin Powder is an independent contractor within the reach and jurisdiction of the 1977 Mine Act. Austin is no different from other independent contractors who are retained by coal companies for the express purpose of utilizing their expertise and experience in different phases of the coal extraction process. For example, a mine operator may retain the services of a contractor to sink mine shafts or to construct other necessary facilities such as cleaning plants, tipples, or even bathhouses, or to perform certain drilling or mine excavation work. As a matter of law, these contractors are "operators" under the Mine Act's definition. On the facts of the instant proceedings, the citations issued to Austin Powder described conditions or practices by an employee of Austin Powder relating to the work that Austin Powder was engaged to perform. As a matter of fact, Austin Powder was directly involved in the abatement of the citations attributed to its alleged violations.

Notwithstanding Mr. Thrush's "loss of memory" concerning the matter of who absorbs the costs of the services provided by the blaster, and

Austin's assertion that there is no charge for these services, there is a strong inference in this case that these costs are included in the price of the explosives and powder used by Doan Coal Company. I assume that Austin Powder is in business to make money, and I assume further that its success has not come from "free services". In any event, even if Austin gave its powder away I would still conclude that it was engaged in provided a blasting service, albeit gratuitously.

It seems clear to me from the record in this case, that contrary to any intent on the part of the parties as to the status of the blaster Lucas, he is in fact an employee of the Austin Powder Company. It is also clear to me that on the day of the accident in question Mr. Lucas was performing an important service at the Doan Mine site and that this service was directly related to the extraction of coal. While it may be true that anyone on Doan's mine property is subject to the "control" of the mine owner and operator, this is no different from the "control" that any land owner of businessman exercises over persons who come onto to his property or enter his business establishment. The critical question here is whether Doan Coal exercises supervision and control over Austin Powder's blaster while the blaster is performing his blasting duties.

I conclude and find that while engaged in the work of the actual blasting and removal of the overburden on the day of the accident, the blaster, Mr. Lucas, was performing his duties as a "miner" as defined by section 3(g) of the Act, that he was not under the control of Doan Coal Company while performing these duties, but rather, acted as an employee and agent of the Austin Powder Company. In addition, I also find and conclude that as the licensed blaster Mr. Lucas acted independently from any direct supervision or control by Doan Coal Company, and that in his capacity as the licensed blaster he exercised direct supervision and control over his crew, all of whom are in the employ of Austin Powder, and that he also had direct control of the trucks and equipment owned by Austin Powder and used in the blasting process. Further, Mr. Lucas had full responsibility for the blast, including the charging of the holes, and the final detonation. He was also responsible for insuring the safety of his crew and other miners, and he issued the order to shut down all mine equipment immediately preceding the blast. As a matter of fact, Doan's own safety director Mitchell testified that once the blasting crew comes onto mine property, the only contact he has with them is to make sure that they have signed a "hazard recognition" form.

After careful consideration of all of the evidence and testimony adduced in this case with respect to the jurisdictional question, including the arguments advanced by the parties in support of their respective positions, I conclude and find that for the purposes of this proceeding, Austin Powder Company is an independent contractor who was performing blasting services at the mine site in question on the day of the accident and as such is, as a matter of law and fact an "operator" within the meaning of the Act and is therefore subject to the Act as well as to MSHA's enforcement jurisdiction. I reject Austin Powder's "common law loan servant"

argument, and I also reject its arguments that the "service agreement" fixes the parameters of MSHA's enforcement jurisdiction, and that the agreement places Austin Powder beyond the reach of the Act. I also reject the notion that before Austin Powder can be considered an independent contractor there must first be in existence an implied or express contract between Austin Powder and Doan Coal requiring the provision of services. It seems clear to me on the facts of this case that Austin Powder did in fact provide rather extensive and continuous services for Doan Coal Company, and that the services provided were directly related to the mining of coal. Austin's attempts to limit its liability through the use of a "service agreement" may be recognized as valid as between the parties, but I reject it as a means of absolving Austin from any responsibility or accountability under the Mine Act. I accept MSHA's arguments that acceptance of Austin Powder's attempts to limit its liability by means of the "service contract" would amount to a total disregard of the Congressional intent expressed in the Act of placing liability for violations according to actual conduct, and would be contrary to public policy.

Fact of Violation - Citation No. 1041345, August 6, 1981, 30 CFR 77.1303(h)

Citation No. 1041345 was issued because the inspector believed that Mr. Lucas failed to give "a proper warning according to the posted requirements", and that his asserted failure to do so constituted a violation of section 77.1303(h). The first sentence of this standard states that "Ample warning shall be given before blasts are fired".

The requirement stated in section 77.1303(h) is that an ample warning be given before a shot is fired. MSHA's position in this case appears to be that by failing to follow the blasting warning signal system which was posted on a sign on the road coming onto the mine site, Mr. Lucas failed to give the kind of warning required by the standard. In short, MSHA contends that the signal system posted on the sign was required to be followed by Mr. Lucas, and when he failed to follow it he violated section 77.1303(h). A short answer to this argument is that the standard itself does not provide for any specific signals to be given. It seems to me that since blasting and the use of explosives is inherently hazardous, MSHA should as a minimum promulgate a standard that makes it absolutely clear as to what is required. The use of such broad language as "ample warnings" leaves much to the imagination, and the instant case is a classic example of this. MSHA's counsel conceded during the hearing that the cited regulation does not require the use of any particular signal system, the posting of signs, barricades, or road guards for the purpose of warning persons about blasting.

MSHA's counsel conceded that there is no specific regulatory standard as to what constitutes a "proper" or "ample" warning signal prior to the detonation of any shot (Tr. 42). His position is that if a sign gives sufficient warning of a pending blast and gives the mine operator's and contractor's employees time to remove themselves from a blast area, if that sign is followed, then ample warning is given (Tr. 43). Given the

facts in this case, MSHA's position appears to be that since the accident victim was killed when struck by flyrock from the blast, the signal which was given by the blaster was obviously per se inadequate to properly warn the victim.

Section 77.1303(h) only requires that an ample warning be given. The term "ample warning" is not further defined, and MSHA's counsel conceded that the question as to what constitutes an "ample warning" within the meaning of the standard "has to be determined by the facts" (Tr. 78). Further, since the standard itself does not require any particular form of warning such as signs, flags, barricades, or the sounding of horns, MSHA's arguments that the blaster was required to follow the signal system posted on a sign which was located on a mine road leading onto the property is rejected.

MSHA's counsel conceded that there is no requirement for the use of blast warning signs, and there is no requirement that such a sign be posted on the mine roadway (Tr. 451-452). As a matter of fact, the sign which was on Doan's property and which has been referred to in this case was in fact a sign approved or furnished by the Office of Surface Mining (OSM), U.S. Department of the Interior (Tr. 450). However, counsel took the position that if the sign is posted, it becomes the blast warning plan, and the operator should follow it (Tr. 452). Absent any showing that the mine operator or contractor in this case were required by any MSHA standard to adopt a signal system and post it on such a sign, I cannot conclude that Mr. Lucas' failure to do so ipso facto constitutes a violation of the warning requirements of the cited regulation. MSHA has conceded as much when it agreed that the question of what constitutes an "ample warning" has to be determined by the facts of any given case. Further, I believe that the question as to whether any blasting warnings are "proper", as charged in the citation in question, is a highly subjective matter which is not even addressed by the regulatory language in question. What may be "proper" to an experienced and licensed blaster who is at the blast site supervising a shot, may not be "proper" in the judgment of an inspector who is called upon (in hindsight) to render a judgment after an accident such as the one which occurred in this case.

In a case decided by Judge Broderick on October 13, 1981, MSHA v. Domtar Industries, Inc., 3 FMSHRC 2345 (1981), a salt mine operator was charged with a violation of section 57.6-175, an underground blasting regulation, the first sentence of which is identical to the first sentence of section 77.1303(h). In that case two miners were killed in a blasting accident, and MSHA charged that the blasting crews had failed "to use effective voice communications between themselves to provide ample warning when firing blasts". Although Judge Broderick ruled that since two miners were killed it was obvious that they were not warned, he also observed that oral communication is not the only way to provide "ample warning" in compliance with the standard, and he rejected MSHA's suggestions to the contrary.

MSHA's conclusions at page nine of its posthearing brief that "the blast warning signals given by the blaster apparently varied from day to day" are unsupported conclusions by counsel and he cites no transcript references or testimony in this regard. Further, MSHA's reliance on the opinion by State Inspector Williams that the warning signals used by the blaster on the day of the accident did not constitute a "proper warning" to miners is rejected. I conclude and find that the respondents in these proceedings presented credible evidence and testimony that Mr. Lucas did all that could reasonably be expected of him on the day in question to insure that miners were apprised of the fact that there would be a shot or blast, and my reasons for these findings follow.

Mr. Lucas' unrebutted testimony is that five-to-ten minutes elapsed between the time the shot was fired and actually detonated. During this time a call was placed over the mine radio communications system advising the personnel in the scale house, as well as the mine office, that the blast would be set off and that all equipment should be shut down. In addition, prior to the actual detonation, three 20 second blasts of an air horn were sounded, and a siren signal was sounded for at least a minute prior to the blast.

David Potempa testified that when he arrived on mine property some five minutes before the blast, he knew there was going to be a blast because he had seen the blasting crew earlier in the day, and he went directly to the scale house. He also testified that he knew the shot would be fired because he heard the warning signals go off five minutes before the blast and one minute before it was actually detonated. He believed that he received adequate warning, did not feel that he was in danger, and believed that the signals sounded on the day in question were the same as those posted on the signal sign by the mine roadway.

Crusher operator Albert Bloom testified that ten minutes before the blast he received notice over the company radio installed in his loader, and he received the notice from the dragline operator who instructed him to shut the equipment down. Since the crusher where the accident victim Alvatrona was working had no radio on it Mr. Bloom signaled him by hand to shut the crusher down, and Mr. Alvatrona complied. Mr. Bloom indicated that the hand signal which he gave to Mr. Alvatrona to shut down the crusher was one that is regularly used and it is a procedure that everyone knew and followed. As a matter of fact, he indicated that when he observed truck driver Martz driving into the area he signaled him to stop his truck and to shut it down. Once the loader and crusher were shut down, Mr. Bloom observed Mr. Alvatrona heading toward the scale house and he assumed that he was going there and did not speak to him further. Mr. Bloom also confirmed that company policy calls for personally advising all employees of an impending blast over the radio communication system, and that five to seven or ten minutes elapsed between the time he received the radio notice and the actual blast. He also confirmed that it was normal operating procedure to shut down all equipment as soon as a notice of a blast is received, and if any of his fellow workers do have radios,

he personally sees to it that they are notified. Further, Mr. Bloom indicated that in addition to personal notification, he also heard three airhorn signals sounded immediately before the blast.

In view of the foregoing, I conclude and find that the signal system used on the day of the accident, namely the sounding of air horns, coupled with the direct personal contact made over the mine radio communications system was an ample warning within the meaning of the first sentence of section 77.1303(h). Accordingly, respondent Austin Powder Company was in compliance with the cited standard and the section 104(a) Citation No. 1041345 IS VACATED.

Fact of Violation - Citation No. 1041342, July 31, 1981, 30 CFR 77.1303(h)

Citation No. 1041342 contains two "specifications" which the inspector apparently believed constituted violations of the second sentence of mandatory safety standard section 77.1303(h). The citation asserts that (1) "all persons were not cleared and removed from the blasting area", and (2) that "suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting". The pertinent portion of section 77.1303(h), is as follows:

> 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.

The alleged failure to clear persons from the "blasting area"

The term "blasting area" is defined by section 77.2(f) as "the area near blasting operations in which concussion or flying material can reasonably be expected to cause injury". MSHA's theory in this case seems to be that since someone was killed, the victim was obviously not removed or cleared from the blasting area. In the circumstances, MSHA argues that since the standard deals with explosives and blasting, an operator is absolutely liable for any resulting injuries or deaths. MSHA's theory of absolute liability was expounded on by its counsel during the course of a colloquy from the bench (Tr. 177-182). MSHA's counsel takes the position that since the standard deals with explosives there is absolute liability when the operator fails to remove all persons from the blasting area, even though the operator may have made a reasonable physical search of the area prior to blasting. MSHA's position is highlighted by its answer to the following question asked by me during the course of the hearing (Tr. 181):

> ADMINISTRATIVE LAW JUDGE KOUTRAS: If some back packer came on the site, crawled in his sleeping bag and fell asleep; and, during the hoot owl shift, a shot fired off, the mine operator took reasonable steps to remove and to account for all of his people, and every man was taken

> away from the shot, and the next morning they found this guy that was knap sacking killed, would you have a citation, and would you charge the operator for failing to insure that that kid was not removed from the site prior to the shot?
>
> MR. COHEN: It may be a technical violation, no negligence, but you are dealing with explosives, and we do think there is an absolute liability to remove all persons.

In the Domtar Industries case, supra, MSHA amended the citation after the action before Judge Broderick was begun to include an allegation that the two men who were killed were not cleared and removed from areas endangered by the blast as required by the second sentence of section 57.6-175. This standard uses the phrase "areas endangered by the blast" rather than "blasting area". In affirming the violation, Judge Broderick ruled that "the fact that the miners' bodies were found in that area is irrefutable proof" that all persons were not cleared from the area endangered by the blast. In a footnote to this ruling, Judge Broderick stated as follows at 3 FMSHRC 2348:

> The Mine Act is generally a strict liability statute. The language of the cited standard and the wording of § 110(a) of the Act make it plain that unforeseeability is not a defense to a violation, nor can the operator avoid a violation by placing the blame on a careless employee. MSHA v. El Paso Rock Quarries, 3 FMSHRC 35 (1981); Hendensfels v. Drilling Co., 2 FMSHRC 790 (1980).

In the instant case, MSHA does not cite the Domtar Industries decision or the cases cited by Judge Broderick in support of a strict liability theory. MSHA's brief simply states that the use of explosives have generally been considered areas where strict liability concepts are specifically applicable, and concludes that the language of section 77.1303(h) "directly incorporates the strict liability principals applicable to blasting, into its requirements". MSHA argues that the mere fact that the blast victim and blaster and his crew were not clear of the area where flyrock from the blast did fall is sufficient to impose liability under section 77.1303(h).

I agree with the position taken by Austin Powder Company in its posthearing arguments that before MSHA can establish that all persons were not cleared from the blast area, it has the burden of first establishing what that area is. As correctly pointed out by Austin Powder's counsel in his brief, MSHA has attempted to establish the "blast area" in two ways. First, MSHA maintains that the blast area was an area within 500 feet of the actual blasting location, and it arrives at this distance by citing and relying on a State of Pennsylvania regulation which only requires that machinery within 500 feet be shut down and that persons retreat to a safe distance.

MSHA's second attempt to establish the parameters of the blast area was to determine after the accident during its investigation how far the furthest flyrock traveled. Anything inside that area would be considered the "blast area", and anything beyond the farthest point where the rock landed would be outside the "blast area" and presumably in the "safe zone".

MSHA's interpretations and arguments with respect to what the "blasting area" should be in this case border on fantasy. It seems to me that when one is dealing with regulations concerning explosives and blasting, the standards sought to be invoked by MSHA should be clearly and precisely drawn and applied by the inspectors in the field so that they are readily understood by those being regulated, as well as those who have the enforcement responsibility for insuring compliance. The theories advanced by MSHA in this case are different from those recently advanced in another blasting case concerning a mine operator in Pennsylvania, and a discussion of this case follows.

On August 25, 1982, I issued a decision in the case of MSHA v. Rockville Mining Company, Docket No. WEVA 82-10. The case concerned an allegation that a Pennsylvania mine operator failed to clear and remove miners from a blasting area in violation of section 77.1304(h). Even though the mine was located in Pennsylvania, MSHA made no mention of any 500 foot requirement or absolute liability, and the inspector who issued the citation, as well as a second inspector who was a qualified MSHA explosives instructor, said absolutely nothing about any 500 foot "safe distance" requirement. In fact, the instructor gave an opinion that based on the size of the charge in the two bore holes in question, 130 feet was a safe distance, and the inspector who issued the citation rendered an opinion that if all of the holes in question were charged with 800 pounds of explosives each, a safe distance would be 2,000 feet away. In short, in the Rockville Mining case, the question as to what constituted the "blasting area" was dependent on a number of variables, such as the amount of explosives used, the number and depth of the holes which constituted the "shot", the topography, and the expertise of the blaster.

On the facts of the instant case, I conclude and find that in order to establish a violation of the first specification noted in the citation MSHA must establish by a prepondance of the evidence that Austin Powder failed to insure that persons within the "blasting area", as that term is defined by section 77.2(f), were not cleared or removed prior to the blast. I reject MSHA's "absolute liability" theory, and I also reject the notion advanced by MSHA that the mere fact that the blast victim and the blaster and his crew were in an area where flyrock fell is sufficient to impose liability under section 77.1304(h). In order for this standard to make any sense at all, it seems to me that it has to be interpreted rationally and consistently. "Hindsight" and after-the-fact interpretations for the purpose of laying the blame on someone for an unfortunate accident do not in my view advance the interests of safety, particularly when the standard in question is obviously being inconsistently applied and interpreted.

In this case, MSHA also advances the argument that the blaster should have followed the recommendations or requirements of Pennsylvania State law and positioned himself 500 feet from the blast. I find nothing in section 77.1304(h) that supports this theory, and as correctly pointed out by Austin Powder's counsel, the state code provision relied on does not define the "blast area", and counsel's observations that requiring mine operators to follow different state law regulations on this issue can only lead to chaos are well taken. In my view, if MSHA believes that such state requirements should be followed then it should promulgate an appropriate standard and say so. Here, although MSHA fixes the "blasting area" by measuring the distance where the farthest rock fell, it also takes the position that 500 feet was a safe distance for people to be. Had the rock only gone 100 feet, that would have fixed the "blasting area", yet MSHA would probably still insist that miners be cleared to a distance of 500 feet. I simply cannot accept such contradictory interpretations and applications of the cited standard, and I reject MSHA's "500-foot theory".

While I agree with the argument that the blaster in this case had a duty under section 77.1304(h), to locate anyone who happens to be in the "blasting area" prior to the shot and to insure that he is removed and cleared away, I disagree with MSHA counsel's argument that the blaster has such a duty even though he may not be able to visually observe such a person prior to the shot (Tr. 34-35). I conclude and find that in light of the definition of the term "blasting area", the blaster has a duty to take reasonable and prudent measures to insure that all persons are cleared and removed from the "blasting area" as reasonably and prudently determined by him at the time of the shot, and not as determined by non-experts after the fact.

In the instant case, MSHA conceded that the procedures followed by the blaster were technically correct. MSHA found nothing wrong in the manner in which Mr. Lucas loaded, wired, and fired the shot. Further, as the record here established, at the time the citation was issued Inspector Bixler filled out an "inspector's statement" in which he candidly acknowledged that the accident could not have been predicted and that it resulted from circumstances beyond the operator's control. He later filled out a new statement at the direction of his supervisor after someone from the solicitor's office made a "lawyer's judgment" that the case obviously could not be defended on its merits. Mr. Bondra candidly admitted during the hearing that the sketch of the "blasting area" as shown in his accident investigation report was a mistake.

Mr. Lucas testified that he and his crew were positioned some 300 feet from the blast, and he confirmed that in determining what constitutes the "blasting area", he takes into consideration the size of the shot, the manner in which it is loaded, and the surrounding terrain. On the day in question, he determined that the shot would go in the opposite direction from where he and his crew were located, but that for some unexplained reason there was a "blowout" which caused the flyrock in question.

The record reflects that at the time of the blast, Mr. Lucas was an experienced and licensed blaster. He holds a college degree in mathematics, and as indicated earlier, MSHA's investigation disclosed nothing wrong with the manner in which the shot was fired. Further, since Inspectors Bondra and Bixler are not blasting experts, do not hold blaster's licenses, and have no experience in surface blasting, they were in no position to offer any credible testimony as to the technical aspects of the shot or the "blowout". Mr. Bixler conceded that at the time he issued his citation he did not take into account Mr. Lucas' opinion that 300 feet was a safe distance from the blast, and he also conceded that Mr. Lucas did have the safety of his crew in mind prior to the blast.

Mr. Lucas testified that prior to the "blowout" he had made five to six other shots using the same amount of explosives and that there was nothing unusual about those shots. Under the circumstances, he obviously had no reason to believe that a "blowout" or flyrock would occur, and he confirmed that prior to the detonation of the shot, he checked all of the charged holes for potential signs of a "blowout". Further, as indicated earlier in my findings concerning the sounding of a warning, Mr. Lucas did all that was reasonably possible to alert all persons within the blasting zone of hazard to shut down all equipment and to seek shelter.

I conclude and find that Austin Powder Company has established by a preponderance of the evidence adduced in this case that prior to the detonation of the blast in question, Mr. Lucas acted in a reasonable and prudent manner in securing the area, and that he removed himself and his crew to a safe distance and to a location which he reasonably believed was outside the "blasting area" as defined by section 77.2(f). I also conclude and find that Mr. Lucas acted in a reasonable manner in clearing all other persons from the blasting area, and that he did all that could be expected of a reasonable and prudent blaster to insure that all persons, including the accident victim, were outside the blasting area. Under these circumstances, I conclude that MSHA has failed to establish a violation and that portion of Citation No. 1041342, which charges Austin Powder with failing to remove and clear all persons from the blasting area IS VACATED.

The alleged failure to provide suitable blasting shelters

Citation No. 1041342 also charges Austin Powder with a failure to provide suitable blasting shelters. Section 77.1303(h) requires that all persons be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting. The regulations do not specify what a "suitable blasting shelter" is, and this matter is apparently left to the discretion and judgment of the blaster.

MSHA's counsel asserted during the course of the hearing that the citation was issued in part for failure to remove persons from the scale house, a location which counsel asserts was inside the blasting area (Tr. 132-134).

In an attempt to justify the inspector's opinion that the scale house was not a suitable shelter, he was asked to speculate on whether or not a large rock would crash through the roof of the scale house, and when he answered in the affirmative, counsel grasped at this as evidence that the scale house was not a suitable shelter. I find this conclusion on the part of the inspector to be sheer speculation and a feeble attempt to justify his after-the-fact lay opinion that the scale house was not a suitable shelter and that the failure to remove personnel from that location also constituted a violation of section 77.1303(h).

I take note of the fact that nowhere in the official MSHA report of investigation compiled by Inspector Bondra is there any mention of the fact that the scale house was not a suitable shelter, or that the failure to remove persons from that location concerned the inspector. Further, I take note of the fact that the conditions or practices described by Inspector Bondra on the face of his citation do not even mention the scale house or anyone in it as part of the alleged violative conditions or practices. His citation is limited to an assertion that the accident victim was not removed to a safe area, and his conclusions in this regard were obviously based on the fact that the accident victim suffered fatal injuries as a result of being struck by flyrock. Since the citation was issued after the investigation was completed, and since it is based on information which came to the inspector's attention in the course of that investigation, one would think that the inspector would have included the "scale house theory" in the citation. I believe that his failure to do so stemmed from the fact that at that point in time Mr. Bondra did not believe that the scale house was in the blasting area. I also believe that the inclusion of the scale house personnel during the course of the hearing was an after-thought to bolster MSHA's theory of the definition of "blasting area".

Although Mr. Lucas conceded that there were no designated blasting shelters at the location of the shot, a drill rig, a shot truck, and a driller's maintenance truck were present and he considered this equipment to be suitable blast shelters (Tr. 67-69). However, in his opinion, if the men are at a safe distance there is no need for them to crawl under the equipment. As for himself, he conceded that he was not in or under any piece of equipment because he believed he was at a safe distance some 300 feet from the actual blast operating his detonating device. Aside from the fact that he believed he was at a safe distance, Mr. Lucas also was of the opinion that a blaster must be able to observe the blast so as to detect any misfires and to insure that the proper blasting sequence takes place. Mr. Doan testified that the scale house was in a secure area and that a rock would not penetrate the roof. He also testified that the crusher is constructed of structural steel and was a "wonderful shelter".

Inspector Bondra conceded that a piece of equipment can serve as an adequate blasting shelter, and he confirmed that the drill rig which was some thirty feet from where Mr. Lucas was standing at the time of the detonation would be a shelter. Even though he indicated that his

investigation did not determine where the other trucks were located or where the crew was standing, his opinion was that the only safe shelter within 500 feet of the blast was under the drill rig. He also confirmed that had the blasting crew been under the trucks, he would not have issued the citation for this violation.

I have some difficulty in comprehending precisely what MSHA's position is with respect to the alleged failure by Austin Powder to provide the type of shelter contemplated by the second sentence of section 77.1303(h). I suspect that the inspector decided to include this specification in his citation after determining during his investigation that Mr. Lucas was standing some thirty feet from the drill rig and was not under it when debris from the blast went over his head. Since the inspector apparently did not determine where the rest of the crew was positioned, I have no way of knowing what he had in mind with respect to the rest of the crew.

As I interpret the cited standard, if suitable blasting shelters are provided, there is no requirement that persons be cleared and removed from the blasting area. Conversely, if persons are not within the blasting area, there is no logical reason for requiring suitable blasting shelters. The language of the standard leaves much to the imagination, and I suspect that this is the reason for MSHA's anemic argument which appears at pg. 8 of its brief as follows:

> * * * the fact that there were some trucks inside the blasting zones at the time of the blast is not a substitute for specifically designating and providing suitable shelters for the protection of miners. Unless the miners are trained in using shelters and know where the designated shelters are, they do not serve their intended purpose.

On the facts of this case, it would appear that the fatality which occurred prompted the inspector to conclude that suitable shelters were not provided. However, a fatality, in and of itself, does not establish a violation of any mandatory safety standard. On the facts of this case, I cannot conclude that MSHA has established by a preponderance of any credible evidence, that Austin Powder failed to provide suitable shelters. To the contrary, I conclude and find that the evidence establishes that suitable shelters, within the language of the cited standard, were in fact provided. If MSHA chooses to penalize a mine operator or its independent contractor everytime a fatality occurs, without regard to whether or not the facts presented justify such a course of action, then I suggest it seriously consider completely outlawing blasting or the use of explosives, or in the alternative, promulgating standards which make sense. I conclude and find that MSHA has failed to establish that suitable shelters were not provided, and that portion of the citation which alleges that were not IS VACATED.

Docket No. PENN 82-33

Fact of Violation - Citation No. 1042215, July 31, 1981, 30 CFR 77.1303(h)

This citation was served on Doan Coal Company, and it seems clear that the inspector issued it because of the fatality. An identical citation was served on Austin Powder Company after the inspector concluded that blaster Lucas was not under a suitable shelter because debris from the blast in question flew over his head while he was standing some thirty feet from a drill rig which the inspector believed constituted a suitable shelter. Here, since the victim was struck and killed by flyrock while apparently sitting on a spoil pile observing the blast, the inspector concluded that a suitable shelter was not provided, and that the accident the victim was not cleared and removed from the blasting area.

For the same reasons articulated in my findings and conclusions concerning Austin Powder's alleged failure to provide suitable blasting shelters or to remove persons from the blasting, I conclude and find that MSHA has failed to establish violations of the part of respondent Doan Coal Company. I find that Doan Coal took all reasonable steps to remove persons from the blasting area prior to the detonation. Once the call came over the mine radio communications system, the loader operator, Albert Bloom, signaled the victim to shut down the crusher, and when last seen by Mr. Bloom the victim was walking on the road in the direction of the scale house. I conclude that the victim must have known about the impending blast since he shut down his equipment and apparently decided to go on a frolic of his own to the coal spoil pile to view the blast. In these circumstances, I conclude that Doan acted reasonably, and absent any requirement that a mine operator take a physical inventory of all of its personnel and lead them individually to a safe shelter, I cannot conclude that Doan Coal Company could have done anything else to prevent the tragic accident which occurred in this case. Under the circumstances, the specification in the citation charging Doan Coal Company with failing to remove all persons from the blasting area IS VACATED.

With regard to the charge that Doan Coal Company failed to provide suitable blasting shelters, I conclude and find that the primary responsibility for providing such shelters fell on Austin Powder. MSHA's attempts to hold Doan Coal Company responsible after the fact on the theory that the scale house was not a suitable shelter and did not have a sign posted on the door identifying it as such is rejected. If MSHA believes that a mine operator should label every piece of equipment or building as a "suitable blast shelter", similar to those buildings labeled "civil defense shelters" to be used in the event of a nuclear holocust, then MSHA should seriously think about promulgating some standards and guidelines in this regard. This specification noted in the citation is also VACATED.

ORDER

In view of the foregoing findings and conclusions, MSHA's proposals

for assessment of civil penalties against the named respondents are rejected, and these proceedings are DISMISSED.

George A. Koutras
Administrative Law Judge

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SERVICE AGREEMENT

AUSTIN POWDER COMPANY
Cleveland, Ohio

Dated January 19, 1981

WHEREAS, the undersigned customer may hereafter, from time to time, request certain assistance of AUSTIN POWDER COMPANY in connection with the performance of certain blasting work; and

WHEREAS, AUSTIN POWDER COMPANY is not engaged in blasting work, its business in explosives being confined solely to the manufacture and sale thereof, but to assist the said customer, the said AUSTIN POWDER COMPANY has agreed, at certain times, to permit said customer the temporary use, free of charge, of the services of said company's employees, together with or without certain needed equipment.

NOW, THEREFORE, the undersigned customer hereby expressly agrees that, while engaged in said work, said employees and equipment are and shall be, on each occasion, to all intents and purposes, the employees and equipment of the said customer and subject to said customer's sole supervision and control in all respects, and that all work and services so performed shall be at the sole risk and responsibility of the said customer. The undersigned customer further expressly agrees to indemnify and hold harmless the AUSTIN POWDER COMPANY, its employees and agents, from any and all liabilities, damages, losses or claims of any character, whether caused by negligence or otherwise, as a result of injuries to any property, any person or the said customer from such services or work (excepting only liability for injury or death of AUSTIN POWDER COMPANY employees). The undersigned customer hereby expressly recognizes and assumes sole and absolute responsibility for the result of the services or work of such employees or the use of equipment gratuitously furnished by said AUSTIN POWDER COMPANY.

This agreement shall continue in force until either party notifies the other, in writing, of its desire to terminate the same, but such termination shall not relieve either party of any liability arising thereunder prior to such termination.

AUSTIN POWDER COMPANY

By Roy T. Smith Dist. No. 023

DOAN COAL COMPANY
Customer

By

ORIGINAL - CLEVELAND COPY PINK - CUSTOMER'S COPY YELLOW - SALESMAN'S COPY

FORM 62 REV.-1-75

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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

JAN 18 1983

SECRETARY OF LABOR, on behalf of ANTHONY HERIGES, TOM ANTONINI, JOHNNY GIBSON and LARRY HALEY, Complainant	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket Nos. KENT 80-14-D
	:	KENT 80-15-D
	:	KENT 80-22-D
	:	KENT 80-23-D
v.	:	KENT 80-42-D
	:	KENT 80-52-D
ISLAND CREEK COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

FOR GOOD CAUSE SHOWN, the Secretary's motion to withdraw his complaint in each of the above cases is GRANTED.

WHEREFORE IT IS ORDERED that the above proceedings are DISMISSED.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 18 1983

WESTMORELAND COAL COMPANY, Contestant	:	CONTEST OF ORDER
v.	:	Docket No. WEVA 82-152-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 886894; 1/12/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 82-369 A.C. No. 46-01514-03501
v.	:	
WESTMORELAND COAL COMPANY, Respondent	:	
	:	Eccles No. 6 Mine

DECISION

Appearances: John A. MacLeod, Esq., Crowell & Moring, Washington, D.C., for Westmoreland Coal Company;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor.

Before: Judge Melick.

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., "the Act", to contest an order of withdrawal issued to the Westmoreland Coal Company (Westmoreland) under § 104(d)(1) of the Act and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA), for the violation charged in that order. 1/ The order before me (No. 886894) issued

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

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent

by MSHA inspector Homer Gross on January 12, 1982, charges a violation of the regulatory standard at 30 C.F.R. § 75.202 and alleges as follows:

> During a fatal accident investigation, it was revealed that the known overhanging rib in the old two north entry on two south west section (0270), 55' inby survey station number 9363, was not supported or taken down, which resulted in a fatal accident. The section was supervised by Robert Hairston, who was aware of the condition.

The cited standard provides as relevant herein that "overhanging or loose faces and ribs shall be taken down or supported."

At approximately 10:15 p.m., on January 11, 1982, a roof fall occurred at Westmoreland's Eccles No. 6 Mine, resulting in the death of scoop operator John H. Clay. The fall occurred in an area of "old works" last mined in the 1930's known as the old No. 2 Entry of the two southwest main section. A work crew under the supervision of section foreman Robert Hairston, was sent to the section on Friday, January 8, 1982, and again on Monday, January 11, 1982, to prepare to build a stopping needed to maintain required ventilation. On the latter date, the crew arrived on the section around 4:30 p.m. Hairston first performed the required examination of the work places and then assigned duties to the crew members. In the sequence of operations, the continuous mining machine was first trammed to the last open crosscut, left, connecting southwest main with the No. 2 entry of the old inactive two north haulway. Albert Honaker, the miner operator, proceeded to clean rock and coal from the mine floor across the 20 foot wide entry. While working there, Honaker observed what he described as a "brow" 2/ at the top of the No. 2 entry that protruded from the left rib some

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1/ (contd.) danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

2/ West Virginia State Coal Mine Inspector Danny Graham, testifying on behalf of the operator, explained that the terms "brow" and "overhanging rib" are essentially synonymous. Both terms were used in this case to describe the same phenomenon and I conclude that the terminology is indeed synonymous.

10 to 14 inches along 8 feet of the entry. 3/ Honaker was unable to reach the "brow" because it was then too far inby the roof bolts, but as he left, he warned the "pin" crew (roof bolting crew) and Arthur Burdiss, the bolter helper, in particular, to "watch it". After cleaning as much as he could, Honaker left to work in another area. Honaker told foreman Hairston of the brow condition and they both later returned with a slate bar. They tried "four or five times" to bring it down but left the area without succeeding. 4/

Arthur Burdiss, a roof bolter helper on Hairston's crew that afternoon, recalled being warned by Honaker of the "overhanging brow" in the old No. 2 entry. Burdiss estimated that the brow protruded some 10 to 12 inches along 4 feet of the rib. He and his co-worker, George Ayers, also tried to take down the brow with the slate bar but they too were unsuccessful. They were also unable to bolt into the overhanging brow because of the position of the roof bolter canopy. Four roof bolts were, however, installed to within 4 inches of the outby edge of the brow.

Jim Milam was working with the deceased just before the roof fall. They unloaded the supplies needed to build the stopping and Milam examined the entry to determine where to locate the stopping. At this same time, Honaker and Hairston were continuing in their efforts to take down the brow. According to Milam, it projected 12 to 14 inches into the entry and had a "hairline" crack or separation in it. He recalls commenting that it looked like a "bad brow" and asked if it had been checked. Milam and the deceased then also tried unsuccessfully to pull the brow down. Because of their inability to bring it down with the slate bar, Milam thought it was safe and both men began preparatory

3/ There is some divergence of opinion regarding the size of this "brow". The operator's witnesses who actually saw it before it fell described it variously as protruding from 10 to 14 inches from the rib along 4 to 22 feet of the entry. The MSHA inspectors, basing their estimates on the amount of debris after the fall, thought the overhang would have been 22 feet long, 16 to 34 inches thick, and with a brow of up to 68 inches. West Virginia Coal Mine Inspector Graham, testifying for the operator, estimated, based on the same debris, that the brow had projected 30 to 31 inches into the entry. I do not consider the testimonial discrepancies in the size of the brow to be significant for purposes of this decision.

4/ Mr. Hairston, the section foreman, declined to answer questions relating to the subject matter of this case citing as grounds therefor the protections afforded by the Fifth Amendment to the U.S. Constitution. Counsel for MSHA could give no assurance that Hairston would not be subject to criminal liability based on the subject matter of this case and did not contest the asserted privilege. No inferences have been drawn from Mr. Hairston's refusal to testify in this regard based on his invocation of the Fifth Amendment privilege.

work on the stopping. As they began shoveling loose coal from the rib beneath the brow, Milam saw some "flakes" begin to fall. This convinced him that the top was indeed "no good" but before he could shout a warning, the brow and some additional roof and rib fell onto Mr. Clay, causing his death. Milam later admitted, after seeing the amount and size of the debris from the fall, that the full brow had indeed extended some 22 feet along the entry and that "there was more to it" than he initially thought.

As a preliminary matter, Westmoreland claims that the regulatory standard here cited, 30 CFR 75.202, is unenforceably vague as applied to the facts of this case. The standard provides as relevant herein that "overhanging or loose faces and ribs shall be taken down or supported." Westmoreland appears to argue that because an MSHA inspector testified that he would not necessarily cite every overhanging rib (for example, a one inch overhang) that in his opinion posed no hazard, enforcement of the standard was therefore based upon the subjective discretion of the various inspectors. Westmoreland also cites in this regard an internal MSHA memorandum which provides in essence that overhanging ribs should be cited only when they present a hazard (Government Ex. No. 2). In determining the constitutional validity of a regulatory standard where challenged for vagueness, however, the language of the standard itself must first be examined. In this regard I find that the language provides constitutionally "reasonable certainty" and is indeed facially unambiguous. Accordingly, MSHA's enforcement practices under the standard are irrelevant to the defense asserted. Connally v. General Construction Co., 269 U.S. 385, 391; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337.

Westmoreland next argues that the brow which fell did not constitute an "overhanging rib" within the meaning of the cited standard. As previously noted, however, West Virginia State Coal Mine Inspector Danny Graham testified on behalf of Westmoreland that the terms "brow" and "overhanging rib" were essentially synonymous. The terms were used in this case by counsel and various witnesses to describe the same phenomenon and I have already concluded that the words are indeed synonymous. It is accordingly immaterial whether the cited phenomenon is referred to as a "brow" or "overhanging rib". I find that the phenomenon was, regardless of the terminology used, an "overhanging rib" within the meaning of the cited standard.

Westmoreland further contends that a violation of the cited standard cannot be supported where "every means of taking down or supporting an alleged overhanging rib was either infeasible or presented a potential hazard equal to or greater than the hazard presented by that overhanging rib." The contentions involve elements of two affirmative defences, i.e. impossibility of performance (or compliance) and the "greater hazard defense". In order to establish the former defense, the operator must prove that (1) compliance with the requirements of the cited standard either would be functionally impossible or would preclude performance of required work, and (2) alternative means of employee protection are unavailable. Diamond Roofing Company, Inc., 80 OSAHRC 76-3653, 8 BNA OSHC 1080, 1980 CCH OSHD ¶ 24,274 (Feb. 29, 1980); Secretary v. Sewell Coal Co., 3 FMSHRC 1380 (1981), aff'd 686 F.2d 1066 (4th Cir. 1982). In order to establish the latter defense, the operator must prove that (1) the hazards of

compliance are greater than the hazards of non-compliance; (2) alternative means of protecting miners are unavailable; and (3) modification proceedings under Section 110(c) of the Act would have been inappropriate. Secretary v. Penn Allegh Coal Co., Inc., 3 FMSHRC 1392 (1981). Even assuming that modification proceedings would have been inappropriate under the unique facts of this case (an evidentiary matter which was not, however, fully developed at hearing), Westmoreland has failed to sustain its burden of proving the other necessary elements of either the impossibility of compliance or the "greater hazard" defense.

It has not been shown for example that it was necessary in the first instance to have required the miners to have erected a stopping beneath the overhanging brow. Evidence has not been presented to demonstrate that the stopping could not have been erected in a safer location or that other alternative means of meeting the ventilation requirements were unavailable. Even assuming, arguendo, that such alternatives were unavailable, Westmoreland has failed to prove that it would have been more hazardous to have supported or taken the overhanging brow down.

MSHA apparently concedes that the overhanging roof in this case could not reasonably have been blasted down or supported with roof bolts (because the canopy on the roof-bolting machine would not allow the machine to be placed under the subject brow) and that posts or crib blocks could not have been installed because of the angle of the brow (Government Ex. No. 4, page 4). MSHA maintains, however, that the overhanging roof could have been cut down by using the continuous mining machine. There is no dispute that no efforts were made to do this. Westmoreland concedes, moreover, that the continuous miner could have been brought in parallel to the old No. 2 entry if additional roof bolting had been first provided in the entry. It contends, however, that once in the vicinity of the brow, the ripper heads of the miner might have come into contact with roof bolts located in close proximity to the brow, causing sparks and possibly tearing down part of the roof. Westmoreland's argument fails, however, to take into consideration that the continuous miner could have been safely used to trim the brow just ahead of the roof bolting operation. Thus, the miner operator could have progressed alternately with the roof bolter, cutting down the brow without the ripper head of the miner ever being in close proximity to the inserted roof bolts.

Westmoreland also contends that the brow was beyond the reach of the ripper head and therefore the miner could not have been used to bring it down. Westmoreland ignores the evidence, however, that the miner could have been elevated onto blocks that would have given the ripper head sufficient height to have reached the brow. While Westmoreland also claims that it would not have been safe to have placed roof bolts in the area between the last open crosscut and the second last crosscut in the old No. 2 entry in order to properly position the miner, no specific safety problems have been cited. To the contrary, MSHA inspector Homer Gross opined that the continuous miner could have been safely used to bring down the brow. Under all the circumstances, it is clear that Westmoreland has not met its burden of proving either the "greater hazard" or "impossibility of compliance" defense. The cited violation is accordingly sustained.

Whether that violation was "significant and substantial", however, depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 at 825. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. Even considering only the testimony from the operator's witnesses, it is clear that a substantial overhanging brow existed in the cited entry in which at least a hairline fracture or separation could be observed. According to these witnesses, the brow protruded from 10 to 31 inches from the rib for as long as 22 feet of the entry. Even had the fracture or separation not been observed, Westmoreland's expert witness, Dr. Syd Peng, conceded that fractures may very well exist that are not visible. In addition, the overhanging brow in this case was sufficiently obvious to have attracted the attention of at least six experienced miners who were sufficiently concerned to have all made efforts to bring it down with a slate bar. It may reasonably be inferred therefore that all of these miners, at some point in time, perceived the brow as a serious hazard. Under all the circumstances, I conclude that the violation presented a high probability of serious or fatal injuries. There indeed existed a reasonable likelihood that the hazard of a roof fall would occur, resulting in injuries of a serious nature. Accordingly, I find the violation to have been "significant and substantial". For the same reasons, I find that the violation reflected a high level of gravity.

I further find that the violation was the result of the unwarrantable failure of the operator to comply with the law. A violation is the result of "unwarrantable failure" if the violative condition was one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Co., 7 IBMA 280. In this regard, the negligent acts of section foreman Robert Hairston are attributable to the operator. Secretary v. Ace Drilling Co, Inc., 2 FMSHRC 790 (1980). It is undisputed in this case that Hairston had been warned about the overhanging brow at issue, had seen the condition, and had apparently deemed it sufficiently dangerous to have made efforts on his own to bring it down with a slate bar. The very existence of this brow as described by the operator's own witnesses clearly constituted a violation of the cited standard. It may reasonably be inferred, therefore, that Hairston had knowledge of the violative condition but failed to correct that condition through indifference or lack of reasonable care. Zeigler Coal Co., supra. The violation was accordingly the result of the unwarrantable failure of the operator to comply with the law and, indeed, of gross negligence. Accordingly, I affirm the order at bar.

In determining the amount of civil penalty that is appropriate in this case, I also consider that the operator is large in size, that it has a fairly substantial history of violations, and that the penalty here imposed would not affect its ability to stay in business. Within this framework of evidence, I find that a penalty of $8000 is appropriate.

Order

Order No. 886894 is affirmed and the contest of that order is dismissed. A civil penalty of $8000 shall be paid by the Westmoreland Coal Company within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

John A. MacLeod, Esq. and Orin H. Kutinplan, Crowell and Moring, 1100 Connecticut Avenue, N.W., Washington, DC 20036

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 19 1983

CHARLES J. FRAZIER, Complainant, v. MORRISON-KNUDSEN, INC., Respondent.	COMPLAINT OF DISCRIMINATION DOCKET NO. WEST 81-329-D

Appearances:

Gary Overfelt, Esq.
417 Petroleum Building
Billings, Montana
for Complainant

Earl K. Madsen, Esq.
1717 Washington Avenue
Golden, Colorado
for Respondent

Before: Judge John J. Morris

DECISION

Complainant Charles J. Frazier, (Frazier), brings this action on his own behalf alleging he was discriminated against by his employer, Morrison-Knudsen Company, Inc., (MK), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), in its pertinent part provides as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... 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 ... on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties a hearing on the merits was held in Billings, Montana on June 7-8, 1982.

The parties filed post trials briefs.

ISSUES

The threshold issues are whether complainant, as a management supervisor, is within the coverage of the Act and, further, whether the complaint was timely filed.

The issue on the merits is whether respondent discriminated against complainant, a safety supervisor, in violation of the Act.

COVERAGE

Respondent contends that complainant does not come within the coverage of the Act since he is a member of management.

The uncontroverted facts establish that complainant was employed as a safety specialist in respondent's surface coal mine operation (Tr. 99, 199). The answer to the coverage issue is found in the Act itself where a "miner" is unambiguously defined as any individual working in a coal or other mine, Section 3(g). Management personnel working in a coal mine are therefore "miners" within section 105(c)(1) and they are accordingly entitled to the protections afforded therein. Accord: Miller v. Federal Mine Safety and Health Review Commission, 687 F. 2d 194, (7th Cir August 1982). Eagle v. Southern Ohio Coal Company, 2 FMSHRC 3728, December 1980, (Merlick, J.). Herman v. IMCO Services, 4 FMSHRC 1540, August 1982 (Morris, J.).

The motion to dismiss for lack of coverage is denied.

TIMELY FILING OF COMPLAINANT

MK asserts the complaint of discriminatory discharge was not timely filed. The discharge occurred on April 28, 1981 and the first notice MK received was when Frazier filed his amended petition in this case on August 25, 1981, approximately four months later.

A review of the sequence of events is necessary to consider this issue. On April 10, 1981, Frazier was permanently assigned to the swing shift (Tr. 46, 74). He considered this assignment to be discriminatory and on April 24, 1981 he filed a discrimination complaint with MSHA. Frazier alleged his transfer was motivated by four different incidents. He alleged these occurred on September 25, 1980, September 30, 1980, April 6, 1981, and April 7, 1981.

On May 12, 1981, in the process of investigating his discrimination complaint, MSHA took a 12 page handwritten statement from Frazier (Commission File).

On June 15, 1981 MSHA advised Frazier that on the basis of their investigation they concluded that no violation of Section 105(c) had occurred. On July 14, 1981 Frazier appealed to the Commission. On August 26, 1981 an "amended complaint" was filed before the Commission alleging Frazier was unlawfully discharged on April 28, 1981 for engaging in a protected activity.

DISCUSSION

It has been held that none of the filing deadlines in the discrimination section of the Act are jurisdictional in nature. Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (1979), Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539, (1981).

All of the above facts indicate that Frazier was pursuing his discimination complaint in a timely manner. To support MK's argument would be to exalt form above substance.

The motion to dismiss for untimely filing of the complaint is denied.

COMPLAINANT'S EVIDENCE

Complainant's evidence consists of the testimony of Charles J. Frazier, Jewell Davisson, and numerous exhibits.

Charles J. Frazier was employed with Morrison-Knudsen as a safety supervisor 2 on April 24, 1979 (Tr. 14, 19, 56). He was terminated April 28, 1981 (Tr. 14). Frazier's initial assignment was at the MK mine in Kemmerer, Wyoming. At that location Frazier reported to Gary Kilstrom, the senior safety supervisor (Tr. 58). Frazier's relationship with Kilstrom developed into a personality conflict (Tr. 58). Frazier was not as severe as Kilstrom (Tr. 62-63).

Frazier was subsequently transferred to the MK Absoloka Mine in Billings, Montana where he worked under Jed Taylor, mine manager (Tr. 19). He also reported to Richard Daly in the home office. Daly was in charge of safety and environmental services (Tr. 19).

In February 1980, Frazier was restricted to his office (Tr. 141).

In March 1980 an MSHA audit found MK in violation of the dust standard (Tr. 32, 125, 126). Frazier complained that MK's dust sampling program was inadequate (Tr. 28). Frazier was reprimanded numerous times and Jed Taylor reprimanded him about the dust and noise violation. Taylor told Frazier that we got away with it and keep your nose out of it (Tr. 31-32). It wasn't Frazier's responsibility to take dust samples (Tr. 127).

In September 1980 MK had a ground control problem in pit No. 4 (Tr. 27-28). MSHA inspector Clayton issued a citation and told Taylor (mine manager) what he expected to be done (Tr. 28). Taylor made the remark that "that's the way the Good Lord meant it to be and there wasn't nothing he could do to change it." Frazier felt this was a poor safety attitude and behavior (Tr. 28).

In September 1980 Frazier reported an unsafe condition to Wunderlick (mine superintendent) in pit No. 4 (Tr. 33). Wunderlick told Frazier he wasn't to be in the pit (Tr. 33).

In December 1980 Frazier gave a company safety citation to Chaps Lix in a local bar (Tr. 89, 158). The union complained and Taylor was upset stating that company business shouldn't be conducted in a bar (Tr. 101). Frazier said he'd apologize to Lix for giving it to him in a bar but he would'nt apologize for the citation. He told Taylor he could "eat it" (Tr. 101).

On one occasion Taylor told Frazier that his [miner] training was inadequate (Tr. 35). Frazier felt the Company's facilities and training aids were inadequate. Frazier made requests for teaching aids from when he arrived until he ceased to conduct miner training which was about four months before he was terminated (Tr. 37). Frazier received no response from his supervisors and no aids except a projector (Tr. 37). The only text books he had were those he had brought from MSHA (Tr. 38).

Frazier and Doug Harper, an MSHA inspector, have a personality conflict. On one occasion Frazier flunked Harper in a mine rescue course. Harper felt Frazier didn't have sufficient education in safety and health (Tr. 40).

In December, 1980, and January, 1981, Frazier was aware that MK and Local 400 of the Operating Engineers were negotiating a labor contract (Tr. 40-41). Frazier hadn't made his union preference known to other miners except about a year before his discharge he told Chaps Lix that he felt for

the money that we were paying for dues and initiation into the Operators Local 400, they weren't getting proper representation (Tr. 42, 43). Frazier did not express any union preference after being advised by MK policy of the supervisors role (Tr. 42, 43). Frazier attended a meeting in January 1981 concerning the necessity of supervisors remaining neutral (in the conflict between the unions) (Tr. 81, 82).

Frazier went to the home office in Boise in midwinter, 1981 (Tr. 41, 42). Taylor said Frazier was being sent to the home office because of a complaint he (Taylor) had received from the Operating Engineers (Tr. 76).

On April 7, 1981 Frazier talked to Dean Gilson in the home office. Gilson told Frazier he'd have to get along with Taylor or his career would be in jeopardy (Tr. 44, 45). Frazier replied he wouldn't take any guff off of Taylor and "to hell with his career" (Tr. 44-45). Frazier isn't overly fond of Taylor (Tr. 149).

On April 8, 1981 Frazier told fellow safety supervisor Barnett that he had no recourse but to go to MSHA (Tr. 46).

On April 10, 1981 [1]/ Frazier was transferred to the swing shift (Tr. 46). Frazier was told that Barnett was going to do the training. They said Frazier wasn't qualified and Frazier agrees he wasn't qualified (Tr. 46, 47).

On April 11 Frazier went to the home of MSHA inspector Dick Clayton. At that time he listed 12 violations (Tr. 45, 46). [A detailed analysis of the complaints is set forth, infra, pages 13-14.] An MSHA inspection took place on April 24, 1981 (Tr. 47).

About this time Frazier posted the NLRB election decision on the union bulletin board (Tr. 96, R3).

On April 28, 1981 Taylor called Frazier to the office and accused him of preferring one union over the other (Tr. 105). Frazier said he wanted to see his accuser. At this juncture Taylor terminated Frazier (Tr. 105). Frazier then told Taylor he hadn't seen the last of him. Further, he said he had turned MK into MSHA. In addition, Frazier said he had filed a discrimination complaint (Tr. 107).

1/ Frazier's testimony is that he was put on the straight swing shift on April 14 but the manager's memorandum of transfer is dated April 10, 1981 (R2). Frazier was already on the swing shift and management's directive established that the shift would be "non rotating". I accordingly consider Friday, April 10th, 1981 as the first date Frazier knew he would continue on the swing shift.

RESPONDENT'S EVIDENCE

Respondent's evidence consists of the testimony of William Harper, Elwood Burge, Robert Whempner, David Camden, Robert Wunderlick, Jeffrey Barnett, Howard Clayton, Bruce Zimmerman, George (Chaps) Lix, James Vanderslott, Dean Gilson, Jed Taylor and numerous exhibits.

Frazier's first assignment was at the Kemmerer, Wyoming mine where he reported to Gary Kilstrom (Tr. 407, 417). Problems with Frazier at the Kemmerer Mine included tardiness, an odor of alcohol, and failure to stay awake (Tr. 418).

MSHA inspector Doug Harper, a safety trainer, first inspected MK in 1979. He evaluated the training and except for first aid he concluded that the miner training was insufficient (Tr. 175-180). Charles Frazier was conducting the training (Tr. 76). Harper prepared a written report which was dated December 18, 1979 (Tr. 178, 179, R7). The final report and conclusion was issued on January 9, 1981 by Walter R. Schell, MSHA training administrator located in Denver, Colorado (Tr. 178, R7). The MSHA report states, in part, that use should be made of the large body of information, visuals, films and tapes available (R7).

Harper had never received any training from Frazier although he had spent four to five hours monitoring Frazier's class as an observer (Tr. 186, 195).

On May 31, 1979 Bruce Zimmerman, MK's training manager, in a interoffice memorandum to his supervisors reviewed the on going training and program development to meet the requirements of MSHA at three MK mines (Tr. 357, R13). The memorandum states in part: "In addition Charlie [Frazier] has a vast resource library of overheads, handouts and written material" (R13, Tr. 367, 368).

Dean Gilson, MK's manager for safety and training, asked that the MSHA report be withheld until MK could improve its training (Tr. 426). Bruce Zimmerman was sent to work with Frazier in an effort to change the negative comments on his performance (Tr. 427). At a meeting on January 9, 1980 Zimmerman related the feelings of George Herman and Doug Harper (MSHA personnel) to Frazier (Tr. 364). Zimmerman further suggested that Frazier should be less confrontive and less antagonistic. Frazier agreed (Tr. 365). About the first of December, 1980, the local union, Operating Engineers Local 400, was negotiating with the company over the terms of labor contract (Tr. 322). At this time workers complained to David Camden, a union stewart, about Frazier's efforts to influence union representation at the mine. Frazier was advocating that the MK workers weren't getting representation from Local 400. Further, Frazier was advocating that Local 400 should be kicked out and the workers should vote in the United Mine Workers (UMW) (Tr. 261, 332). There were approximately 15 such complaints over an eight to ten month period (Tr. 264-265). Camden and Mike Pascal reported these conversations to David Whempner, an official of Local 400 (Tr. 226, 232-233, 263). At that time Whempner complained to mine manager Jed Taylor, who suggested that the matter be tabled (Tr. 233-234). On the same day Whempner talked to worker Chaps Lix who told

Whempner that such conversations were taking place in neighborhood bars (Tr. 234). Whempner again told Jed Taylor to have it stopped (Tr. 235).

On January 6, 1981 Elwood Burge, MK's assistant director of Industrial Relations, came to the Absoloka Mine from the home office in Boise, Idaho. The visit was because of complaints MK was receiving from Whempner that Frazier was showing his preference for the United Mine Workers over Local 400 (Tr. 200-201, 205-208, 322). There were a number of meetings discussing the company policy that MK was to remain neutral between the two unions. Frazier was present at the January 6, 1981 meeting. Whempner, a union official and Taylor, mine manager, identified Frazier at the meeting (Tr. 207-208, 276-277).

A week or two later Camden told Whempner that Frazier and Lix had been in an argument in a bar about the union. At that time Frazier wrote Chaps Lix a company safety violation in a local bar (Tr. 235). Lix brought the citation to Camden. Whempner in turn went to the mine and "raised hell" with the Board of Adjustments and threatened Jed Taylor with an NLRB unfair labor charge. Specifically, the stewards had been telling Whempner that Frazier was telling everybody that Local 400 had given away over half of their labor contract. In addition to "raising hell" with Jed Taylor Whempner contacted his boss, Vince Bosch, in Helena, Montana and "raised hell" with him (Tr. 238). Bosch indicated that unfair labor charges would be filed by Local 400 against MK (Tr. 240). [No such charges were in fact ever filed (Tr. 241).]

Vince Bosch, Whempner's boss, contacted Burge (Industrial Relations for MK), after Whempner complained. The problems ceased. Frazier was temporarily transferred to the home office in Boise, Idaho on January 28, 1981 where he remained until March 10, 1981 (Tr. 241, R1). Problems for Whempner resumed when Frazier returned to the mine (Tr. 241-242).

After he returned from Boise Taylor assigned Frazier to the second shift (Tr. 468). The shift assignment was no different from any other assignment (Tr. 468). The notice to Barnett and Frazier dated April 10, 1981 states "It is not beneficial to have rotating shift in the Safety Department at this time because of our busy schedule and various activities such as training sessions and meetings. Therefore, we will continue to operate on "straight" shift until further notice. Should you have any question on this, please do not hestitate to call me" (R2).

In the meantime the United Mine Workers had petitioned the NLRB requesting an election between the UMW and Local 400 (R3). The order directing the election was entered on April 13, 1981 and the notice was timed stamped as received by MK on April 16, 1981 (R3). Shortly thereafter union steward Camden called Whempner and told him that Frazier was passing around the notice of the election at the mine site and urging the miners to vote for the "right outfit" (Tr. 243, 401-403). Whempner "raised hell" (Tr. 244-245). Whempner's complaint were that Frazier was passing the election notice around in the lunchroom and change room (Tr. 248). The

NLRB order wasn't posted on the union bulletin board until about three or four days later (Tr. 269). Whempner was in a huff because Frazier, a company man, was passing the election around before the union knew about it (Tr. 256). Whempner could handle criticism of himself but he couldn't discipline a company man (Tr. 251-252).

James Vandersloot testified that Frazier came into the lunchroom with the NLRB order and he said they should vote for the right outfit so "you can get some representation out there" (Tr. 403). At this time the whole swing shift was in the lunchroom (Tr. 403).

Whempner again tried to get Frazier removed and he called Burge, (Industrial Relations), who told him to review the problem with mine manager Jed Taylor (Tr. 209-210, 246).

Robert Wunderlick, the mine superintendent, told Taylor that Frazier was in the lunchroom with the [NLRB] petition. Further, he related to Taylor that Frazier was claiming the contract was no good, that there was going to be a new election, and that everything that had been done was no longer good (Tr. 469-470). Taylor called his superiors in Boise who told him to immediately fire Frazier. Taylor said he wouldn't fire Frazier until he verified the report of Frazier's activities (Tr. 470-471). Taylor asked Wunderlick to double check the facts. He did. Camden told Wunderlick that Frazier had presented the paper to the workers (Tr. 278). Taylor had called his supervisors at the home office because home office concurrence is necessary to discharge a safety supervisor (Tr. 410). Burge, (Industrial Relations) and Dean Gilson, manager of safety and training, concurred with Taylor that his decision to terminate was appropriate (Tr. 210-216, 435-436).

Frazier was called to the office on the same day and terminated for union involvement and for not following instructions (Tr. 470-471). He had been told three or four times to remain neutral (Tr. 474, 486-487). Frazier asked Taylor who was accusing him (Tr. 472).

When he was terminated Frazier said MK hadn't heard the last of him (Tr. 477). Taylor didn't know of any MSHA charges brought by Frazier (Tr. 478).

The safety record at the Absolka mine is excellent. It has two years without a lost time acident for 500,000 man hours (Tr. 438-440, R19). The mine incident rate is 0.0 compared with the average for the coal industry of 3.5 (Tr. 440, R20).

DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC (October 1980), rev'd on other grounds

sub nom, Consolidation Coal Co., v. Marshall, 663 F. 2d 1211, (3d Cir. 1981), and Secretary ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination bears a burden of production and persuasion to show that he was engaged in protected activity and that the adverse action was motivated in any part by the protected activity. Pasula, 2 FMSHRC 2799-2800; Robinette, 3 FMSHRC at 817-818.

At this point is appropriate to consider the status of Frazier's activities. The vast majority of discrimination claims arising under the Act are generated by miners engaged in duties other than those of a safety inspector. But I find nothing in the text of the Act nor in the legislative history that indicates Congress intended to exclude a safety inspector from the protection of the discrimination portion of the Act. An operator's safety inspector bears an important function in helping fulfill the purposes of the Act since his duties will ordinarily seek to promote safety and health. Under Pasula and Robinette and their progeny I conclude that good faith complaints of unsafe and unhealthy conditions by a safety inspector in the ordinary course of his duties are protected under the Act.

Having resolved Frazier's status we will go to the Commission's further ruling in Robinette: to rebut a prima facie case a operator must show either that no protected activity occurred (in view of the ruling as to Frazier's status MK cannot establish that defense) or that the adverse action was in no part motivated by protected activity, 3 FMSHRC 817-818 and N. 20. If an operator cannot rebut the prima facie case in the foregoing manner it may nevertheless defend by proving that it was also motivated by the miner's unprotected activities and that it would have taken the adverse action in any event for the unprotected activities alone, Pasula, 2 FMSHRC 2799-2800.

The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. Robinette, 3 FMSHRC at 818 N. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. The Commission made clear in Robinette that the ultimate burden of persuasion does not shift from the complainant in either kind of case. 3 FMSHRC at 818 N. 20. The foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, U.S. 274, 285-87 (1977).

In Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), the Commission affirmed the Pasula-Robinette test, and explained the following proper criteria for analyzing an operator's business justification for adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

3 FMSHRC at 2516-17. Thus, the Commission first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, the Commission held that once it is determined that a business justification is not pretextual, then the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.

By a "limited" or "restrained" examination of the operator's business justification the Commission does not mean that an operator's business justification defense should be examined superficially or automatically approved once offered. Rather, the Commission intends that its Judges, in carefuly analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As the Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982).

With the Commission directives in mind we will examine the proferred business justification asserted by MK. The defense is that Frazier was fired for showing a preference for the United Mine Workers over Local 400. As herein noted I find MK's version of the facts to be generally credible. The credibility of the business justification is established by activities predating Frazier's termination. Burge came to the Absoloka Mine and all supervisors were told to remain neutral. This visit came about because MK was receiving complaints from the union official. After this Frazier was transferred to the home office. Taylor, the mine superintendent told Frazier he was being transferred because of complaints by Local 400. Prior warning of unsatisfactory conduct is one of the criteria mentioned in Bradley v. Belva Coal Company. I accordingly conclude MK's business justification is clearly credible. Having made that determination the next issue is whether MK was motivated as claimed. Yes. The mine manager heard about Frazier's actions involving the NLRB petition. He had the facts verified by Wunderlick and Frazier was terminated that very afternoon. In the midst of two unions struggling to represent its workers company neutrality would be normal practice. In short, Frazier was fired for violating MK policy.

Frazier's post trial brief asserts that MK discriminated against him when he was transferred to the swing shift and thereafter terminated.

A vital element of a prima facie case is a showing that adverse action was motivated in any part by the protected activity. If there is no direct evidence then the Commission suggests four criteria to be utilized in analyzing the operator's motivation with regard to adverse personnel action. This criteria includes knowledge of the protected action, hostility toward the protected activity, coincidence in time between the protected activity and the adverse action and disparate treatment of the complainant, Johnny N. Chacon v. Phelps Dodge Corporation.

Guided by the above case law we will review Frazier's initial contention that he was transferred because he was overzealous in the enforcement of safety regulations. I disagree with Frazier's position. I do not find it credible, and no evidence supports the view, that MK waited until April 1981 to take adverse action against Frazier for events in March 1980 (dust sampling program), in September 1980 (problems in pit #4), and December 1980 (citation issued in a bar). 2/

In short, there is no coincidental timing as required by Johnny N. Chacon v. Phelps Dodge.

Frazier complaints about the miner training aids, even if true, could hardly have affected MK's action since Frazier had been transferred from the training duties four months before he was terminated (Tr. 37).

2/ The events of April 7, 1981 is hereafter discussed.

Frazier's evidence is not a model of clarity and the events of April 7, 1981 require special review. Frazier's only evidence is that on April 7, 1981 he talked to Dean Gilson in the home office. Gilson told Frazier he'd have to get along with manager Taylor or his career would be in jeopardy. Frazier replied he wouldn't take any guff off of Taylor and "to hell with his career" (Tr. 44, 45). Dean Gilson testified in the case but neither party inquired into the reason for Frazier's telephone call on or about April 7, 1981 (Tr. 405-444). There is accordingly no evidence establishing that Frazier was engaged in any protected activity on or about that date.

Frazier's post trial brief asserts that there is evidence that Wunderlick [superintendent] ordered Frazier to stay out of safety matters in the pit. This event apparently occurred in September, 1980. It occurred when Frazier reported an unsafe condition to Wunderlick. Frazier took Rob Williamson, the then senior safety officer, down to the pit. Wunderlick told Frazier he wasn't to be in the pit (Tr. 33).

This event, like the other 1980 incidents, lacks coincidental timing as required by Johnny N. Chacon.

Frazier's post trial brief further asserts that whenever a safety violation was issued Frazier was blamed for reporting the violation to MSHA. I have carefully reviewed the record and absolutely no evidence supports this proposition.

Frazier's post trial brief states there are indications that both Taylor and Wunderlick were upset because Frazier went over their heads and contacted the home office about safety. Even if Taylor and Wunderlick were "upset" with Frazier the record fails to establish the prerequisite coincidental timing.

The evidence here shows that Frazier was restricted to his office in March 1980. On this point I credit Wunderlick's uncontroverted testimony that this restriction came about because Frazier wasn't abiding by orders to work out matters of safety with supervisors (Tr. 284, 296). Further, this event occurred in early 1980 and like the other incidents I am not persuaded that it generated adverse personnel action approximately a year later.

Frazier's brief argues that, although there is some dispute as to the exact working, it is clear that Dean Gilson reprimanded Frazier for his "demanding attitude."

I disagree with Frazier's construction of the evidence. It is not indicated that Gilson reprimanded Frazier. Gilson testified Frazier didn't work well with management and he was extremely demanding in things he wanted done. In any event the evidence fails to establish adverse action against Frazier.

I find all of Frazier's contentions to be without merit. I do not find that Taylor's permanent assignment of Frazier to the swing shift was to cloak a discriminatory move. Taylor's stated reason was that "it is not beneficial to have rotating shift in the Safety Department at this time because of our busy schedule and various activities such as training sessions and meetings. Therefore, we will continue to operate on "straight" shift until further notice." (R2). Independent facts support the operator's decision since Barnett, MK's only other safety officer at this mine, had taken over the training duties. I further credit Taylor's testimony that the shift assignment was no different involving Frazier than anyone else (Tr. 468). In short, the proferred business justification here is not plainly incredible or implausible.

It should be noted that Frazier engaged in two additional activities which have been held to be protected under the Act. One protected activity involved Frazier's complaint of discrimination filed with MSHA when he was transferred to the swing shift. But the record here fails to establish that MK knew of Frazier's complaint. If MK didn't know that Frazier had filed a discrimination complaint then that protected activity could not have influenced MK's decision to fire Frazier.

Frazier also contends he was fired because he filed safety complaints with MSHA.

An in depth review of such complaints is in order. The scenario: the day after Taylor made Frazier's swing shift assignment permanent Frazier went to the home of Howard R. Clayton, an MSHA inspector (Tr. 331-332). Frazier's complaints to MSHA's Clayton involved ground control, the mining plan, dust sampling, excessive noise, dust accumulations, oxygen deficiencies, dragline moving over miners, inadequate fire training, superintendent's mining papers, ambulance training, explosives, OSM violations for not dewatering pits, improper ground on a 280 B shovel, all hoists, transformer, watering work roads, keys to electrical unit, and records required to be kept (Tr. 331-345).

MSHA investigated and for various reasons concluded that Frazier's allegations did not support the issuance of any citations except for the alleged violation of the fire training regulations, 30 C.F.R.

77-1100 3/ (Tr. 331-345). A second citation 4/ was issued on the day of the inspection, April 27, 1981. This citation did not result from Frazier's complaints but was initiated by an MSHA priority directive to the inspectors to check guarding underneath new loading shovels (Tr. 333).

Concerning the filing of the MSHA safety complaints: Frazier's argument of discriminatory retaliation fails because no evidence establishes that MK knew Frazier was the informant.

On this record MK could only have learned of the MSHA safety complaints from MSHA inspector Clayton, from Barnett, or from Frazier himself.

Concerning Inspector Clayton: I credit the professionalism of Clayton who observed at the hearing that it was against the law to notify an operator of the identity of an informant (Tr. 346-347). Further, Clayton couldn't recall telling anyone with MK that Frazier was the informant (Tr. 345-346).

Concerning Barnett: Frazier says he told Barnett about going to MSHA. However, no evidence establishes that Barnett communicated this information to his supervisors. I find Barnett's testimony illustrates the situation, namely "I heard from the day I walked on that mine site to [the] day he [Frazier] left that at some time or another 'I [Frazier] should file charges with MSHA' or 'I'm [Frazier] going to call the feds', or 'I'm [Frazier] going to call my friends back in Pittsburg' or whatever, and file charges. That was just a rhetoric of something that went on all the time" (Tr. 354).

Concerning Frazier himself: Frazier does not claim, before he was terminated, to have notified MK supervisors that he was the MSHA informant. In fact, Frazier indicates it was he who told Taylor after his termination that he was the informant (Tr. 107).

3/ Citation 827683 alleges as follows:

There is no record or indication that the mine operator is complying with 77.1100 of the CFR, in that employees are not being instructed or trained annually in the use of firegighting facilities and equipment.

4/ Citation 827682 alleges as follows:

The opening under the Bucyrus Erie 280B shovel located in 004-0 pit did not have a guard or cover over it. This allowed access in through the frame of the machine to the high voltage collector rings (4160 volts). This is a non-compliance of Article 710-44 of the 1975 National Electrical Code.

In this basic credibility confrontation Frazier objects to the "totem Pole" hearsay of his union activities. Further, he complains that no one with MK interviewed Chaps Lix whom he asserts was the person responsible for making the "original" complaint concerning Frazier's union activities.

Contrary to Frazier's argument it is not important whether the statements concerning Frazier's activities were in fact truthful. The vital issue is whether MK could reasonably believe that such information was truthful. On the basis of the facts previously stated I conclude MK could have such a reasonable brief. I further find MK did not seize on these events as a pretext to cloak a discriminatory move.

Further bearing on a resolution of the credibility in this case are the facts that Frazier agrees he expressed a union preference although he claims this occurred before contrary instructions were issued by MK (Tr. 43). In addition, direct testimony confirms the event that triggered Frazier's discharge: Vandersloot testified Frazier came into the lunchroom with the NLRB order and told the men to vote for the "right outfit" so "you can get some representation out there" (Tr. 401-403). Frazier's testimony itself reflects that he had the NLRB decision (Tr. 96).

The Commission does not attempt to count witnesses but I find that MK's evidence, a combination of witnesses from management, union, and fellow workers, has carried the operator's burden of proof as required in David Pasula. In short, I find that MK would have fired Frazier for his activities preferring one union over the other regardless of any protected activity.

Frazier's final contention that no one from MK interviewed Chaps Lix lacks merit. There is no obligation on MK to seek out Chaps Lix especially where some 15 complaints arose about Frazier's union activities (Tr. 265). In addition, I find that union official Whempner who was the person complaining of Frazier's activities did, in fact, talk to Lix. This occurred at the same time Whempner first went to Jed Taylor in December, 1980 (Tr. 233-234).

Since no discrimination occurred in violation of the Act it is unnecessary to consider Frazier's claim for damages.

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

ORDER

The complaint of discrimination is dismissed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

JAN 24 1983

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

CLIMAX MOLYBDENUM COMPANY, a Division of AMAX, INC.,	CONTEST OF CITATION PROCEEDINGS
Contestant,	DOCKET NO. WEST 82-87-RM Citation 567341; 12/3/81
v.	DOCKET NO. WEST 80-453-RM Citation No. 566900 (Consolidated)
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	MINE: Climax
Respondent.	

Appearances:

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Before: John A. Carlson, Judge

DECISION AND ORDER

These two cases were consolidated for decision upon joint motion of the parties. Docket WEST 80-453-RM was fully tried upon the merits; WEST 82-87-RM was not tried, but as shown in the pleadings, involves an identical question of law. Upon the parties' representation that the underlying facts were the same as those adduced at hearing in WEST 80-453, the motion for consolidation for decision was granted. Both cases arose out of contests of a 104(a) citation. The citations in both cases alleged violation of the mandatory standard published at 30 C.F.R. § 57.20-11. It provides:

> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required.

The case presents this issue: In parts of the Climax Molybdenum Mine where miners are exposed to 0.1 working levels or more of radon daughter radiation, does the cited standard require the operator to post signs warning miners that cigarette smoking, in the mine or outside the mine may significantly increase their risk of contracting respiratory cancer?

Both parties submitted extensive post-hearing briefs. The Commission's jurisdiction was stipulated.

REVIEW AND DISCUSSION OF THE EVIDENCE

I

The parties have no significant disagreement as to most of the facts. Climax Molybdenum Company (Climax) operates a large molybdenum mine near Leadville, Colorado. Radon gas is naturally present in measurable quantities in certain underground areas of the mine. The gas which emanates from uranium in the ore body or surrounding rock is not itself dangerous to miners, but as it decays it liberates radioactive particles known as radon daughters. Health authorities recognize that certain of these particles cause respiratory cancer when inhaled over prolonged periods of time. Consequently, the Secretary has promulgated a number of specific mandatory health standards regulating exposure levels to radon progeny. These are found at 30 C.F.R. § 57.5-37 through 57.5-47. The standards use the "working level" as the measurement of radon daughter exposure. 1/ Four working level months exposure are permitted in any calendar year under 30 C.F.R. § 50.5-38. Other standards prescribe sampling techniques, the frequency of testing, and record keeping methods. In a non-uranium mine such as Climax, 30 C.F.R. § 57.5-40 requires the operator to record the exposure received by all miners working in areas where concentrations exceed 0.3 WL.

None of the radiation standards mention smoking except for 30 C.F.R. § 57.5-41 which provides:

> Smoking shall be prohibited in all areas of a mine where exposure records are required to be kept in compliance with standard 57.5-40.

1/ The term is defined at 30 C.F.R. § 57.2 as:

> ... any combination of the short-lived radon daughters in one liter of air that will result in ultimate admission of 1.3×10^5 MeV (million electron volts) of potential alpha energy, and exposure to those radon daughters over a period of time is expressed in terms of "working level months" (WLM). Inhalation of air containing a radon daughter concentration of 1 WL for 173 hours results in an exposure of 1 WLM.

The parties agree that Climax mine has a number of areas where exposures are high enough to require recording of individual miner exposure. 2/

The Secretary has never contended that Climax failed to comply with any of the specific radon daughter standards. On the contrary, he makes no effort to dispute the operator's evidence that it maintains an effective computerized system for regulating miner's exposure. He also concedes that the north hanging wall area, on the date of inspection, displayed a "no smoking" sign in conformity with section 57.5-41.

The Secretary contends, however, that scientific data disclose that persons who smoke cigarettes and who are also exposed to radon daughters experience a far higher incidence of respiratory cancer than do miners who do not smoke, or smokers who are non-miners. Moreover, according to the Secretary, the incidence of cancer in smoking miners who are exposed to radon daughters significantly exceeds the rate predictable from adding the incidence observable for non-smoking miners and the incidence for non-miner smokers. In other words, the Secretary maintains cigarette smoking and radon daughter exposure interact synergistically to create significantly greater probabilities of cancer than one would expect from looking at either type of exposure alone, or from the sum of the two.

The Secretary provided evidentiary support for his position through the testimony of Victor E. Archer, M.D., Clinical Professor at the University of Utah School of Medicine. Dr. Archer, a Fellow of the American College of Preventive Medicine, has specialized in the study of the biological effects of radon daughter exposure on humans (Tr. 32). His testimony traced the history of epidemiological studies in this country and elsewhere which indicate that radon daughter exposure has a linear relationship to the incidence of cancer - the greater the exposure, the higher the respiratory cancer rate. Studies of uranium miners conducted under his direction, he testified, further showed respiratory cancer rates were higher among cigarette smokers than non-smokers where radon daughter exposures were the same. He presented a graph based upon data obtained from his uranium miner studies and those of the American Cancer Society which investigated the relationship between lung cancer and smoking.

2/ A stipulation made during the hearing shows that radon daughter concentrations monitored in the Climax Mine during the year preceding the issuance of the citation ranged from .00 to 5.77 working levels (Tr. 74-75). Respondent's exhibit 3 shows readings at various locations, including the "north hanging wall," which was the area singled out in the citation. The highest reading disclosed in the exhibit for that area is 0.33 working levels, recorded on August 11, 1980. There is no dispute as to the exhibits's accuracy.

The graph compares the incidence of respiratory cancer (in terms of incidence rates per 10,000 person years) between uranium miners who smoked and who did not smoke in contrast to non-miners who smoked and who did not smoke (respondent's exhibit 2). These data disclose, among other things, that the rate observed in miners who smoked was six times greater than miners who had never smoked, and ten times greater than for non-miners who smoked (Tr. 41). According to Dr. Archer, two Swedish studies inquiring into the same areas produced results consistent with his. He further asserted that the data establish that the "induction latent period" (the time between initial exposure and ultimate onset of cancer) was "considerably" shorter for smoking miners than for non-smoking miners (Tr. 45). From the studies and his experience and training he was of the opinion that for miners exposed to radon daughter concentrations:

> ... the first 25 years the lung cancer rate substantially increased and that the induction latent period would be shorter among smokers. (Tr. 47.)

He further believed that this would be true for exposure levels below the 4 working level months allowed as a maximum annual exposure under the Secretary's radiation rules. In fact, according to Dr. Archer, some cancer risk exists at any level of radon daughter exposure, and that risk would in all instances be enhanced by smoking (Tr. 57-58).

In Dr. Archer's opinion, miners should be warned of the effects of smoking whenever radon daughter concentrations substantially exceed normal ambient air or "background" levels. When questioned regarding the precise concentration which should trigger a warning, he responded with this specific recommendation:

> Any level one sets is somewhat arbitrary, but I would suggest that one-tenth working level would be a reasonable place (Tr. 60).

This is the proposition upon which the Secretary founds his citation. He concedes that the north hanging wall area displayed a "no smoking" sign in compliance with standard 57.5-40. Because miners who smoke cigarettes at any time or place and also inhale radon decay particles in the mine environment are especially vulnerable to respiratory cancer, the Secretary reasons that that hazard must be spelled out to miners. The standard at 30 CFR § 57.20-11, he maintains, imposes a clear duty upon Climax to post such a sign wherever radon readings exceed 0.1 working levels. This is so because smoking, when combined with radiation exposure, is a health hazard "not immediately obvious to employees," in the words of the standard, and thus one which must be emphasized and explained by a warning sign.[3]/

3/ The Secretary does not contend that Climax's duty extends beyond the giving of a warning; he has not suggested, for example, that compliance with any standard demands any sanctions against miners who smoke outside the mine.

Climax relied upon the testimony of Dr. Keith J. Schiager, a health physicist, to dispute Dr. Archer's opinion concerning a radon daughter-smoking synergism. Dr. Schiager conceded that over the long-term there is a relationship between radon daughters and smoking in that both increase the risk of lung cancer (Tr. 123). He asserted, however, that agreement among scientists ends there. No concensus exists within the scientific community, he testified, as to the proof of a synergistic relationship (Tr. 123). 4/

Climax also stresses an admission from Dr. Archer that the various studies which led him to his conclusions were conducted at a time before today's stringent limitations on radon daughter exposure were in effect (Tr. 56). Exposures of the studied miners could thus have been many times higher than those now permitted at Climax.

II

Climax's basic defenses may be summarized as follows:

(1) The evidence does not prove that risk of respiratory cancer associated with radon daughter exposure is increased synergistically by cigarette smoking.

(2) The plain language of section 57.20-11, together with its history, show that the standard was not intended to address hazardous conduct outside the mine - including smoking at home.

(3) A comprehensive body of regulations covers the admitted hazards arising from radon daughters. At section 57.5-41 these regulations cover smoking in radiation areas. Operators are entitled to rely on these regulations as encompassing the requirements with respect to smoking as it relates to radon daughters. Consequently, the Secretary cannot properly rely upon a "general" regulation such as 57.20-11 to impose a requirement for signs warning against smoking at home.

III

In resolving this dispute I do not decide whether the Secretary's assessment of the combined smoking and radiation hazard is valid. Such a finding is unnecessary to reach a correct result. Therefore, for the purposes of this decision, the existence of the hazard is assumed. The central issue presented here concerns the cited standard: Does it fairly encompass the hazard perceived by the Secretary? For the reasons which follow, I hold that it does not.

4/ However, Raymond Rivera, Climax's occupational health manager at the mine, agreed on cross examination that there is a synergistic relationship (Tr. 97).

In analyzing the scope of the standard which the Secretary seeks to apply, we must first recognize that the enforcement and review processes contemplated by the Act are accusatory and adversarial. Thus, while mine operators are obliged to comply with every mandatory standard, the language of each standard must reasonably convey to the operator the nature of the practices or procedures required or forbidden. Diamond Roofing Co., v. OSHRC 528 F. 2d 645 (5th Cir. 1976); Phelps Dodge Corp., v. FMSHRC, 681 F. 2d 1189 (9th Cir. 1982). Put another way, a standard must import reasonable notice of conduct expected. Climax concedes that the standard has valid application to non-obvious safety or health hazards originating in the mine. The thrust of its claim is that a good faith reading does not fairly suggest any obligation to place warning signs in the mine concerning miners' non-work-related conduct outside the mine.

Much of the specific argument of the parties centers around the relationship between the group of standards which deal specifically with radiation, and the more general standard cited by the Secretary. Climax stresses those cases arising under the Occupational Safety and Health Act which declare that specific standards dealing with a certain subject matter must take precedence over those of a more general application. In the same vein, Climax argues that by promulgating the discrete body of radiation standards beginning at section 57.5-37, the Secretary has worked a species of preemption. Operators, that is to say, reading this seemingly comprehensive collection of standards naturally are lead to believe that they need look no further to find all the requirements for radiation protection. Climax further suggests that, other considerations aside, the plain words of the standard, speaking as they do of "barricades" in addition to warning signs, imply that section 57.20-11 was intended to apply solely to definable hazards within the posted or barricaded area. 5/

5/ In a refinement of that argument, counsel for Climax attached to his post-hearing brief an excerpt from the proceedings of the Federal Metal and Non-Metal Safety Advisory Committee, which recommended adoption of the regulation in 1975. According to counsel, the comments of committee members show their explicit concern was the protection of miners from non-obvious hazards in underground travelways or mined out areas. The Secretary objects to this post-trial submission as an improper attempt to adduce evidence after the closing of the evidentiary record. While it is probable that the Advisory Committee's proceeding (42 Fed. Reg. 5546, 29418 (1977)) is subject to official notice as an aid to interpretation of the standard, I give it no weight because of its content. The hurried discussion of the participants is random and superficial, giving few useful clues to the true intended scope of the standard.

The Secretary contends that the distinctions Climax attempts to draw are invalid because the hazard contemplated here is not exclusively a radiation hazard, but a unique combination of smoking and radiation exposure, and therefore beyond the cognizance of the radiation standards. Thus, he contends, the hazard fits squarely within the cited "miscellaneous" standard. The Secretary also stresses that every standard must be read with an appreciation of the remedial intent of the Act, which gives the safety of miners paramount consideration.

I agree that the existence of a body of regulations dealing with a specific class of hazards does not invariably operate to exclude coverage of the same sort of hazard by a more general regulation, unless the general in some way conflicts with the specific. Also, the remedial aims of the Act are beyond cavil. The cited standard must be liberally construed.

Given the most liberal construction consistent with the constraints of due process, however, Climax's arguments must prevail in this case. I am simply unable to conclude that a mine operator, even supposing his knowledge of the alleged synergistic effect of smoking and radon daughter exposure, could read section 57.20-11 in conjunction with the radiation standards and perceive a requirement to post signs in radiation areas of the mine to warn miners against smoking outside those areas. The standards, taken together, do not fairly convey such a notion to the most prudent and conscientious operator. This is particularly so for the following reasons:

(1) The specific radiation standards do not ignore smoking. Section 57.5-41 addresses the matter quite clearly. As mentioned earlier, this standard requires simple "no smoking" signs in all mine areas where exposure records must be kept in compliance with section 57.5-41 (0.3 working levels). This implies that the Secretary considered the combined effects of smoking and radiation exposure, and was satisfied with this mode of protection. Moreover, the Secretary predicates his case for signs warning against smoking at home on a 0.1 working level threshold. Such a level appears wholly inconsistent with the 0.3 level specified in sections 57.5-40 and 41. Operators may scarcely be expected to read section 57.20-11 to imply the necessity for more elaborate and intensive warnings at a lower level of exposure than does the specific radiation standard which speaks directly to the issue of smoking.

(2) The cited standard identifies no particular hazards. It refers to those "[a]reas where health or safety hazards exist that are not immediately obvious to employees ...." It is specific, however, concerning means of abatement. It names but two: barricades and warning signs. This specificity concerning corrective measures may properly be considered in determining the intended reach of the standard. Assume that a mine operator, through its own exploration of the scientific and medical data

on the relationship between smoking and radon daughter exposure, is convinced of a need to warn its miners against smoking away from the mine. Would that operator be likely to see any connection between that need and the section 57.20-11 requirement for on-site signs? I think not. I must agree with Climax that the operator would be inclined to regard the act of smoking at home as a unique off-site hazard, and to look for corrections through such common devices as safety meeting presentations, employee safety handbook coverage, or paycheck inserts.

(3) As mentioned earlier, this decision does not purport to decide whether the Secretary correctly identifies and assesses the smoking-radiation hazard. One aspect of this issue, however, is material to efforts to determine the application of the cited standard. The Secretary's expert, Dr. Archer, was commendably frank in acknowledging that he was "somewhat arbitrary" in fingering one-tenth working level as the trigger point for a warning under section 57.20-11. Nowhere does his testimony or any other evidence suggest a general agreement among experts that this, rather than some other point, is where the operator's duty should commence. As a regulated party, the operator is entitled to some concrete guidance in the scientific literature, if not the standard itself, as to the radiation level which poses a danger sufficient to necessitate worker warnings. It is likely true, as Dr. Archer suggests, that there is no "safe" radiation level; and that the minimum radiation level requiring warning would of necessity be somewhat arbitrary. The point is, however, that under the regulatory scheme of the Act the Secretary bears the duty of determining where that level is, and making it known to mine operators. The ad hoc quality of the determination in this case is all too apparent. 6/

Climax did not violate the cited standard. The citations must therefore be vacated.

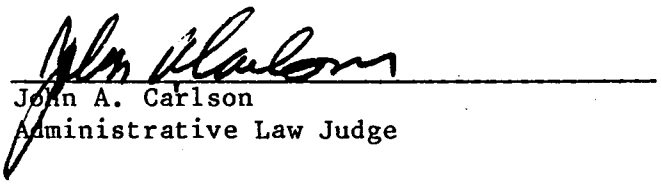
6/ I do not fault the Secretary for his concern over the hazard which he perceives. Much of his evidence on the issue is impressive. I must suggest, however, that his effort to protect against the hazard through an existing standard was misplaced. The lack of a finite threshold radiation level for warnings illustrates the need for recourse to the rule making powers granted by the Act. Use of those powers would provide ample opportunity for a full airing of all data, the making of a decision based upon that data, and the promulgation of a clear and precise regulation.

ORDER

In accord with the findings and conclusions embodied in the narrative portions of this decision, the citation in Docket WEST 80-453-RM is ORDERED vacated.

Further, in accord with the findings and conclusions made in Docket WEST 80-453-RM, and pursuant to the parties' agreement that the determination in WEST 82-87-RM should be governed by the result reached in WEST 80-453-RM, the citation in WEST 82-87-RM is likewise ORDERED vacated.

Consequently, this consolidated proceeding is dismissed.



John A. Carlson
Administrative Law Judge

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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

JAN 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of Arnold J. Sparks, Jr., Complainant	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. WEVA 79-148-D
	:	Shannon Branch Coal Mine
v.	:	
ALLIED CHEMICAL CORPORATION, Respondent	:	

ORDER REINSTATING DECISION AND ORDER OF SEPTEMBER 27, 1979

On May 20, 1982, the Commission remanded the captioned matter for "further proceedings consistent with the court's decision" in UMWA v. FMSHRC, 671 F.2d 615 (D.C. Cir. 1982), cert. denied October 12, 1982, _____ U.S. _____.

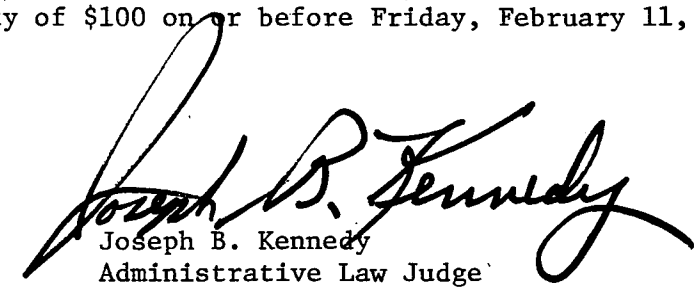
Accordingly, on July 1, 1982, the trial judge issued an order to show cause why his decision and order of September 27, 1979 should not be reinstated.

Counsel for the Secretary responded saying he had no objection to reinstatement of my finding of discrimination in Allied's refusal to pay walkaround compensation. 1 FMSHRC 1451 (1979). Counsel for the operator suggested reinstatement be stayed pending disposition of a petition for certiorari in Helen Mining et. al. The petition for certiorari was denied on October 12, 1982.

In the meantime the American Electric Power Company through its coal subsidiaries filed contests designed to provoke relitigation of the issue of the applicability of section 103(f) to "spot" inspections. Under settled principles of issue preclusion, however, and by the specific terms of the Commission's order of remand, relitigation of the issue in these matters is foreclosed.

The record shows that while its appeal was pending counsel for Allied assured the Commission that all but paragraphs 1, 2 and 6 of my order of September 27, 1979, had been obeyed. Accordingly, it is

ORDERED that in compliance with the order of remand paragraphs 1, 2 and 6 of my order of September 27, 1979, be, and hereby are, REINSTATED and the operator pay a penalty of $100 on or before Friday, February 11, 1983.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of Ray Gann and Dennis Gann Complainants	:	Complaint of Discharge Discrimination or Interference
	:	Docket No: SE 81-34-DM
	:	Young Mine
v.	:	
ASARCO, INCORPORATED, Respondent	:	

DECISION ON CROSS MOTIONS FOR SUMMARY JUDGEMENT

All of the pertinent facts in this discrimination case have been stipulated and the matter has been presented to me on cross motions for summary judgement. At the time in question the two complainants were classified as production machine men earning $5.43 per hour. When production machine men do the work of drilling and blasting they are paid an incentive bonus which is based upon the time they were engaged in drilling and blasting and upon the total tonnage broken by all employees in a particular week.

On July 29, 30 and 31, 1980, federal mine inspector Frank Mouser inspected respondent's mine. On the first two days he was accompanied by Mr. Ray Gann for two 8-hour workshifts and on July 31, 1980, Mr. Dennis Gann accompanied the inspector for an entire 8-hour workshift. The two complainants were paid "walkaround pay" at the rate of a production machine man, and the alleged act of discrimination is they did not get the incentive bonus that they otherwise would have earned. Stipulation VII states:

> "On the days in question all other employees in the machine man classification did drilling and blasting work for their entire shifts and received incentive pay in direct proportion to the number of hours actually worked in the classification."

It is therefore clear that it cost each of the complainants a certain amount of money when they accompanied the inspector during the inspection.

Section 103(f) of the Act authorizes a representative of the miners to accompany an inspector on his rounds and states:

> "Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection."

It is not necessary to resort to legislative history to determine that each of these two miners did suffer a "loss of pay during the period of his participation in the inspection..." There was a violation of the Act and a citation would have been appropriate. If a citation was issued, and I do not know whether one was, then the appropriate civil penalty should be considered during the normal assessment procedures connected with a citation. Unless and until the Commission rules that it is appropriate to bypass the established assessment procedures, I am not going to assess civil penalties in discrimination cases. If I were to assess a civil penalty in this case, however, it would be nominal because the hazard and negligence are of such a low degree.

It is hereby ORDERED that respondent, Asarco, Inc. pay to Dennis Gann the sum of $7.94 */ and pay to Ray Gann the sum of $15.88 and that each be paid interest at the rate of 10% beginning on the day when they normally would have received the incentive pay involved herein and continuing until payment is made.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

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Mr. Dennis Gann, Riverbend Road, Mascot, TN 37806

Mr. Ray Gann, Route 3, Park Street, Strawberry Plains, TN 37871

Mr. Don H. Walters, Mine Superintendent, ASARCO, Inc., Highway 11-E, Strawberry Plains, TN 37871

C.T. Corporate Systems, 503 Gay Street, Knoxville, TN 37902

*/ The amounts of pay where stipulated

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 28 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 82-136-M A.C. No. 48-01181-05040
v.	:	
MINERALS EXPLORATION COMPANY, Respondent	:	Sweetwater Uranium Project

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Anthony D. Weber, Esq., Los Angeles, California, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act", in which the Secretary charges the Minerals Exploration Company with one violation of the mandatory standard at 30 C.F.R. § 55.9-3. The cited standard requires that "powered mobile equipment shall be provided with adequate brakes." The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

I have previously determined in connection with violations alleged under the identical standard at 30 C.F.R. § 56.9-3, that the regulatory language does not provide sufficient guidance as to what is to be considered "adequate brakes." 1/ In order to pass constitutional muster, a statute or standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. General Construction Co., 269 U.S. 385, 391 (1926). Rather, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972). See Secretary v. Alabama By-Products Corporation, 4 FMSHRC _____ (December 9, 1982).

1/ Secretary v. Concrete Materials, Inc., 2 FMSHRC 3105 (1980); Secretary v. A.H. Smith, 4 FMSHRC 1371 (1982) rev. grntd. September 3, 1982.

In deciding whether powered mobile equipment is provided with adequate brakes under 30 C.F.R. § 55.9-3, the alleged violative condition may appropriately be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action. Alabama By-Products, supra.

The one citation at issue in this case (No. 578809) charges as follows:

> A Michigan 280 rubber tired dozer No. 2506 was being operated in the C-3 Pit with inadequate brakes. It would slowly stop on level ground at less than 5 miles per hour. The parking brake would not hold on level ground with the engine idling and transmission engaged. This created a hazard to the operator and other persons working in the pit.

On the unique facts of this case, I cannot conclude that a reasonably prudent person familiar with the factual circumstances surrounding this allegedly hazardous condition would recognize that there was in fact a hazard warranting corrective action within the purview of the cited regulation. This determination is based in part upon the failure of MSHA to have followed the standardized brake testing procedures approved by industry and accepted by MSHA. According to MSHA inspector Merrill Wolford, brake testing standards established by the Society of Automotive Engineeers (SAE) then existed for rubber-tired construction equipment such as the Michigan 280 dozer here cited (See Appendix A attached hereto). Wolford conceded that the SAE tests were the only "recognized" tests, but for reasons not made clear, he devised and followed his own testing procedures in this case which admittedly did not meet the SAE standards. 2/ By devising and using his own ad hoc testing procedures, procedures not shown to have had scientific validity or reliability, the inspector was, indeed, exercising completely arbitrary enforcement practices.

The actual tests performed by Wolford, first on the parking brake and then on the service brakes, were described by him in the following colloquy:

> A. I asked the operator to set the parking brake, to engage the transmission on the vehicle with the engine in idle speed, and then let off of the service brakes, and the vehicle moved forward with no hesitation * * * then I asked the operator -- explained to him what I wanted to do: to have him back up a ways. And while he was doing that, I checked the backup alarm

2/ Wolford testified at one point that it would have been hazardous to have followed the SAE tests on the cited machine, but he also testified that he nevertheless offered to perform those tests for the operator and was prepared to do so. Wolford subsequently recanted and admitted that he did not in fact advise the operator that he would perform the SAE tests. I do not find Wolford's testimony to be credible in light of these inconsistencies.

-- the audible warning device, rather -- and asked him to run it forward at slow speed and when I waved to him, to set the service brakes. Q. Did he do that? A. Yes, sir. Q. When you say "slow speed," how fast did he proceed? A. Estimated at 3 to 5 miles an hour. Q. Now, when you signaled him to set the service brake, what then occurred? A. The vehicle slowly came to a halt -- what I estimated to be in excess of what would constitute adequate brakes -- approximately 25, 30 feet. (T. 14-15).

In light of Inspector Wolford's admission that his own ad hoc testing procedures were not the recognized industry and MSHA procedures, that Wolford's testing procedures had no correlation to those recognized SAE procedures and that no evidence has been presented to show that Wolford's testing procedures have any scientific validity or reliability, I cannot conclude that a reasonably prudent person would have recognized that the brakes on the Michigan 280 loader here cited were inadequate in that they presented a hazard warranting corrective action within the purview of 30 CFR 55.9-3. 3/ Accordingly, the operator was denied fair notice of any alleged violation and the citation must be vacated.

Even assuming, arguendo, that the apparent partial admission by safety supervisor Casey Conway that the parking brakes were indeed bad (see footnote 3, supra) and that therefore due process problems stemming from the operator's asserted lack of notice may be considered waived, I do not find from the credible evidence of record that MSHA has in any event met its burden of proving that the parking and service brakes on the Michigan 280 loader here cited were indeed "inadequate". For the reasons previously stated, I reject the unproven testing procedures followed by Inspector Wolford. In any event, I give no weight to Conway's apparent admissions that the parking brakes were bad, in light of his testimony that he had no expertise in brake testing procedures and that indeed he was then confused by the procedures followed by Wolford.

3/ Wolford also claims that Casey Conway, the company safety supervisor, admitted after Wolford's testing that the brakes were bad. Ordinarily, if the operator has actual knowledge that a cited condition is hazardous, the problem of fair notice does not exist. Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSHRC, 512 F.2d 1148 (1st Cir. 1975). However, Conway testified, and credibly I believe, that although he did initially agree with Wolford, he was inexperienced in brake testing and confused by Wolford's tests and that indeed he subsequently learned in talking with his maintenance "people" that Wolford's tests were indeed improper. Under the circumstances, I do not find Conway's apparent admission to be probative and, because of his inexperience in the testing of brakes, I would not consider him to have been a qualified person sufficiently "familiar with the factual circumstances surrounding the allegedly hazardous condition". Alabama By-Products, supra.

On the other hand, I accord significant weight to the firsthand testimony of David Martinez, the man who was actually operating the cited dozer both before and after it was cited, that the brakes were working "real good". I also accord significant weight to the firsthand testimony of field mechanic George Baker, who drove the cited dozer to the shop after it was cited. He too found the brakes to be in "very good" condition and upon inspection, found no need for repairs. In addition, inspection documents produced at hearing, buttressed by the testimony of Conway, show that the cited dozer had been subjected to a "150 hour" inspection, including an inspection for brake adjustment, only the day before the citation herein was issued. I find it unlikely that the cited dozer would have been returned to service with defective brakes after such an inspection.

Finally, I accept as credible the testimony of mine operations supervisor Jerome Connor that he did not personally believe that the brakes on the cited dozer were defective and that he agreed to withdraw the dozer to the shop only to avoid an argument with Inspector Wolford. Under these circumstances, I do not consider either Connor's silence in the face of accusations by the inspector or his agreement to withdraw the cited equipment to constitute admissions that either the testing procedures followed by Wolford were proper, or that the brakes on the cited equipment were indeed defective. For these additional reasons, then, I find that the cited standard was not violated in this case and that Citation No. 578809 should be vacated.

ORDER

Citation No. 578809 is hereby vacated and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Anthony D. Weber, Esq., Union Oil Company of California, Union Oil Center, Box 7600, Los Angeles, CA 90017

Robert J. Lesnick, Esq., Office of the Solicitor, U..S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294

SAE STANDARD RECOMMENDED PRACTICE INFORMATION REPORT

J- 1152

This material appears in the SAE Handbook

SAE The Engineering Resource For Advancing Mobility

SAE, 400 COMMONWEALTH DRIVE, WARRENDALE, PA 15096

ed. BRAKING PERFORMANCE—RUBBER-TIRED CONSTRUCTION MACHINES—SAE J1152 APR80 SAE Recommended Practice

Report of the Construction Machinery Technical Committee, approved July 1976, editorial change April 1980. This document incorporates material from SAE J166, J236, J237, J319, and J1080, which have been discontinued. Rationale statement available.

1. Scope—Minimum performance criteria for service braking systems, emergency stopping systems, and parking systems for off-highway, rubber-tired, self-propelled loaders, dumpers, tractor scrapers, graders, cranes, ex-ed. cavators, and tractors with dozer are provided in this SAE Recommended Practice. Refer to SAE J1057 (July, 1973) and J1116 (July, 1975) (Sections 1.1, 1.2, and 2) for machine identification.

2. Purpose

2.1 To define minimum braking system performance for in-service machines.

NOTE: This is not a design standard.

2.2 To provide test criteria by which machine braking system compliance may be verified.

3. Braking Systems

3.1 Service Braking System—The primary system of any type used for stopping and holding the machine.

3.2 Emergency Stopping System—The system used for stopping in the event of any single failure in the service braking system.

3.3 Parking System—A system to hold stopped machine stationary.

NOTE: Common Components—The above braking systems may use common components. However, a failure of a common component shall not reduce the effectiveness of the machines stopping capability below the emergency stopping performance as defined in paragraph 4.2.1.

4. Braking System Performance

4.1 Service Braking System—All tractor scrapers and dumpers shall have braked wheels on at least one axle of the prime mover and one axle of each trailing unit. All other machines shall have at least two braked wheels (one right hand and one left hand).

4.1.1 STOPPING PERFORMANCE—The service braking system, when tested in accordance with Section 5, shall stop the machine within the distance specified in the appropriate table.

4.1.2 HOLDING PERFORMANCE—The service braking system shall have capability equivalent to holding the machine stationary on a dry swept concrete

41.188

ed. TABLE 1—LOADERS, TRACTORS WITH DOZERS—Brake Performance Requirements (SI Units)

Machine Mass kg	Machine Speed, km/h									
	6	10	14	18	22	26	30	34	38	42
	Service Brake Maximum Stopping Distance—Metres (Emergency Brake Stopping Maximum Stopping Distance—Metres)									
Up to 16 000	0.3 (0.9)	1.5 (4.5)	2.9 (8.7)	5.2 (15.6)	7.1 (21.3)	9.2 (27.6)	11.6 (34.8)	14.4 (43.2)	17.2 (51.6)	20.4 (61.2)
Over 16 000 to 32 000	—	—	—	6.6 (19.8)	9.2 (27.6)	12.2 (36.6)	15.5 (46.5)	19.3 (57.9)	23.5 (70.5)	28.1 (84.3)
Over 32 000 to 64 000	—	—	—	7.9 (23.7)	11.1 (33.3)	14.8 (44.4)	19.0 (57.0)	23.8 (68.4)	29.2 (87.6)	35.0 (105.0)
Over 64 000 to 127 000	—	—	—	9.1 (27.3)	12.9 (38.7)	17.4 (52.2)	22.5 (67.5)	28.3 (84.9)	34.8 (104.4)	41.9 (215.7)
Over 127 000	—	—	—	11.0 (33.0)	15.8 (47.4)	21.3 (63.9)	27.8 (83.4)	35.0 (105.0)	43.2 (129.6)	52.2 (156.6)

Brake Performance Requirements (U.S. Customary Units)

Machine Mass, lb	Machine Speed, mph											
	4	6	8	10	12	14	16	18	20	22	24	26
	Service Brake Maximum Stopping Distance—Feet (Emergency Brake Maximum Stopping Distance—Feet)											
Up to 36 000	2 (6.0)	5 (15.0)	8 (24.0)	15 (45)	20 (60)	25 (75)	31 (93)	38 (114)	45 (135)	53 (159)	61 (183)	70 (212)
Over 36 000 up to 70 000	—	—	—	19 (57)	25 (75)	33 (99)	41 (123)	51 (153)	61 (183)	72 (216)	84 (252)	97 (292)
Over 70 000 up to 140 000	—	—	—	22 (66)	31 (93)	40 (120)	50 (150)	62 (186)	75 (225)	89 (267)	105 (315)	121 (364)
Over 140 000 to 280 000	—	—	—	26 (78)	36 (108)	47 (141)	60 (180)	74 (222)	89 (267)	107 (321)	125 (375)	145 (435)
Over 280 000	—	—	—	31 (93)	43 (129)	57 (171)	73 (219)	91 (273)	111 (333)	132 (396)	156 (468)	181 (543)

grade under conditions as listed:

Machine	Grade	Condition
Loaders	30%	Loaded to manufacturers gross mass (weight) rating and distribution. Bucket to be in SAE carry position.
Dumpers & Tractor Scrapers	25%	Loaded to manufacturers gross machine mass (weight) rating and distribution.
Graders	30%	Cutting edge to be in the transport position.
Cranes & Excavators	25%	Unloaded, with components in the transport position as recommended by the manufacturer.
Tractors with *ed.* Dozer	30%	Lowest part of cutting edge to be 460 mm (18 in) above test surface.

The criteria shall apply to both forward and reverse directions.

4.1.3 System Recovery—With the machine stationary, the service braking systems primary power source shall have capability of delivering at least 70% of maximum brake pressure measured at the brakes when the brakes are fully applied twelve (12) times at the rate of four (4) applications per minute with the engine at maximum governed rpm for dumpers, tractor scrapers, cranes and excavators; and twenty (20) times at the rate of six (6) applications per minute with the engine at maximum governed rpm for loaders, graders, and *ed.* tractors with dozer.

4.1.4 Warning Device—The service braking system using stored energy shall be equipped with a warning device which actuates before system energy drops below 50% of the manufacturers specified maximum operating energy level. The device shall be readily visible and/or audible to the operator, and provide a continuous warning. Gauges indicating pressure or vacuum shall not be acceptable to meet these requirements.

4.2 Emergency Stopping System—All machines shall be equipped with an emergency stopping system.

4.2.1 Stopping Performance—The emergency stopping system, when tested in accordance with Section 5, shall stop the machine within the distances shown in parenthesis in the appropriate table.

4.2.2 Emergency Application—The emergency system shall be capable of being applied by a person seated in the operator's seat. The system shall be arranged so that it cannot be released from the operator's seat after any application unless immediate reapplication can be made from the operator's seat to stop the machine or combination of machines.

4.2.2.1 In addition to the manual control, the emergency stopping system may also be applied automatically. If an automatic emergency stopping system is used, the automatic application shall occur after the warning device is actuated.

4.3 Parking System—All machines shall be equipped with a parking system capable of being applied by a person seated in the operator's seat.

4.3.1 Parking System Performance—The parking system shall have capability equivalent to holding the machine stationary on a 15% dry swept concrete grade under all conditions of loading. This criterion shall apply to both forward and reverse directions.

4.3.2 Remain Applied—The parking system while applied shall maintain the parking performance in compliance with paragraph 4.3.1 despite any contraction of the brake parts, exhaustion of the source of energy or leakage of any kind.

TABLE 2—DUMPERS—Brake Performance Requirements (SI Units)

Machine Mass, kg	Machine Speed, km/h			
	24	32	40	48
	Service Brake Maximum Stopping Distance—Metres (Emergency Brake Maximum Stopping Distance—Metres)			
Up to 45 000	10.9 (27.1)	17.0 (46.2)	26.5 (70.4)	36.0 (99.5)
Over 45 000 to 90 000	14.2 (31.6)	22.3 (52.1)	32.1 (77.7)	43.5 (108.5)
Over 90 000 to 180 000	19.2 (38.1)	29.0 (60.9)	40.4 (88.7)	53.5 (121.6)
Over 180 000	24.2 (44.9)	35.6 (69.9)	48.8 (99.9)	63.5 (135.0)

Brake Performance Requirements (U.S. Customary Units)

Machine Mass, lb	Machine Speed, mph			
	15	20	25	30
	Service Brake Maximum Stopping Distance—Feet (Emergency Brake Maximum Stopping Distance—Feet)			
Up to 100 000	36 (90)	59 (153)	88 (234)	122 (330)
Over 100 000 to 200 000	47 (105)	74 (173)	106 (258)	144 (360)
Over 200 000 to 400 000	64 (126)	96 (202)	134 (294)	177 (403)
Over 400 000	80 (149)	118 (231)	161 (331)	210 (448)

TABLE 3—COMBINATION DUMPERS AND DUMPER TRAINS—Brake Performance Requirements (SI Units)

Machine Mass, kg	Machine Speed, km/h			
	24	32	40	48
	Service Brake Maximum Stopping Distance—Metres (Emergency Brake Maximum Stopping Distance—Metres)			
Up to 45 000	10.9 (27.1)	17.9 (46.2)	26.5 (70.4)	36.9 (99.5)
Over 45 000 to 90 000	17.6 (36.0)	26.8 (58.1)	37.6 (85.1)	50.2 (117.3)
Over 90 000 to 180 000	25.9 (47.1)	37.9 (72.9)	51.5 (103.7)	65.9 (139.5)
Over 180 000	37.6 (62.7)	53.4 (93.6)	71.0 (129.6)	90.2 (170.6)

Brake Performance Requirements (U.S. Customary Units)

Machine Mass, lb	Machine Speed, mph			
	15	20	25	30
	Service Brake Maximum Stopping—Feet (Emergency Brake Maximum Stopping Distance—Feet)			
Up to 100 000	36 (90)	59 (153)	88 (234)	122 (330)
Over 100 000 to 200 000	58 (119)	89 (192)	125 (282)	166 (389)
Over 200 000 to 400 000	86 (156)	125 (241)	171 (344)	221 (462)
Over 400 000	124 (207)	177 (310)	235 (429)	298 (565)

5. Brake Criteria

5.1 Facilities and Instrumentation

5.1.1 The test course shall consist of a clean swept, level, dry concrete or other specified surface of adequate length to conduct the test. The approach will be of sufficient length, smoothness, and uniformity of grade to assure stabilized travel speed of the machine. The braking surface shall not have over 1% grade in the direction of travel, or more than 3% grade at right angles to the direction of travel.

5.1.2 An instrument to measure the stopping distance with an accuracy of ±1%.

5.1.3 A means to measure the test speed with an accuracy of ±5% of actual speed.

5.1.4 A means for determining the machine mass (weight).

5.1.5 A means for measuring the braking system energy level as required in paragraphs 4.1.3 and 4.1.4.

5.1.6 A means for measuring the force required by the operator to actuate the braking system.

5.2 Test Requirements

5.2.1 All tests to be conducted with the applicable braking system fully charged.

5.2.2 Stopping tests to be conducted under the following conditions:

Machine	Condition
Loaders	Unloaded, with bucket in SAE carry position (Reference SAE J732c (June, 1975)).
Dumpers & Tractor Scrapers	Loaded to manufacturers gross machine mass (weight) rating and distribution.
Graders	Cutting edge to be in the transport position.
Cranes & Excavators	Unloaded, with components in the transport position as recommended by the manufacturer.
Tractors with *ed.* Dozers	Lowest part of cutting edge to be 460 mm (18 in) above test surface.

5.2.3 Stopping distance to be measured in metres (feet) from the point at which the brake control is applied to the point at which the machine is stopped.

5.2.4 Stopping tests to be conducted from at least one speed for each machine as listed:

Machine	Speeds
Loaders, Tractors *ed.* with Dozers	Not less than 26 km/h (16 mph) or maximum speed if less than 26 km/h (16 mph).
Dumpers, Tractor Scrapers	Not less than 32 km/h (20 mph) or maximum speed if less than 32 km/h (20 mph).
Graders	Not less than 30 km/h (18 mph) or maximum speed if less than 30 km/h (18 mph).
Cranes, Excavators	Not less than 32 km/h (20 mph) no more than 48 km/h (30 mph) or maximum speed if less than 32 km/h (20 mph).

5.2.5 Stopping test shall be conducted with the transmission in gear commensurate with the speed required in paragraph 5.2.4. The power train may be disengaged prior to completing the stop.

5.2.6 Auxiliary retarders shall not be used in the test unless the retarder is simultaneously actuated by the applicable brake system control.

5.2.7 Maximum allowable operator forces to actuate braking systems as defined in Section 3 are 890 N (200 lb) for a foot operated system, and 535 N (120 lb) for a hand operated system.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 31 1983

WALTER JOE BLANC, Complainant, v. BROWN & ROOT, INC., Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 82-186-DM

Appearances:

Mr. Walter Joe Blanc
722 Hemlock Drive, Grand Junction, Colorado 81501
Appearing Pro Se

Peter R. McLain, Esq., Wilson, Brown & Faulk
P.O. Box 4611, Houston, Texas 77210
For the Respondent

Before: Judge John J. Morris

DECISION

Complainant Walter Joe Blanc, (Blanc), brings this action on his own behalf alleging he was discriminated against by his employer, Brown and Root, (B&R), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), in its pertinent part provides as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... 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 ... on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties a hearing on the merits was held in Grand Junction, Colorado on November 3, 1982.

Complainant elected not to file a post trial brief. Respondent filed a post trial brief.

ISSUE AND SUMMARY

The issue on the merits is whether respondent discriminated against complainant, a safety supervisor, in violation of the Act.

The evidence is generally without substantial conflicts. Complainant's evidence seeks to prove he was fired because he detected and required the abatement of substandard mining practices by Gilbert Western, (Gilbert), a subcontractor. Respondent's evidence seeks to establish a business justification for discharging complainant. The proffered justification arises from incidents of unprotected activity.

COMPLAINANT'S EVIDENCE

Walter Joe Blanc testified on his own behalf:

He was employed by B&R on September 24, 1981 (Tr. 8). Wayne Pierce, a B&R supervisor, offered him the position of safety supervisor at $2400 a month (Tr. 9, 12). Pierce also offered Blanc additional employment incentives (Tr. 9). Blanc had 10 years experience as an MSHA coal mine inspector (Tr. 13, 14, 16).

Blanc was, in fact, hired as a safety inspector at $14.50 an hour (Tr. 52-53, R1). After two or three weeks he was told he would not receive the safety supervisor's position (Tr. 20, 54). Blanc was terminated on November 3, 1981 (Tr. 8).

Blanc's duties included the inspection of the work areas of Tectonic Construction, Summit Construction, and Gilbert at the Colony Shale Oil project. These companies were all subcontractors of B&R, the general contractor (Tr. 19, 20, 22).

After he started Blanc found explosives and dynamite scattered around the Gilbert area (Tr. 22). Prior to this time Blanc detected many unsafe conditions (Tr. 23, C1). He kept a daily list of these substandard conditions which he gave to William Minton, his supervisor, when he was terminated (Tr. 24).

Gilbert personnel would become outraged on almost every substandard condition Blanc would point out to them (Tr. 25). Blanc discussed such conditions with Gilbert supervisors Reseigh, Schnopp, Burkey, or Neff (Tr. 26). At least five substandard conditions would be corrected each day (Tr. 27).

After he was terminated Blanc prepared an additional list of these substandard conditions. The list, only partially complete, contains fewer

conditions than the list he gave to his supervisor when he was terminated. The list, as supplemented by the testimony, shows the following sub-standard conditions were detected by Blanc:

1. No berm along the elevated haulage road for a distance of about 40 feet (C1). This condition was discussed with Reseigh or Schnopp. Blanc could not recall their reaction (Tr. 28).

2. Various pieces of mobile equipment were parked unblocked and unattended (C1). Blanc discussed this condition with Reseigh or Schnopp. They would "get mad" about having to abate but they would eventually do it (Tr. 3, 28).

3. Inoperative overwind device on the crane (C1). This condition was discussed with Reseigh or Schnopp (Tr. 28).

4. Safety equipment check card not filled out on the triple boom drill (C1). This was discussed with Reseigh or Schnopp but they didn't get too upset (Tr. 29).

5. Battery lid cover loose and unsecured on triple boom drill (C1). This would have been discussed with Gilbert's mechanic, Minton. He didn't get upset like the rest of them (Tr. 30).

6. No fire extinguishers on triple and double boom drills, two air compressors, and oil storage station (C1). This condition was discussed with Schnopp (Tr. 30).

7. Inoperative backup alarm on crane (C1).

8. Broken roof glass in crane (C1). This condition and the preceding one were discussed with mechanic Minton who didn't get out of hand (Tr. 30, 31).

9. From October 19, 1981 to November 3, 1981 tagline was not used on suspended equipment (C1). This practice was discussed with Reseigh or Schnopp (Tr. 31). They got upset and aggravated (Tr. 31).

10. October 19, 1981 to November 3, 1981 workmen were observed below suspended load (C1). This practice was discussed with Reseigh or Schnopp (Tr. 31).

11. Paper, aluminum cans, and other trash was scattered throughout the area (C1). Reseigh and Schnopp were not upset over this condition (Tr. 32).

12. The truck carrying explosives: it lacked a cover lid for detonators, it was not identified as one carrying explosives, and it was not blocked to prevent motion. Smoking was observed within ten feet of the truck (C1). This was discussed with Reseigh. He was angry and upset but took care of it right away (Tr. 32).

13. On two separate days two sticks of damaged explosives were observed outside of and in the tunnel. A detonator cap was found in the back of the explosives truck. Truck was not blocked to prevent motion (C1). This condition was discussed with Schnopp (Tr. 32). He got upset and aggravated but took care of it right away (Tr. 33).

14. No smoking signs were not placed on the truck carrying diesel fuel (C1). This was discussed with Schnopp or Bill Milton (mechanic)(Tr. 33). Blanc didn't think this was abated (Tr. 33).

15. Diesel fuel was stored in two 5 gallon containers (C1). Blanc discussed this with Schnopp but couldn't recall his reaction (Tr. 33).

16. A backhoe and front end loader were taken into the tunnel without emissions control for the diesel exhaust (C1). This situation was discussed with Reseigh or Schnopp who tried to convince Blanc that the equipment had emissions controls (Tr. 33).

17. The lunchroom was cluttered with tin cans and paper trash (C1). This condition was discussed with Schnopp who didn't seem to get too upset (Tr. 34).

18. The roof in the tunnel was not supported in an area about six feet wide and ten feet in length (C1). Blanc discussed this with Reseigh who became outraged. Blanc had a copy of the ground support plan. Reseigh through up his hands, replied with an obscenity, and left the property like a wild man (Tr. 34, 43). Schnopp with whom Blanc also discussed this was upset because they'd have to put in ground support (Tr. 34). The roof support incident happened the same day Blanc was terminated (Tr. 43, 61).

In the three and one half weeks Blanc was on the Gilbert site the only conditions not abated were the roof support problem [No. 18] and the broken glass in the crane [No. 8] (Tr. 60). Blanc didn't know if the roof supports were installed since this incident occurred on the day of his termination (Tr. 61).

Minton terminated Blanc on November 3, 1981 between noon and 3 p.m. (Tr. 35). Minton said he was terminating Blanc for his failure to get along with the contractor. Minton said he couldn't go around "putting out fires" (Tr. 30). At this meeting no statements were made about Blanc's safety complaints issued against Gilbert nor was there any discussion about Blanc's job activities (Tr. 38, 40, 41). At the termination conference Hohon said Blanc was in his hair and he (Hohon) had only been there a week (Tr. 41).

On two prior occasions Blanc's supervisor, Minton, had told him to take it easy on Gilbert because they had a hard money contract (Tr. 41-42). Hard money, according to Blanc, means they don't want any slowdown (Tr. 43).

On one occasion Blanc was riding the mantrip van down the mountain. When riding the van everyone must sign his name to a piece of paper. Except for the driver only Gilbert employees were present. When the paper was returned from the rear of the van someone had written "sucks" by Blanc's name (Tr. 62). Blanc stated if any one was man enough to admit it he'd stop the van, get out, and take care of the situation (Tr. 62). By that Blanc meant he was going to "knock him on his ass" (Tr. 62-63). This was not Blanc's normal approach to problems although he did get upset with safety director Dave Allen over a flagrant violation (Tr. 63).

On another occasion, after the van incident, Blanc noticed part of his lunch was missing from his lunchbox. Blanc didn't say anything until he checked with his wife (Tr. 65). The next morning he held his only safety meeting. At the meeting he told the Gilbert employees that whoever got into his lunchbox would need an ambulance, i.e., Blanc was going to "knock them on their ass" (Tr. 65, 66).

RESPONDENT'S EVIDENCE

Respondent's witnesses were William Minton (B&R safety director), Walter Saunders (Blanc's immediate supervisor), Gary Bates (Exxon's mine superintendent and client's representative), and Bob Reseigh (Gilbert project manager).

Witness William Minton testified as follows:

As B&R's safety director, he was responsible for safety and health at Colony Shale Oil Project (Tr. 94, 95). Blanc was responsible for the mine bench area (Tr. 96). Blanc was hired as a safety inspector at $14.50 per hour because of his knowledge about MSHA and mining practices (Tr. 106).

Minton explained to Blanc that he shouldn't shut down Gilbert for non-serious violations (Tr. 111). B&R could be back charged for this and it would affect productivity (Tr. 111). Blanc was counselled on two different occasions because of complaints by Reseigh (Gilbert project manager) and Gary Bates (Exxon manager) (Tr. 111).

Minton first heard about the middle of October from Vance English that Gilbert was being shut down for improperly marked gas cans and for workers being on top of a trailer (Tr. 112, 113). Minton went up to the mountain and didn't see anything that would cause a shutdown (Tr. 113-114).

It is B&R policy that if a safety inspector sees employees in a situation of imminent danger he has the authority to shut down the operation (Tr. 115). Various remedies are available to the inspector (Tr. 116-117). Minton did nothing about this particular complaint (Tr. 117-118).

It was over two weeks later when Reseigh came to Minton and said they were being harassed by Blanc and shut down for no reason at all (Tr. 118, 119). Minton's investigation showed nothing serious that should cause a shutdown (Tr. 119). Minton counselled with Blanc. He explained that B&R was subject to back charges if a shutdown occurred and the situation was not one of imminent danger and life threatening (Tr. 120, 121). Minton

explained that Gilbert had a "hard money contract" that is, a unit price contract (Tr. 122).

Gary Bates (Exxon) complained to Minton about an incident that arose when Blanc, Bills, and Reseigh were talking. Bills brushed against Blanc who automatically took offense. He put his fists up and told Bills he better never touch him again (Tr. 122). Minton talked to Bills and Reseigh, but not Blanc, about this incident (Tr. 123).

About November 3 Gates came to Minton about a shutdown (Tr. 124-125). Minton felt Blanc was abusing his authority as an inspector (Tr. 125).

At his termination meeting Minton told Blanc he had no alternative but to terminate him for failure to get along with the subcontractor (Tr. 125). Blanc was quiet. He did not deny the lunchbox, the van, and the Bills incidents (Tr. 125). Blanc's discharge slip reads that he was fired for failure to get along with the subcontractor (Tr. 145-146).

Minton's first counselling session with Blanc was after Reseigh complained about Blanc shutting Gilbert down. The second session was over what hours Blanc was to work. The fourth session was after the Bills incident. This was on the date of termination (Tr. 128). There were five counselling sessions before Blanc was terminated (Tr. 129). The fifth and final session was on the day Blanc was fired (Tr. 129). Minton never threatened Blanc's job nor did he at any time tell him not to note or correct violations or defects (Tr. 129, 133-134).

Minton learned of the incident involving roof supports in the tunnel on November 3 after Blanc had been terminated (Tr. 135). Bates and Reseigh came to Parachute (Colorado), after Blanc had left, and explained they had put in additional bolts (Tr. 135). Reseigh said this was not an imminent danger situation although bolts were required in the drawings (Tr. 135). Blanc hadn't talked about the bolts at the termination meeting (Tr. 135). Prior to Blanc being terminated Minton didn't have any knowledge of the unsafe conditions for which Gilbert was cited (Tr. 158-159).

Blanc never told Minton he was having problems with the subcontractors (Tr. 161).

Blanc's termination on November 3, 1981 was triggered by the complaints of the subcontractor, the client, and the [disregard by Blanc of the] counselling sessions. The final straw was the lunchbox incident (Tr. 159).

Witness Walter Saunders testified as follows:

He was Blanc's supervisor (Tr. 163). Saunders returned from leave about October 26. At that time Minton informed him that there were some problems on the mine bench. Some animosity had developed between Gilbert personnel and Blanc. Gilbert was complaining they were being shutdown unnecessarily. Allen and Schnopp said the same thing (Tr. 165-166). Saunders did nothing but he intended to keep his eye on the situation (Tr. 166).

Saunders was asked by Minton to investigate the lunchbox incident. He interviewed most of the people who had been at the safety meeting (Tr. 167, 168). The only topic at the safety meeting was Blanc's lunchbox (Tr. 168). Saunders related this information to Minton (Tr. 168).

Saunders was present at the November 3 termination meeting. Blanc's defense, in essence, was that this was the only way he knew how to do it (Tr. 169, 170).

B&R procedure is for an inspector to note violations and report them to his supervisor (Tr. 170). Blanc mentioned explosives lying around (Tr. 171). The problems Blanc related to Saunders were the lunchbox and the van incidents as well as the lack of communication with Gilbert (Tr. 171).

Saunders never threatened Blanc for shutting down the job when there was no imminent danger (Tr. 173).

Dave Allen's complaints were that Blanc was either shutting down the operation or threatening to do so when it wasn't justified (Tr. 177).

Blanc was terminated because of his inability to talk with sub-contractors and because he was abrasive (Tr. 179, 180). It is improper for an inspector to threaten someone with bodily harm (Tr. 182).

Witness Gary Bates testified as follows:

He was the representative for Exxon USA, and as such he was responsible for the day to day operation of the Colony Shale Oil Project (Tr. 184).

Joe Blanc first came to Bates' attention shortly after Gilbert mobilized (Tr. 188). A series of statements were made to Bates which he considered to be overzealousness on Blanc's part (Tr. 189). It was not so much what Blanc said but how he stated it (Tr. 189). Blanc was using abusive language and a tough guy attitude (Tr. 190). Bates asked Minton to straighten this out (Tr. 190).

About a week later the Bills incident (when Bills brushed against Blanc) was brought to Bates' attention (Tr. 191). Bates contacted Minton because he was concerned about a fight (Tr. 191). Minton told Bates he'd talk to Blanc (Tr. 191).

Another matter brought to Bates' attention was the lunchbox incident which Bates describes as Blanc "lining up" the Reseigh group and saying he'd send them off the hill in an ambulance if it happened again (Tr. 192). Bates told Minton this conduct is "completely unacceptable and we can't have that" (Tr. 192). Minton said he'd look into it and try to get it resolved (Tr. 192).

Bates never made any recommendation concerning Blanc's personnel status (Tr. 192).

Bates learned of the roof bolts incident after Blanc had gone (Tr. 193).

Bob Reseigh testified as follows:

He was Gilbert's project manager, and he started on the project on October 26, 1981. By November 5, 1981 the tunnel extended 60 to 70 feet (Tr. 211-213). Gilbert had a fixed price contract where Gilbert was paid in lineal feet of tunnel (Tr. 213).

Reseigh and Blanc disagreed over the way things should be done. Blanc would note violations and bring them to Reseigh's attention (Tr. 214, 215). Basically Blanc wanted it corrected now (Tr. 215). It was Gilbert's policy to correct, if possible (Tr. 215).

On several occasions Blanc shutdown several pieces of equipment for not having fire suppressors. MSHA did not require such suppressors (Tr. 215-217). Reseigh complained to Bates (Tr. 216-217).

About a week or 10 days later they were about 40 to 50 feet into the access tunnel (Tr. 219). Blanc wanted ventilation. Reseigh hestitated because subsequent blasting would blow it up (Tr. 219). Reseigh went to Bates and told him they could legally advance 100 feet (Tr. 219). Bates agreed. Reseigh didn't know if Blanc had shut down the tunnel (Tr. 219).

Blanc called a safety meeting and threatened to carry some people off of the mountain because a sandwich was missing from his lunchbox. Reseigh told Saunders about it. Reseigh felt they couldn't have that kind of animosity on the site (Tr. 220).

On one occasion [November 3] Blanc said Gilbert couldn't drill. The plan called for rock bolts in back of the rib (Tr. 221). Normally such bolts are installed behind the Jumbo (Tr. 222). The Jumbo was pulled out, muck brought in, and Gilbert installed the roof bolts (Tr. 222). Reseigh went down and talked to Bates and after lunch they both went to Minton in Parachute, some 16 to 20 miles from the job site (Tr. 222).

Reseigh said something had to be done about Blanc (Tr. 222-223). He was told that something had been done (Tr. 222-223).

Reseigh's workers were instructed to get along with Blanc (Tr. 223-224).

On one occasion Bills was talking with his hands and he touched Blanc, who got "stiff". Blanc told Bills not to touch him again, that he did not like to be touched. He was not belligerent but there was no question he didn't want to be touched (Tr. 226-227). Bills is 5 foot, 7 inches tall and 68 to 75 years old (Tr. 227). [At the hearing the Judge observed that Blanc appears taller and younger than Bills].

On one occasion Blanc wanted all work to cease in the tunnel face during blasting operations (Tr. 230). When Gilbert blasts in a tunnel they

remove the workers out but they do not remove them during the charging process (Tr. 230).

As a rule Gilbert was given time to correct [a defect] before they were shut down (Tr. 231).

It is very possible that Blanc brought up five safety or health violations every day (Tr. 243).

Reseigh only complained twice about Blanc. The first instance was that Blanc was inspecting them unnecessarily for trivial problems. On the day Blanc was no longer assigned to the mine bench Reseigh wanted to be sure the problem had been taken care of so he went to see Minton (Tr. 247).

DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom, Consolidation Coal Co. v. Marshall, 663 F 2d 1211, (3d Cir. 1981), and Secretary ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination bears a burden of production and persuasion to show that he was engaged in protected activity and that the adverse action was motivated in any part by the protected activity. Pasula 2 FMSHRC 2799-2800; Robinette, 3 FMSHRC at 817-818.

At this point it is appropriate to consider the status of Blanc's activities. The vast majority of discrimination claims arising under the Act are generated by miners engaged in duties other than those of a safety inspector. I find nothing in the text of the Act or in the legislative history that indicates Congress intended to exclude a safety inspector from the protection of the discrimination portion of the Act. An operator's safety inspector bears an important function in helping fulfill the purposes of the Act since his duties will ordinarily seek to promote safety and health. Under Pasula and Robinette and their progeny I conclude that good faith complaints of unsafe and unhealthy conditions by a safety inspector in the ordinary course of his duties are protected under the Act.

Having resolved Blanc's status we will go to the Commission's further ruling in Robinette: to rebut a prima facie case a operator must show either that no protected activity occurred (in view of the ruling as to Blanc's status B&R cannot establish that defense) or that the adverse action was in no part motivated by protected activity, 3 FMSHRC 817-818 and N. 20. If an operator cannot rebut the prima facie case in the foregoing manner it may nevertheless defend by proving that it was also motivated by the miner's unprotected activities and that it would have taken the adverse action in any event for the unprotected activities alone, Pasula, 2 FMSHRC 2799-2800.

The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. Robinette, 3 FMSHRC at 818 n. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. The Commission made clear in Robinette that the ultimate burden of persuasion does not shift from the complainant in either kind of case. 3 FMSHRC at 818 n. 20. The foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977).

In Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), the Commission affirmed the Pasula-Robinette test, and set out the following proper criteria for analyzing an operator's business justification for adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

3 FMSHRC at 2516-17. Thus, the Commission first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, the Commission held that once it is determined that a business justification is not pretextual, then the

judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.

By a "limited" or "restrained" examination of the operator's business justification the Commission does not mean that an operator's business justification defense should be examined superficially or automatically approved once offered. Rather, the Commission intends that its Judges, in carefuly analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As the Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982).

With the Commission directives in mind we will examine the defense asserted by B&R. The defenses are succinctly stated by Blanc's supervisor Minton. Blanc was terminated because of complaints by the subcontractor (Gilbert), the client (Exxon), and the counselling sessions. The final straw was the lunchbox incident (Tr. 159). B&R in its post trial brief also argues that the Bills and the van incidents support B&R's business justifications.

We will examine the record. Gilbert's complaints: Manager Reseigh complained twice. Once was over being unnecessarily inspected over trivial problems (Tr. 247). The second time was apparently when Reseigh went to see Minton himself (Tr. 247). At that point Blanc had already been terminated.

The client's complaints: Exxon, through its manager Gary Bates, asked Minton to "straighten out" Blanc's attitude. Bates dislikes an attitude of "I am not here to help your safety program, I'm here to shut you down" (Tr. 190).

Further complaints by the client arose from the Bills incident. Bates was concerned about a fight and again contacted Minton (Tr. 191).

Bates describes the lunchbox incident as Blanc "lining up" Reseigh's group (Tr. 192). Bates admonished Minton stating "that type of behavior is completely unacceptable and we can't have that" (Tr. 192).

Three complaints by a client-owner in less than a three week period would motivate Minton to fire Blanc. A miner's unsatisfactory past work record is one of the criteria discussed in Bradley v. Belva Coal Company.

On the basis of the Commission directives I conclude that the business justification is not pretextual and the reasons were enough to have legitimately moved B&R to take adverse action against Blanc.

I have carefully examined Blanc's evidence. A cursory review might indicate that his facts establish a claim of retaliatory conduct. The scenario: Blanc has been overzealous in enforcing safety regulations

against Messers Reseigh, Schopp, Burkey, and Neff of the Gilbert Company. The culmination comes when Blanc requires that roof bolts be installed in the tunnel. This delays production. Reseigh storms out, goes to Exxon's Bates, and in turn they go to Minton who immediately fires Blanc for his overzealous enforcement of the safety regulations.

For several reasons the evidence does not support this theory of the case.

Blanc testified that he never advised Minton of the problems he was having with Gilbert (Tr. 67, 68). Minton confirms this fact (Tr. 161). Further, concerning the two hour termination meeting Blanc testified there was no discussion about safety complaints Blanc has issued against Gilbert (Tr. 38). This evidence combines with Minton's uncontroverted testimony that he didn't learn of the roof bolts incident until after he had terminated Blanc (Tr. 135).

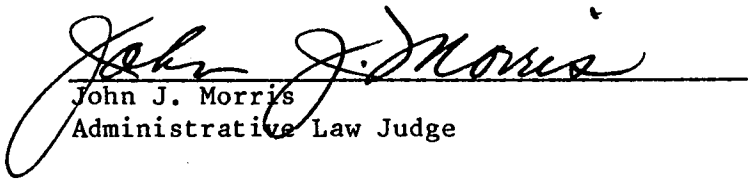
Since Minton generally did not know about Blanc's disagreement over safety conditions with Gilbert personnel nor about the roof bolt incident these factors could not have motivated Minton to fire Blanc.

Since the evidence fails to establish a case of discriminatory conduct in violation of the Act it is unnecessary to consider Blanc's claim of lost wages and expenses.

Based on the foregoing facts and conlusions of law I enter the following:

ORDER

The complaint of discrimination is dismissed.



John J. Morris
Administrative Law Judge

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*U.S. GOVERNMENT PRINTING OFFICE : 1983 0-381-569/5276