JANUARY 1984

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 Michael Hogan and Robert Ventura v. Emerald Mines Corporation, Docket No. PENN 83-141-D (Judge Koutras, December 19, 1983)

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

United Mine Workers of America, Local #1197 v. Bethlehem Mines Corporation, Docket No. PENN 83-234-D (Judge Broderick, December 13, 1983)

Secretary of Labor, MSHA v. United States Steel Corporation, Docket No. PENN 83-221 (Judge Merlin, December 14, 1983)

United States Fuel Company v. Albert J. DiCaro, Docket No. WEST 82-113-D (Judge Fauver, December 15, 1983)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 82-3-R
	:	PENN 82-15
v.	:	
MATHIES COAL COMPANY	:	

DECISION

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and presents the question of whether a violation of 30 C.F.R. § 75.1403 was "significant and substantial" within the meaning of Cement Division, National Gypsum Company., 3 FMSHRC 822 (April 1981). The Commission's administrative law judge concluded that Mathies Coal Company ("Mathies") violated the standard, that the violation was significant and substantial, and assessed a penalty. 4 FMSHRC 1111 (June 1982)(ALJ). We granted Mathies' petition for discretionary review, which challenges only the judge's significant and substantial findings. For the reasons that follow, we affirm.

On September 22, 1981, during a spot inspection of Mathies' underground coal mine, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Mathies under section 104(a) of the Mine Act, 30 U.S.C. § 814(a)(Supp. V 1981). The citation alleged a violation of 30 C.F.R. § 75.1403, 1/ and stated:

1/ The portions of the standard involved in this citation are:

Section 75.1403, a statutory provision, which requires that

> [o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided;

Section 75.1403-1, which permits the Secretary's authorized representative to require on a mine-by-mine basis, safeguards in addition to those required in §§ 75.1403-2 through 75.1403-11; and

Section 75.1403-6(b)(3), which requires in part that each track-mounted, self-propelled personnel carrier be equipped with "properly installed and well-maintained sanding devices...."

> One of the four sanding devices provided for the No. 4 self-propelled personnel carrier (mantrip) was inoperative which was going to transfer personnel from Gamble No. 1 to 4 face 24 Butt Parallel Section. The sander was empty due to a valve that was stuck open. Foreman in charge Ron Pietroboni. Notice to provide safeguard 1JWC 12-01-72. [2/]

The citation also alleged that the violation was significant and substantial. The inspector issued the citation at the start of the day shift, immediately following the mantrip operator's regular check of the mantrip. The inspector terminated the citation five minutes later after Mathies adjusted the valve and refilled the defective sander with sand. Thereafter, Mathies filed with this independent Commission a notice of contest of the citation. The contest proceeding subsequently was consolidated with the Secretary of Labor's proposal for a civil penalty.

The mantrip was used by Mathies to transport its production crews of 8-10 miners to and from working areas in the mine. The mantrip traveled along the haulage track from an area near the mine portal called the "bottom" to the working sections, at the beginning of each of three shifts and back again at the conclusion of the shifts. In addition to primary and secondary braking systems, the mantrip was equipped with a sander above each of its four wheels. Each sander contained a half-gallon of sand. The sanders supplemented the mantrip's brakes by dispensing sand in order to increase the friction between the haulage track and the wheels. The mantrip used only the two sanders at the front end, as determined by the direction of travel. One hand lever activated the two sanders at the front end of the mantrip, so that one inoperable sander would reduce sanding capacity by one-half.

The record evidence indicates that sanders were most likely to be needed to supplement a mantrip's brakes in wet conditions, on curves, or on grades. The Mathies mine was considered to be a "wet" mine. Some areas along the haulage track were always damp or wet. In a few locations, Mathies used sump pumps to reduce excess moisture. On September 22, 1981, the haulage track was wet at least in part because it was a high humidity time of year. The mantrip's route to the working section on the September 22d day shift passed curves, including blind curves and an S-curve, and hills, the steepest having a 3.4% grade.

At the time the inspector issued the citation, the mantrip was fully loaded and ready to go. The inoperable sander was on the rear end of the mantrip. Because the mantrip changed directions five minutes into the 20-minute trip, however, what was the rear end of the mantrip at the start of the trip would become the front end. Thus, the majority of the mantrip's 6,500-foot trip into the mine and a portion of the return trip could have required the use of the inoperable sander to supplement the brakes.

2/ A general notice of safeguard, issued December 1, 1972, requiring sanding devices on all self-propelled mantrips, was modified on August 12, 1980. The modification required that "all mantrips at this mine will be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel." 4 FMSHRC at 1112.

The Commission's administrative law judge concluded that the defective sander constituted a violation of the cited standard, and that the violation was significant and substantial. He assessed a $130 penalty. Applying the National Gypsum test for determining when a violation is significant and substantial, the judge concluded that the hazard associated with the violation was a sliding derailment or collision with an object on the tracks, and that the hazard was reasonably likely to result in an injury of a reasonably serious nature. 4 FMSHRC at 1115, 1117-19. He attributed the likelihood of such injury to such factors as the "wetness, albeit occasional, of the haulageway, the curves, and downgrades in the mine and the intrinsic danger of haulage travel itself." 4 FMSHRC at 1118.

The issue on review is whether substantial evidence supports the judge's conclusion that the violation was "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C.§ 814(d)(1)(Supp. V 1981). 3/ We have previously interpreted this statutory language as follows:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

National Gypsum, 3 FMSHRC at 825. Noting that the Mine Act does not define "hazard," we construed the term to "denote a measure of danger to safety or health." 3 FMSHRC at 827. We stated further that a violation "'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." Id. (footnote omitted).

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; 4/ (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will

3/ The Mine Act's references to significant and substantial violations are contained in sections 104(d) and (e), 30 U.S.C. §§ 814(d) & (e). The MSHA inspector's significant and substantial findings in this case were made in connection with a citation issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), which does not expressly refer to this statutory phrase. Mathies has not challenged the propriety of including such findings in a section 104(a) citation, and we accordingly express no view on the issue in this decision. We note, however, that the question is pending before us in Consolidation Coal Co., FMSHRC Docket No. PENN 82-203-R, etc.

4/ We emphasize that this case involves the violation of a mandatory safety standard. We have pending before us a case raising a challenge to the application of National Gypsum to a violation of a mandatory health standard. Consolidation Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intimate no views at this time as to the merits of that question.

result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. As a practical matter, the last two elements will often be combined in a single showing.

Here, only two of the four elements necessary to establish a significant and substantial violation are at issue. Mathies does not contest the judge's finding of a violation or, assuming the existence of a hazard posing a reasonable likelihood of injury, that the injury would be reasonably serious. Mathies argues only that the evidence does not support a finding either that one defective sander could contribute to a hazard or that any such hazard would involve a reasonable likelihood of injury.

The judge found that the violative condition, the defective sander, contributed to a hazard of a sliding derailment or collision with some object on the tracks. 4 FMSHRC at 1115. The record amply supports this finding. Section 75.1403-6(b)(3) (n. 1 supra), which requires sanders on mantrips, reflects a broad determination by the Secretary of Labor that a mantrip's brakes by themselves do not always provide sufficient traction to prevent derailment or collision and that sanders are necessary to provide added stopping power. MSHA's modification of the 1972 notice of safeguard to Mathies (n. 2 supra) reflects a specific determination that conditions at the Mathies mine required that mantrips be equipped with properly maintained sanding devices "sufficient to sand all wheels in both directions of travel." 4 FMSHRC at 1112. These determinations support the conclusion that because brakes alone may not suffice to stop the mantrip at Mathies' mine, sanders are necessary to supplement the brakes and that a defective sander can contribute to a derailment or collision hazard.

Moreover, the record also establishes the existence of a hazard on the day of the citation. The damp conditions in the mine, the wet track, and the fact that the mantrip's route traversed curves and grades, created travel risks on September 22, 1981, that could have required the extra traction that sanders are intended to provide. The foregoing considerations establish the existence of a hazard. We need not pass on the validity of the additional consideration, relied on by the judge, of the "intrinsic danger" of haulage travel.

The remaining issue is whether the judge properly concluded that there was a reasonable likelihood that the hazard contributed to could result in injury. As we have noted in our discussion of the hazard, the mantrip's route encompassed curves and grades. In addition to the chronically wet conditions at the mine, conditions were exceptionally wet on the day the citation was issued. If the dampness, curves, or grades had necessitated use of the defective sander, the absence of sanding capacity could have been a major cause of a derailment or a collision. We must be mindful of the fact that the mantrip carried miners, and we agree with the judge that it is reasonably likely that such a loss of control would have exposed the 8-10 miners riding in the mantrip to the reasonably serious injury that any derailment or collision could entail. Thus, we concur with the judge that the hazard contributed to by the violation created a reasonable likelihood of injury, and that the violation was therefore a major cause of a danger to safety.

In reaching this conclusion, we note that the judge's decision was based in large part on his credibility findings and his resolution of disputed testimony in the Secretary's favor. Such determinations by a judge should not be overturned lightly, and in any event, we need not take that exceptional step here. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). First, in light of our admonition that an inspector's judgment is an important element in making significant and substantial findings, (National Gypsum, 3 FMSHRC at 825-26), the judge gave appropriate weight to the inspector's judgment. Second, as the judge concluded, the inspector's testimony was "reasonable, logical and credible." 4 FMSHRC at 1115. The inspector observed conditions first-hand, in contrast to Mathies' sole witness, its foreman, who conceded he was present only part of the time. Moreover, the inspector's testimony was more specific than that of the foreman who could not remember the exact conditions that day. Thus, we conclude that the judge did not err in crediting the inspector's testimony as to the wet rail, the hazards created by the loss of sanding capacity, and the likelihood of injury.

For the foregoing reasons, we affirm the judge's holding that the violation was significant and substantial.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

I agree with the majority as to the result reached and in their affirmance of the decision of the judge below. However, for the reasons expressed in my dissent in National Gypsum, supra, I disagree with their analytical approach as set forth here and in that decision.

A. E. Lawson, Commissioner

Distribution

H. Juanita M. Littlejohn, Esq.
Mathies Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Harrison Combs, Esq.,
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Michael Lasher
Fed. Mine Safety & Health Rev. Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 9, 1984

WALTER A. SCHULTE	:	
	:	
v.	:	Docket No. YORK 81-53-DM
	:	
LIZZA INDUSTRIES, INC.	:	

DECISION

This case involves a discrimination complaint brought by Walter A. Schulte against Lizza Industries, Inc. ("Lizza"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V. 1981). At issue is whether Lizza's discharge of Schulte on October 15, 1980, was in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1)(Supp. V. 1981). Following a hearing on the merits, the Commission's administrative law judge determined that Lizza did not violate section 105(c)(1) and dismissed Schulte's complaint. 4 FMSHRC 1239 (July 1982)(ALJ). For the reasons that follow, we affirm the judge's decision.

Lizza operated a gravel quarry and preparation plant in Mount Hope, New Jersey, known as the Mount Hope Quarry. Lizza operated the quarry on a full-time basis, Monday through Friday, and with a reduced work force on Saturday. Employees were required to report to work daily at 7:00 a.m. The work day ended at 4:30 p.m. Lizza had a policy requiring employees to notify the operator between the hours of 6:00 a.m. and 7:00 a.m. of unforeseen absences, in order that they might be excused. Lizza also had a policy requiring employees to work overtime each day. Failure to comply with either policy was grounds for disciplinary action.

Schulte was hired by Lizza on May 27, 1980. On September 10, 1980, Schulte left work two hours early. Plant Manager Fred Oldenburg told Jesse Parzero, Schulte's foreman, to have a talk with him regarding his early departure. Schulte previously had received two verbal warnings from Oldenburg concerning his attendance in the period leading up to September 23, 1980.

Schulte reported for work six to ten minutes late on both September 23 and 24, 1980. On the first occasion, Oldenburg prepared a letter alerting Schulte to the possible consequences of his actions and personally

delivered it to him. By his signature, Schulte acknowledged receipt of the letter and the accompanying postscript. 1/ On September 30, 1980, Schulte left work one half hour early. He failed to report for work on October 2, 1980, and failed to notify Lizza of his absence.

Tension between Schulte and Lizza surfaced on October 4, 1980, when Schulte was demoted from the position of bulldozer operator to the position of laborer for his alleged unsafe practices as an operator. Schulte contended at the Commission hearing that he was removed in order to make room for a friend of the plant manager. Later that day, an altercation developed between Schulte and Parzero, his foreman, and disparaging remarks were exchanged. Ultimately, Oldenburg had to make peace between the two men. That same day, Oldenburg informed Schulte that he was being suspended without pay for three days.

On October 6, 1980, the first day of this three-day suspension, Schulte reported safety complaints to the Department of Labor's Occupational Safety and Health Administration and Mine Safety and Health Administration ("MSHA"). Apart from these documented complaints, Schulte indicated at the hearing that he also reported safety complaints to both his foreman and his shop steward. Both individuals denied the allegations.

Upon Schulte's return from the three-day suspension, Oldenburg gave him a letter, dated October 6, 1980, advising him of the suspension. Schulte acknowledged receipt of the letter and the accompanying postscript. 2/ On October 10, 1980, Schulte again left work one half hour

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1/ The body of the letter dated September 23, 1980, reads:

> Your attendance practices leave much to be desired. These practices cannot be tolerated. I am, therefore, formally informing you that if these practices continue you will be suspended and subsequently terminated. If you have any questions, please let me know.

The postscript reads:

> I hereby understand that if my poor attendance practices continue I will be suspended for three days and terminated thereafter if the practices continue.

2/ The body of the letter dated October 6, 1980, reads:

> Your attendance practices and work attitude leave much to be desired. You have been warned about these practices, yet you continue to be insubordinate. You are therefore suspended without pay for three days. If your performance does not improve, your employment will be terminated. If you have any questions, please let me know.

The postscript reads:

> I hereby understand that if my poor attendance practices and work attitude continue, I will subsequently be terminated.

early. He also left work one half hour early on October 14, 1980. On October 15, 1980, he reported for work six minutes late.

Responding to Schulte's safety complaints of October 6, 1980, two MSHA inspectors conducted an inspection of Lizza's Mount Hope Quarry on October 14 and 15, 1980. On October 14, 1980, MSHA cited Lizza for the inadequate guarding of a conveyor belt in a walkway near an area where Schulte worked. MSHA Inspector Robert Held testified that he mentioned to management that the miner's safety complaint which MSHA had received involved the guarding of the conveyor belt. Held did not identify Schulte as the complainant. Schulte testified that Oldenburg, Parzero and Vincent Crawn, his shop steward, were present when he directed the MSHA inspectors to other alleged safety violations.

The decision to terminate Schulte was reached at a meeting of management personnel on the second day of the MSHA inspection, October 15, 1980. Those participating included Oldenburg, Parzero, Crawn and senior company official James Granito. Both Oldenburg and Parzero admitted that at the time of the meeting they were aware of rumors that Schulte had initiated the MSHA inspection. At the hearing, Oldenburg testified that Granito may have brought up the fact that Schulte's discharge had absolutely nothing to do with the MSHA inspection.

Schulte was called into the meeting and discharged by Oldenburg, who gave him a letter detailing the reasons for his discharge. 3/ The two MSHA inspectors on the mine site were notified by management of Schulte's termination.

Following his discharge, Schulte's union filed a grievance on his behalf and the question of whether his dismissal was for just cause under the applicable collective bargaining agreement was submitted for

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3/ The body of the letter dated October 15, 1980, reads:

> You had been warned several times and subsequently suspended without pay as a result of poor attendance practices and insubordination. At a meeting held on Wednesday, October 15, 1980, you stated that your attitude had not improved and would not improve as a result of your no longer operating the bulldozer at our Mt. Hope plant.
>
> You were reminded on several occasions, and specifically on Thursday, October 9, 1980, by your foreman, Jesse Parzero, that your job required overtime each day. You have opted to neglect these instructions and have left your work area prior to the designated quitting time.
>
> Our prior verbal warnings, written warnings and disciplinary suspension have obviously failed to rehabilitate you. You have therefore left us no choice but to terminate your employment, effective today, October 15, 1980, at 1:30 p.m.

arbitration. 4/ On January 15, 1981, Schulte filed a complaint of discrimination with MSHA pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). Upon investigation, MSHA determined that no provisions of the Act had been violated and so informed Schulte on May 4, 1981. On May 14, 1981, Schulte filed his own complaint of discrimination directly with this independent Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). 5/ Three separate evidentiary hearings were held. On July 6, 1982, the Commission's judge issued his written decision dismissing Schulte's complaint. Both parties filed cross petitions for discretionary review, which we subsequently granted.

In reaching his decision, the judge employed the discrimination analysis which we enunciated in Secretary on behalf of 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 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). The judge found Schulte's safety complaints to MSHA on October 6, 1980, constituted activity protected by section 105(c)(1) of the Act and, thus, that Schulte had established the first element of his prima facie case under Pasula. As to the second element of that case, whether Schulte's discharge by Lizza was motivated in any part by his protected activity, the judge found from the circumstantial evidence available that "it could very well be inferred that Mr. Schulte's discharge was at least partially motivated by his protected activities." 4 FMSHRC at 1241. However, given the uncontradicted evidence regarding his work attendance, the judge further found that "while Lizza may very well have had a 'mixed motivation' for discharging Schulte, it had credible 'business justifications' to discharge Schulte exclusive of any protected activities and it clearly would have discharged Schulte in any event for his unprotected activities alone." 4 FMSHRC at 1244. The judge also found that Schulte's contention of disparate treatment, without credible evidence to support it, was not sufficient to rebut Lizza's affirmative defense. Id.

4/ The arbitrator's subsequent decision, dated February 23, 1981, was admitted as evidence at the hearing before the Commission's administrative law judge. Although the Commission judge did not refer to the arbitral decision in his own decision, we note in passing that the arbitrator concluded that Schulte was dismissed for a poor work attitude and attendance problems, and that his discharge was therefore for just cause within the meaning of the contract. This result accords with that reached by the judge.

5/ After investigation of a miner's complaint, the Secretary of Labor, acting through MSHA, is required to file a discrimination complaint with this Commission on the miner's behalf if he determines that the Act was violated. 30 U.S.C. § 815(c)(2). If the Secretary determines that the Act was not violated, as happened in this case, he shall so inform the miner and the miner may then file his own complaint directly with the Commission. 30 U.S.C. § 815(c)(3).

On review Schulte contends that the judge erred in concluding that Lizza established a successful affirmative defense to his prima facie case. As a preliminary matter, Lizza argues that Schulte's discrimination complaint to MSHA was not timely filed under the 60-day time limit contained in section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), and should have been dismissed on that basis. Lizza also contends that, even if the complaint were timely, the judge erred in finding that Lizza had knowledge of Schulte's protected activity and in concluding that Schulte established a prima facie case. We first address the timeliness question.

Lizza initially raised its limitations defense before the judge during the last evidentiary hearing on April 16, 1982, and, again, by written motion prior to issuance of the judge's written decision. At the hearing, the judge expressed doubt about Lizza's own timeliness in raising the issue at that late stage of the proceedings. He seemed to be of the opinion that Lizza had waived the affirmative defense by not raising it in its pleadings and by proceeding with the hearing on the merits. Lizza maintained that it had not received a copy of the complaint Schulte originally filed with MSHA until April 5, 1982, when it obtained a copy from the Secretary pursuant to a Freedom of Information Act ("FOIA") request. Only then, Lizza asserted, was it able to ascertain that Schulte's complaint was filed out of time. The judge did not specifically address Lizza's limitations defense in his decision. From the fact that the judge proceeded to decide the case based upon the merits, however, it appears, by necessary implication, that he rejected it. That is the construction of his decision which Lizza urges on review and is the one which we adopt.

Section 105(c)(2) of the Act establishes the relevant period of limitations:

> Any miner ... 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 occurs, 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....

30 U.S.C. § 815(c)(2)(emphasis added). In Herman v. Imco Services, 4 FMSHRC 2123 (December 1982), we held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." We relied on the Mine Act's relevant legislative history, which states:

> While this time limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances

> which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limits because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in, Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)(emphasis added). "Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each case." Hollis v. Consolidation Coal Co., FMSHRC Docket No. WEVA 81-480-D, slip op. at 4 (January 9, 1984).

In the present case, Schulte filed his initial discrimination complaint with MSHA on January 15, 1981, 91 days after his discharge on October 15, 1980, and, thus, 31 days out of time. In its motion to amend its answer to include a period of limitations defense, Lizza apparently concedes that the reason Schulte did not file his complaint with MSHA on a timely basis was due to his ignorance of any such requirement. To support this contention, Lizza points to the transcript of MSHA's March 4, 1981, interview with Schulte, wherein Schulte stated:

> Q. Are you familiar that there's a time limit on the discrimination complaint?
>
> A. No. I was not aware of that.
>
> * * *
>
> Q. Ok. Now, so you weren't familiar with the time limit on this?
>
> A. No, sir.

Operator's Exhibit 24, p. 4. On the basis of this uncontroverted evidence, we conclude that Schulte failed to file his complaint with MSHA within 60 days of the alleged violation because he was unaware of the Act's provisions in this regard.

We also conclude that the operator was not prejudiced by Schulte's 31-day delay in filing. Lizza's only claim of prejudice is that, due to the judge's failure to dismiss Schulte's complaint based upon its period of limitations defense, it was required to expend the time and expense of litigating this case. While the expenditure of time and money involved in litigation should not be discounted, neither should it be overstated. Lizza has not demonstrated to us the kind of legal prejudice which we recognized in Herman, supra, namely, tangible evidence that has since disappeared, faded memories, or missing witnesses. 4 FMSHRC at 2139. In any event, the record reveals significant evidence which leads us to conclude that Lizza's conduct before raising the limitations argument was tantamount to waiver.

The copy of Schulte's complaint to MSHA, which Lizza relies upon as "newly discovered" evidence, is really not new. In a letter addressed to Oldenburg dated January 26, 1981, the Secretary of Labor notified Lizza that Schulte had filed a complaint with MSHA alleging discriminatory treatment by Lizza. A Summary of Discriminatory Action, also dated January 26, 1981, was attached to the letter. Included on each item was the discrimination number, MD 81-46, which MSHA had assigned to the complaint. By letter dated August 3, 1981, Lizza's attorney communicated with then Chief Judge Broderick, concerning Schulte's May 14, 1981, complaint of discrimination pending before the Commission. MSHA's letter to Oldenburg of January 26, 1981, was appended to this letter. In the body of his letter, Lizza's attorney stated, "For your information, Mr. Schulte had filed a complaint against the Company in January of this year in case No. MD 81-46."

A complaint filed by Schulte anytime in January 1981 would have been outside the 60-day limit. Lizza's August letter thus reveals that Lizza, in January of 1981, but certainly no later than in August of 1981, had actual notice of Schulte's late filing. This notice substantially predated receipt of its FOIA request in April 1982. 6/ Under these circumstances, Lizza's own delay of many months after it had such notice before complaining of Schulte's 31-day delay was tantamount to waiver of its period of limitations claim. Cf. Rule 8(c), Fed. R. Civ. P.

On the basis of the foregoing considerations, Schulte's delay in filing his complaint is excused. We emphasize, however, that although a miner's lack of understanding regarding his rights under the Mine Act is one of the circumstances that may possibly justify excuse of a delayed filing, any delay is a potentially serious matter. 7/

6/ While the document Lizza received from the Secretary pursuant to its 1982 FOIA request clearly identifies January 15, 1981, as the date Schulte's complaint was actually filed, MSHA's letter to Oldenburg dated January 26, 1981, nevertheless provided Lizza with sufficient independent information from which to determine the timeliness of Schulte's complaint. The newly discovered evidence did little more than advise Lizza that the complaint was actually filed 11 days earlier than it first might have been led to believe.

7/ This case is distinguishable from Herman and Hollis, supra, where the miners' late filings were not excused. The delay involved here was less than in those cases. In Herman, we concluded that the delay prejudiced the operator's ability to prepare and present its case. 4 FMSHRC at 2138-39. In Hollis, the Commission concluded (Commissioner Lawson dissenting on this issue) that the miner knew of his Mine Act rights, but deliberately chose to pursue other avenues of relief. Slip op. at 3-5.

We now turn to the substantive discrimination issues. Under Pasula and Robinette, supra, a complainant alleging a violation of section 105(c) of the Act must make a prima facie showing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by the protected activity. In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears an intermediate burden of production and proof with regard to these elements of defense. 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. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983)(approving the Commission's Pasula-Robinette test).

At this stage of the proceedings, no one disputes that Schulte engaged in protected activity. Lizza takes exception only to the judge's factual conclusion that it had knowledge of Schulte's protected activity. It contends that such a conclusion is not supported by the evidence and, consequently, that the judge erred in holding that Schulte had established his prima facie case.

In Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983), we stated that direct evidence of motivation is rarely encountered and that reasonable inferences of motivation may be drawn from circumstantial evidence showing such factors as knowledge of protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment. 3 FMSHRC at 2510. We also indicated that knowledge was probably the single most important aspect of a circumstantial case. Because knowledge also involves subjective factors, it may be proved by circumstantial evidence and reasonable inferences. Id. The judge evaluated the evidence and concluded that Schulte had made a prima facie showing on the issues of knowledge and motivation. The judge found that officials of Lizza "had some knowledge, albeit 'rumors', that Schulte had called in the MSHA inspectors," that there was a coincidence in time between the MSHA inspection and Schulte's discharge, and that the "peculiar gratuitous denial [by Granito] that Schulte's discharge was the result of the MSHA inspection" cast doubt on Lizza's denial of any discriminatory intent. 4 FMSHRC at 124.

Although other inferences could have been drawn from the available evidence, there is a substantial evidentiary basis in the record to support the judge's conclusion that Schulte's discharge was at least partially motivated by his protected activity. We find no persuasive reason to overturn the judge on this point. The next question is whether Lizza affirmatively defended by showing that it would have discharged Schulte in any event for his unprotected activity alone.

The judge found that, although Schulte engaged in protected activity, he also engaged in unprotected activity as well. The judge concluded that the uncontradicted evidence of Schulte's poor work attendance clearly supported Lizza's business justification for discharging him. Schulte argues that the judge erred by imposing on him, as complainant, the burden of proving disparate treatment. Schulte contends that once a prima facie case has been established, the burden of proof shifts to the operator. Schulte also argues that the judge erred in concluding that he would have been discharged for his unprotected activity alone. He maintains that the evidence shows that the discipline meted out to him was not consistent with that given to other employees similarly situated. He also asserts that the judge was extremely vague in analyzing the record evidence in this regard.

Regarding Schulte's burden of proof arguments, we indicated in Chacon, supra, that if a complainant wishes to allege disparate treatment, it could serve as one of the possible bases of a prima facie case. 4 FMSHRC at 2412-13. It may also be presented by a complainant in order to refute an operator's affirmative defense. 4 FMSHRC at 2517. In the latter instance, the ultimate burden of persuasion still remains with the complainant who must refute a facially meritorious affirmative defense in order to prevail. Robinette, 3 FMSHRC at 818 n. 20. Conversely, in bearing the intermediate burden of proof of establishing an affirmative defense, the operator is equally free to show consistent treatment. We do not read the judge's decision as requiring Schulte to prove disparate treatment. 4 FMSHRC at 1244. A prima facie case can be made without such a showing. In this case, the evidence presented by Schulte to demonstrate disparate treatment, however characterized theoretically, simply amounted to evidence to be weighed against the evidence favoring Lizza. The judge did so, and found Schulte's evidence lacking. We find no merit in Schulte's argument regarding any possible misallocation of evidentiary burdens.

Turning to the merits of the issue of whether Schulte would have been discharged for his unprotected activity alone, we set forth in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982), some of the indicia tending to show that a miner's unprotected activity alone would have resulted in the disciplinary action taken:

> Ordinarily, an operator can attempt to demonstrate [that it would have disciplined the miner in any event for his unprotected activity alone] by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question.

Id. at 993.

To support its position that it would have discharged Schulte in any event, Lizza points to significant evidence. It maintains that not only did it discipline Schulte in accordance with its established company disciplinary policy, but the discipline it administered was consistent with past discipline and warnings meted out to Schulte prior to his protected activity. Following repeated oral warnings, Schulte was given a written warning regarding his unsatisfactory attendance. Schulte continued to be both late and absent. Following his argument with Parzero, Oldenburg informed Schulte that he was suspended for three days without pay. During his suspension, Schulte engaged in his protected activity, that is, made his safety complaints to OSHA and MSHA. When he returned to work, Schulte was given both written confirmation of the previous disciplinary action and admonished that termination would follow if his conduct did not improve. Furthermore, following the suspension, Schulte again was caught in the act of leaving work early and again was warned (orally) that severe disciplinary action could be provoked by such a violation of the rules. Lizza argues that, even when Schulte was discharged, he indicated to his supervisors that his attitude would not improve as long as he was not permitted to work on the bulldozer.

On the specific issue of consistent treatment of other employees similarly situated, Lizza argues that even though it had been in operation for less than six months, two other miners had received written warnings. Shortly after Schulte received his written warning, two other miners were suspended for three days without pay under the same disciplinary policy. Lizza also notes that on the same day that Schulte was terminated, miner Boisvert was suspended for three days without pay for refusing to work overtime as required by the company.

To support his contention of disparate treatment, Schulte maintains that the timing of his discharge in relation to Lizza's treatment of seven other employees with similar attendance records is more than just coincidence. Not one of these other miners was terminated as early as Schulte. The only other miner whose employment was terminated on a date even close to his own termination was Boisvert, who was terminated nine days after Schulte's discharge. Schulte also relies upon the fact that the three other miners actually discharged were not terminated until much later, specifically November 1980, April 1981, and September 1981, and that the three remaining miners were never terminated and are still employed by Lizza.

The judge credited Lizza's evidence. There is no question that Schulte had a poor attendance record, and indications are that he was also insubordinate. As a matter of bona fide company policy, Lizza employed a system of progressive discipline, which incorporated both notice and an opportunity to conform errant conduct. Schulte was warned of the possibility of discharge and disciplined within the strictures of established company policy. While the evidence concerning consistent and disparate treatment is not totally harmonious, the substantial

evidence standard governs our review. We conclude that sufficient credible evidence exists to support the judge's conclusion that Schulte's discipline was consistent with that administered to other employees. 8/

We briefly address Schulte's final argument that the judge was vague in his analysis of the evidence regarding disparate treatment. In his decision, the judge stated:

> Schulte claims that co-workers Harley, Bell, and Brock had attendance records as poor as his own but were not similarly discharged. The time cards for those employees are in evidence, however, and Schulte has not shown how those records support his argument. Moreover, from my own independent appraisal of those records, I do not find that they support Schulte's contention in this regard.

4 FMSHRC at 1244. While we can agree with Schulte that the judge was extremely brief in his analysis of the evidence regarding disparate treatment, we do not find his decision to be impermissibly vague. Both at the hearing level and on review, Schulte has failed to show specifically how the time cards in evidence support his position. Presented as raw data, the evidence is open to various interpretations. We will not disturb the interpretation adopted by the judge because, as we have already indicated, it is supported by substantial evidence.

In sum, the evidence shows that other miners received warnings, suspensions, and discharges under the company's disciplinary policy. Taken in conjunction with the evidence of Schulte's poor attendance and insubordination over a relatively limited period of time, we find substantial evidence to support the judge's conclusion that Lizza would have discharged Schulte in any event for his unprotected activity alone.

8/ At the hearing, Schulte testified that immediately following the meeting on October 15, 1980, when he was terminated, his foreman, Parzero, stated to him "This is what you get, mister, for bringing in MSHA...." Parzero denied the statement. Boisvert, who was in the vicinity at the time, testified that he was not able to hear their conversation. Schulte additionally testified that shop steward Crawn, stated to him, "[Y]ou stirred up a hornet's nest. It's a new company. They didn't need the trouble. That's why they routed you out." Had this evidence been credited, it would have cast severe doubt on Lizza's defense. The judge specifically discredited Schulte's testimony regarding Parzero and discounted his testimony regarding Crawn. Nothing appears in the record that would support the extraordinary step of reversing these credibility resolutions. 4 FMSHRC at 1241 n. 3. We also note that the record in this case does not support Schulte's further argument that Boisvert, terminated after Schulte's discharge, was also a victim of discrimination.

For the reasons stated above, we affirm the decision of the administrative law judge.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

Distribution

Frederick D. Braid, Esq.
Rains & Pogrebin, P.C.
Rains Building
210 Old Country Road
Mineola, New York 11501
for Lizza Industries, Inc.

G. Martin Meyers, Esq.
Suite 106
Denville Professional Plaza
35 W. Main Street
Denville, New Jersey 07834
for Walter Schulte

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 9, 1984

DAVID HOLLIS	:	
	:	
v.	:	Docket No. WEVA 81-480-D
	:	
CONSOLIDATION COAL COMPANY	:	

DECISION

This case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). In his decision below, the Commission's administrative law judge dismissed the miner's discrimination complaint on the grounds that it had been untimely filed and that the discharge of the miner by Consolidation Coal Company ("Consol") did not violate the Mine Act. 4 FMSHRC 1974 (November 1982)(ALJ). We affirm the judge's decision on both grounds.

The complaining miner, David Hollis, was employed at Consol's Osage No. 3 Mine, an underground coal mine located near Morgantown, West Virginia. Hollis was active in safety matters and in the affairs of Local Union 4043, United Mine Workers of America, which represented miners at the mine. In April 1980, Hollis was elected to the union safety committee. The President of the UMWA Local appointed him chairman of the committee, and he served in that capacity until his discharge on September 29, 1980.

The circumstances leading to Hollis' discharge occurred on September 26, 1980. At the end of the afternoon shift that day, Hollis and another miner, William Coburn, were waiting to take an elevator out of the mine. Hollis confronted Coburn for attempting to leave work early and an altercation ensued. The evidence shows that Hollis was the instigator, or at best the more aggressive of the two, in the incident. At some point, Hollis either struck or grabbed Coburn. While riding up in the elevator with a number of other miners, Hollis had to be restrained on several occasions from grappling with Coburn. At the time of the altercation, Consol's mine rules proscribed fighting and described it as a dischargeable offense.

On September 29, 1980, Consol discharged Hollis and Coburn for fighting. Both miners then filed grievances under the collective bargaining agreement in effect at the mine. The arbitrator in Coburn's case ordered Coburn reinstated on the grounds that Coburn was the victim in the fight and that he had acted in self-defense. The arbitrator in Hollis' case issued a decision on October 20, 1980, upholding Hollis' discharge for fighting.

On October 15, 1980, five days before the arbitrator's decision concerning his grievance, Hollis filed complaints with respect to his discharge with the National Labor Relations Board and the West Virginia Human Rights Commission. The specific nature and outcome of his NLRB complaint are not disclosed by the record. His complaint to the Human Rights Commission alleged that his discharge was racially discriminatory. The record does not show the outcome of this complaint. Following the arbitrator's decision, Hollis discussed appealing the decision with the union personnel who had represented him before the arbitrator. Hollis decided not to appeal, and was subsequently advised by a law professor whom he consulted to retain a labor lawyer. Hollis did not do so for some time.

Hollis testified that in late March 1981, he was gathering information, which he believed might be relevant to his Human Rights Commission case, at the Morgantown office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Hollis also testified that it was at this point he first learned of his right to file a complaint of discriminatory discharge under section 105(c) of the Mine Act, 30 U.S.C. § 815(c)(Supp. V. 1981). On April 7, 1981, Hollis filed his initial section 105(c) complaint with MSHA.

After investigating Hollis' complaint, MSHA made an administrative determination that his discharge did not violate the Mine Act and declined to file a complaint with this independent Commission on his behalf. Hollis then filed his own discrimination complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). At the ensuing hearing before the Commission's administrative law judge, Consol moved to dismiss the case on the grounds that Hollis' initial complaint under the Mine Act, filed April 7, 1981, was untimely.

The Commission's judge concluded that Hollis' complaint was untimely under the 60-day time limit set forth in section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 4 FMSHRC at 1974-77. 1/ The judge discredited Hollis' testimony that he had been ignorant of his rights under the Mine Act until his March 1981 visit to the Morgantown MSHA office. 4 FMSHRC at 1976-77. The judge found instead that Hollis had known of his Mine Act remedies during the 60-day period following his discharge but had deliberately chosen to pursue other avenues of relief before filing his

1/ Section 105(c)(2) states in pertinent part:

> Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [section 105(c)] may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination....

30 U.S.C. § 815(c)(2)(emphasis added).

section 105(c) complaint over four months past the Act's 60-day time limit. Id. Relying in part on the arbitrator's detailed findings, the judge also concluded that Hollis was discharged entirely because of his unprotected conduct in the fighting incident, and not because of his protected activities. 4 FMSHRC at 1978-96. The judge further concluded, however, that even if Hollis' termination were motivated in some part by his protected activities, the operator would have discharged him in any event for the fighting incident alone. 4 FMSHRC at 1996. We agree with the judge's conclusions.

We first address the timeliness of Hollis' initial section 105(c) discrimination complaint. In relevant part, section 105(c)(1) of the Mine Act prohibits the discharge of a miner, or other discrimination against him, because of his exercise of any statutory right afforded by the Act. 2/ If a miner believes that he has been discharged in violation of the Mine Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation. 30 U.S.C. § 815(c)(2). 3/

2/ Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [30 U.S.C. § 811 (Supp. V 1981)] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

3/ After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this independent Commission on the miner's behalf if the Secretary determines that the Act was violated. 30 U.S.C. § 815(c)(2). If the Secretary determines that the Act was not violated, he shall so inform the miner, and the miner may then file his own complaint with the Commission. 30 U.S.C. § 815(c)(3).

We have held previously that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)(emphasis added). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

In the present case, there is no dispute that Hollis was discharged on September 29, 1980, but did not file a complaint of discrimination with the Secretary until April 7, 1981, more than four months after the statutory deadline for filing such a complaint. The judge did not find Hollis' claimed ignorance of his rights under the Act to be credible. 4 FMSHRC at 1977. Rather, the judge concluded that Hollis knew of his section 105(c) remedies within the 60-day period following his discharge but deliberately elected to seek other avenues of relief. The judge based these determinations, in part, upon the following findings:

> It is not disputed that [Hollis] had been an active, if not militant, chairman of the Safety Committee since his appointment by the local union in April 1980, and that in that capacity he frequently met with state and Federal (MSHA) safety officials. He had access to copies of the Federal law and Hollis himself asserts that he "knew the law" and had more knowledge of the Federal Mine Safety law than any other member of the Safety Committee. Moreover, the successor chairman of the Safety Committee, Edward Pugh, acknowledged that it was one of the duties of that position to advise miners of their rights under section 105(c) of the Act. The fact that Hollis has also achieved a high level of education, having completed two years of college, also reflects on his ability to have understood and waived his rights.

4 FMSHRC at 1977.

The judge also found that even if Hollis had not known of his Mine Act rights initially, the arbitration decision provided adequate notice of these rights at a time when more than half of the statutory filing period remained. The relevant portion of the arbitration decision stated: "In both the Mine Health and Safety Act and the National Labor Relations Act, there are prohibitions against an employer taking disciplinary action against an employee for making charges or filing claims under the particular legislation." Operator's Exhibit 15, at p. 37.

When reviewing a judge's credibility resolutions, as here, our role is necessarily limited. The judge observed Hollis as a witness and did not believe his testimony of ignorance concerning his Mine Act rights. We discern nothing in the record that would justify our taking the extraordinary step of overturning this credibility resolution.

Furthermore, apart from Hollis' discredited testimony, substantial evidence supports the judge's inference that Hollis did know of his Mine Act rights during the 60-day time period. The record shows that Hollis was an aggressive safety committee member. He asserted that he "knew the law." During Hollis' tenure as safety committee chairman, he had filed over 30 safety complaints and had met frequently with federal and state officials on his own time to discuss safety matters. The inference from this evidence that Hollis knew of his section 105(c) remedy is convincing. Additionally, we are not prepared to say that the further inference of notice, which the judge drew from the arbitrator's decision, was impermissible.

We are cognizant of the fact that Hollis filed complaints with other agencies within 60 days from the date of his discharge. We conclude, however, as did the judge, that he pursued these alternate avenues of relief with knowledge of his section 105(c) rights. We do not believe that Congress, in the passage of legislative history quoted above, intended for us to excuse a miner's late-filing where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act.

In sum, the record affords ample support for the judge's findings that Hollis knew of his Mine Act rights but failed to exercise them within the statutory time restriction set forth in section 105(c)(2) of the Act. We therefore conclude that "justifiable circumstances" are not present to excuse Hollis' serious delay in filing.

Moreover, even assuming the timeliness of Hollis' discrimination complaint, we also conclude that substantial evidence supports the judge's determination that Hollis was discharged for non-discriminatory reasons.

We first established the general principles for analyzing discrimination cases in Secretary on behalf of 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 on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, we held that a complainant, in order to establish a prima facie case of discrimination, bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action was taken against him motivated in any part by the protected activity. In order to

rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears an intermediate burden of production and proof with regard to these elements of defense. 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. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983)(approving the Commission's Pasula-Robinette test).

In this case, there is no dispute that Hollis engaged in protected activity, largely in the form of making safety complaints, prior to his termination. The judge concluded, however, that Hollis was discharged solely for his unprotected conduct in the fighting incident. On review, Hollis argues that the judge erred in relying to some extent on the arbitrator's findings concerning the fight and Consol's reasons for firing him. Hollis also asserts that the judge erred in his analysis of Consol's motivation for the discharge. We find these contentions lacking in merit.

In Secretary on behalf of Pasula v. Consolidation Coal Co., supra, we held that in discrimination cases our judges may admit arbitral decisions and accord them such weight as may be appropriate. 2 FMSHRC at 2794-96. 4/ We indicated that according weight to the findings of arbitrators may aid the Commission's judges in finding facts under our Act, "'especially ... where the issue is solely one of fact, specifically addressed by the parties, and decided by the arbitrator on the basis of an adequate record.'" 2 FMSHRC at 2795, quoting Gardner v. Alexander-Denver Co., 415 U.S. 36, 60 n.21 (1974)(emphasis added).

4/ In line with the Supreme Court's analogous approach in Alexander v. Gardner-Denver, 415 U.S. 36 (1979), we declined to enunciate rigid standards governing the weight that should be accorded arbitral findings. We indicated, however, that relevant factors for determining the appropriate weight included such considerations as whether the arbitrator had addressed the miner's Mine Act rights; the similarity, if any, between relevant rights under the collective bargaining agreement and the Act; whether the findings in question were factual in nature; the adequacy of the arbitral record; the procedural fairness of the arbitral proceedings; and the special competency of the arbitrator. 2 FMSHRC at 2795-96.

The only aspects of the arbitral decision relied upon by the judge are the factual findings regarding the fight and Consol's reasons for discharging Hollis. Both subjects were thoroughly tried and argued before the arbitrator. The judge carefully applied the Pasula criteria in making use of these findings (4 FMSHRC at 1980-81 & n. 5), and we agree with him that the criteria are satisfied. We perceive no error in the judge's reliance on the arbitrator's decision concerning the factual issues of the fight and Consol's reasons for discharge. Moreover, the judge himself reviewed the record de novo and arrived at the same conclusions reached by the arbitrator. 4 FMSHRC at 1981. 5/

With respect to the merits of the discrimination case, it is clear that Hollis was the instigator of the fight with Coburn on September 26, 1980. The judge incorporated the arbitrator's detailed findings on this point (4 FMSHRC at 1981-88), which included Hollis' admission that the confrontation got out of hand and that his conduct set a bad example. 4 FMSHRC at 1985. Moreover, in Coburn's arbitration proceeding, the UMWA Local representing Hollis argued that Hollis was the aggressor in the fight and Coburn, the victim. The arbitrator of the Coburn grievance agreed.

The judge also found that Hollis, prior to September 26, 1980, had notice of the operator's rules of conduct, and that one of the rules stated that "fighting is a dischargeable offense." Operator's Exhibit 6. Hollis argues that the operator did not strictly enforce the rules of conduct until the fighting incident. The record discloses, however, that following a raucous 1979 Christmas party, the union requested mine management to do something about the fighting at the mine. Tr. 813, 944. The mine superintendent replied that something would be done, and thereafter the rules were tightened and fighting was expressly labeled a dischargeable offense. Tr. 65-66. We conclude, as did the judge and arbitrator, that management was impelled to enforce strictly the fighting rules because the union wanted the fighting at the mine stopped. We also concur with the judge that Hollis' fight with Coburn "was a serious breach of the known rules of conduct of a severity

5/ Hollis claims that certain evidence adduced at the hearing before the judge had not been introduced at the arbitration hearing and, accordingly, should have been considered by the judge in deciding the issues surrounding the discipline over the fighting incident. The judge did take this evidence into account:

> While the evidence developed at the hearing before me provided some greater detail than was available to the arbitrator, there is nothing in that additional evidence that would warrant any change in the analysis and conclusions of these incidents made by the arbitrator.

4 FMSHRC at 1995.

far beyond that of any other incident cited [by Hollis to prove discriminatory discipline.]" 4 FMSHRC at 1996. 6/

Accordingly, we conclude that substantial evidence supports the judge's finding that Hollis was discharged solely for his unprotected conduct in the fighting incident. Thus, Hollis failed to establish a prima facie case of discriminatory discharge. We are mindful, as was the judge, that some evidence exists that could support an inference of a nexus between Hollis' safety complaints and his discharge. Even had a prima facie case of discrimination been made out, however, we find that substantial evidence supports the judge's further finding that Consol affirmatively defended by proving that Hollis would have been fired anyway solely on the basis of the fighting incident.

For the foregoing reasons, we affirm the judge's dismissal of the discrimination complaint. 7/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

6/ Pointing to Coburn's reinstatement, Hollis also maintains that he was the victim of disparate treatment. In the Hollis arbitration decision, the arbitrator found that "[t]here was nothing in the record to raise any inference that the employer prosecuted the case against Mr. Coburn with any less vigor than it has this case." Operator Exhibit 15, at p. 34. After reviewing the record, we agree.

7/ Certain exhibits, introduced and received into evidence before the judge, were not contained in the record before us on review. Accordingly, we issued an order directing the parties to submit these exhibits so that the record could be made complete. The parties did so, and we have accepted the exhibits and made them part of the record.

Commissioner Lawson concurring and dissenting:

I concur in the result reached by the majority, and agree that substantial evidence supports the judge's finding that Hollis was discharged solely for his unprotected conduct in the fight out of which this case arose. I disagree with their conclusion that the complaint was untimely filed. The majority has determined that Hollis "knew of his section 105(c) remedy", because "he had filed over 30 safety complaints and had met frequently with federal and state officials on his own time to discuss safety matters, and "...was knowingly sleeping on his rights." They found "convincing" the inference from this evidence that Hollis knew of his Mine Act rights, and credited the "further inference of notice which the judge drew from the arbitrator's decision". Slip op. at 5.

The difficulty with this double inference analysis is that the only evidence of record on the question of Hollis knowledge of 105(c) is the unshaken denial thereof by the complainant. Nor did any witnesses testify to the contrary. Tr. 668, 701-704. The record thus confirms that complainant was unaware of his 105(c) rights until a few days before he actually filed the complaint. TR. 666, 668. 4 FMSHRC 1975. This is unsurprising, given Hollis' short tenure as a member of the safety committee, and the uncontroverted testimony that no 105(c) cases had ever arisen at this mine, either during Hollis' committee service, or in the seventeen years preceding Hollis' discharge. Tr. 891, 904. There is no dispute that filing was promptly had, once, as complainant testified, he became aware of his 105(c) rights. No reason appears evident why a miner as "aggressive" as Hollis would not have filed under 105(c) if he were aware of such: the logical inference would appear to be to the contrary.

Indeed, counsel for the operator conceded that Consol "...cannot bring forth any direct evidence that he (Hollis) did have knowledge (of his 105(c) rights) but...it is reasonable to assume that he would know section 105(c)". Tr. 6.

In Schulte v. Lizza Industries, Inc., ____FMSHRC____ (issued today), my colleagues agreed with me that the miner's testimony that he was ignorant of 105(c)'s timeliness strictures, conceded by the operator in that case also, was a consideration sufficient to excuse a (31-day) delay in filing the complaint. In the instant litigation, however, identical ignorance is found by the majority to be insufficient, notwithstanding this operator's admitted inability to present any contrary evidence.

Our standard of review is the familiar one of "substantial evidence", required in most federal administrative proceedings. Section 113(d)(2)(A)(ii). Substantial evidence has been defined as "more than a mere scintilla...mere uncorroborated hearsay or rumor does not constitute substantial evidence"; "it must do more than create a suspicion of the fact to be established". The record may not be "wholly barren of evidence". Universal Camera v. National Labor Relations Board, 340 U.S. 474, 477 (1951)(citing Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 229 (1938)).

Here, given the uncontradicted testimony of the complainant, and the admitted inability of this operator to adduce any evidence to the contrary, other than the contention that it would be "reasonable to assume" knowledge by this miner of section 105(c), the finding of the judge, affirmed by the majority, is sub-scintilla. The record is, indeed, "wholly barren of evidence", and fails to meet the test of substantial evidence.

The language of the Act as to time limits, of course, is precatory, not mandatory: "Any miner ... who believes that he has been ... discriminated against by any person in violation of the subsection may, within 60 days after such violation occurs, file a complaint with the Secretary...." Section 105(c)(2). (Emphasis added.) This language is obviously not accidental, as the majority concedes, the judge below acknowledged, and the legislative history makes evident. Slip op. at 4.

This operator was unable to demonstrate any prejudice it suffered because of the fact that miner Hollis did not file his complaint within 60 days. Tr. 815-822. Nor, as the record reveals, was Consol able to show that any instruction was ever given by it to Mr. Hollis concerning the time limits for filing claims under section 105(c). Tr. 863. There is no dispute that Hollis had brought his complaint to the attention of not only his employer, through the contractual grievance procedure, but to the West Virginia Human Rights Commission, and the National Labor Relations Board as well.

This miner had thus indisputably met at least two of the three tests enumerated in the legislative history (slip op. at 4), either of which would have been sufficient under the guidelines set forth in the legislative history. As we noted in the analogous decision of UMWA v. Consolidation Coal, 1 FMSHRC 1300, 1302 (September 1979): 1/

> In interpreting remedial safety and health legislation, "[i]t is so obvious as to be beyond dispute that ... narrow or limited construction is to be eschewed ... [L]iberal construction in light of the prime purpose of the legislation is to be employed." St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). We believe that a liberal construction of the 30-day filing period for compensation claims requires

1/ Herman v. Imco Service is inapposite (slip op. at 4). There the miner took no action of any sort until eleven months after his discharge, when he filed a complaint with a state (Nevada) employment agency. That decision correctly reflected that record, and that the miner's failure to file a complaint "until eleven months after his discharge was simply because he did not want to do so". 4 FMSHRC 2138.

> a conclusion that the period may be extended in appropriate circumstances. See, Dartt v. Shell, 539 F.2d 1256, 1260 (10th Cir. 1976), aff'd by equally divided court, 434 U.S. 99 (1977); Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978); Moses v. Falstaff Brewing Corporation, 525 F.2d 92 (8th Cir. 1975).
>
> Furthermore, while section 111 of the 1977 Act does not specify a time limit for the filing of compensation claims, the Act's discrimination provisions contain analogous time limits.

The majority's approval of the judge's further reliance on the arbitrator's minimal mention of the Act, (as well as the National Labor Relations Act, to which this miner had already resorted), is even less explicable. On its face that decision provides no notice of either section 105(c) or the time limits thereunder, and obviously makes no reference to remedies under the Act. Slip op. at 5. In any event, many of the Act's prohibitions are enforceable only by the Secretary, not by an individual miner (see e.g., sections 104, 108, 109 and 110). 2/ Further, contrary to the judge's finding, the arbitrator did not reject Hollis "claim that he had been fired for activities protected by the Act". 3/ The only section of the Act referred to by the arbitrator was section 103(g), which has no bearing on the issue here disputed. Dec. at 4. Obviously, the arbitrator had no authority or jurisdiction to rule either for or against this miner on any issue over which the Commission has jurisdiction.

Imputing knowledge of 105(c) to this, or any other, miner thus has no precedential support, and is contrary to both the spirit of the Act and its legislative history. The latter, and not by inference, clearly sanctions filing 105(c) complaints even though 60 days may have passed. Slip. op. at 4.

The majority's upholding the judge's finding of Hollis knowledge consequently only affirms judicial speculation, not record evidence. It is, under the rationale adopted here today, apparently insufficient now for a miner to present uncontroverted evidence that he or she had no knowledge of section 105(c). The trier of fact may henceforth find knowledge, notwithstanding the absence not only of affirmative testimony, but the existence of testimony to the contrary. This error is especially egregious here, given the assertion that the miner "should have known" of his rights, and the judge's failure to comment on Hollis' demeanor, or to find him to be unpersuasive or untrustworthy. Hollis' "access to copies of the Federal law ... his safety committee chairman successor's

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2/ The judge, without explanation, asserts that the arbitrator's decision "clearly advised (Hollis) of those rights" (emphasis added). (Dec. at 4). I fail to find either advice or clarity in that language, nor is there any explanation of "those rights" elsewhere in the decision.

3/ Hollis was discharged pursuant to the collective bargaining agreement. (Oper. Exh. 13). As the arbitration decision noted: "The question presented is whether just cause has been established for the discharge of the Grievant for fighting underground and on the cage on September 26, 1980". The Award of the arbitrator found that "the Employer has established just cause for the discharge of the Grievant." Oper. Exh. 15 at 1 & 42.

"acknowledge[ment]" that one of Hollis' duties was to advise miners of their rights under 105(c) ... his "high" level of education" (slip op. at 4), could equally persuasively lead a disinterested observer to the conclusion that this miner was, in truth, ignorant of 105(c), or perhaps even neglectful of his duties as a union representative.

More importantly, acceptance of the majority's rationale subverts the burden of proof allocations so carefully constructed in Pasula and Robinette, supra, and their requirement that the employer must justify disciplinary action. See also National Labor Relations Board v. Transportation Management Corp., 51 U.S.L.W. 476 (June 15, 1983). The majority's ready acceptance of the judge's "inference" that Hollis "knew" of his section 105(c) remedy, and additional "inference" of notice drawn from an arbitrator's decision such as this, thus impermissibly eases an operator's duty to present the evidence necessary to establish a non-discriminatory motive for any discharge or other discipline it chooses to impose.

Mere assertion that this miner "should have known of his rights under the Act to file complaints", supra, (Dec. at 4), is not evidence, much less substantial evidence. Although the judge and the majority here seek to frame the issue in credibility terms, there is no escaping the fact that this record is devoid of any evidence Hollis knew of the existence of section 105(c), much less its time filing requirements.

I therefore dissent from the majority's holding that the filing hereunder was untimely, but concur in the dismissal of the complaint.

A. E. Lawson, Commissioner

Distribution

Jerry F. Palmer, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Jay Montgomery Brown, Esq.
515 Devany Building
P.O. Box 269
Fairmont, West Virginia 26554

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 13, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 80-116-R
	:	WEVA 80-117-R
v.	:	WEVA 80-118-R
	:	WEVA 80-659
CONSOLIDATION COAL COMPANY	:	

DECISION

This consolidated proceeding presents the question of whether roof control violations cited in a section 104(d)(1) citation were significant and substantial, within the meaning of Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). The Commission's administrative law judge concluded that the violations by Consolidation Coal Company ("Consol") were significant and substantial, and affirmed the citation. 4 FMSHRC 747 (April 1982)(ALJ). 1/ We granted Consol's petition for discretionary review, which challenged only the judge's significant and substantial findings. For the reasons that follow, we affirm.

1/ This same proceeding was originally before another Commission administrative law judge, who affirmed the citation after finding a significant and substantial violation under the then-applicable, pre-National Gypsum case law. 2 FMSHRC 2862 (October 1980)(ALJ). We declined to grant Consol's petition for review of that decision. Thereafter, Consol petitioned the United States Court of Appeals for the Fourth Circuit for review of the judge's decision, which had become a final decision of the Commission pursuant to 30 U.S.C. § 823(d)(1)(Supp. V 1981). The Court remanded the case with instructions that the Commission reconsider the issues in light of our intervening decision in National Gypsum, supra. Consolidation Coal Co. v. FMSHRC, No. 80-1862, 4th Cir., October 13, 1981 (unpublished opinion). Because the Commission judge who originally heard the case had left the Commission, the case was reassigned on remand to the judge whose decision is now before us on review.

On October 30, 1979, during an inspection of Consol's Shoemaker Mine, near Moundsville, West Virginia, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Consol under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 814(d)(1)(Supp. V 1981). The citation alleged a violation of 30 C.F.R. § 75.200. 2/ This citation, which is the sole subject of this proceeding, stated:

> The approved mine roof control plan was not being followed in 4 Right 5 North section (037) and on the section supply track in that roof bolts were spaced from 4 feet 7 inches to 7 feet 6 inches apart and from bolt to coal rib in approximately 350 different locations that were measured in the (intake air) No. 1 entry from 30 to 33 room and 31, 32, and 33 rooms, and in the track from 6 to 18 stopping for a total of approximately 1500 feet in length and more bolts may be spaced wide....

The inspector included in the citation his findings that the violations were significant and substantial and were caused by the operator's unwarrantable failure to comply with the standard.

As alleged by the inspector, the spacing of roof bolts in about 350 locations in the 4 Right 5 North working section exceeded the 4 foot-6 inch maximum permitted by Consol's roof control plan. The greatest concentration of over-wide bolts, including some that were 7 feet or more apart, was along the section's supply track. The inspector testified that although roof conditions generally were good, the roof was cracked, loose, or unsupported between bolts in three unspecified locations and could fall at any time. A roof fall caused by a clay vein had occurred under supported roof when Consol first advanced this section, in about August or September 1978. Roof falls also had occurred in unsupported areas of the section. Two witnesses had observed pieces of fallen rock under supported roof at unspecified times and in unspecified locations. One of these witnesses had heard of employees receiving minor lacerations from pieces of falling rock. However, no lost-time injuries from roof or rock falls apparently had been reported in this section.

All miners working in the section had been exposed to the over-wide bolts on every shift for at least six months, because they walked under the widest-spaced bolts in the supply track on the way to the dinner hole and the tool storage area. Fewer employees than the normal production crew of 7-8 were working in the section on October 30, 1979, when the citation was issued. Consol had voluntarily closed the section on October 26 after receiving a citation that day for roof bolting violations. Nonetheless, on October 30 at least one mechanic and one maintenance foreman were working in the section, and an unspecified number of roof bolters were also abating violations there.

2/ In relevant part, 30 C.F.R. § 75.200, a mandatory safety standard dealing with roof control, requires operators to adopt and comply with roof control plans approved by the Secretary of Labor.

On remand from the Fourth Circuit, Consol conceded before the Commission judge that the over-wide roof bolts violated its roof control plan and hence constituted a violation of 30 C.F.R. § 75.200, but denied that the violations were significant and substantial. The judge analyzed this case in light of National Gypsum, relying in large part on the the findings of fact made by the Commission judge who originally heard the case. In concluding that the violations were significant and substantial, the judge acknowledged the evidence establishing generally good roof conditions. He attached greater weight, however, to the evidence that there had been at least one prior roof fall and that widely-spaced bolts increased the possibility of roof falls. He also relied on the inspector's testimony that the roof was loose, cracked, or unsupported in three locations and could fall at any time.

The judge narrowly interpreted the original judge's finding that there was no evidence of roof cracks, splits, or loose bolts, as not including the widest-spaced bolts in the supply track. 4 FMSHRC at 769-70. In the judge's view, the fact that employees had worked and traveled safely in the section for six months prior to the October 30 citation did not prove the absence of a hazard which could result in a serious injury. In this regard, he noted that after the initial October 26 citation, a considerable amount of additional bolting had been necessary and that the abatement work was proceeding on the day of the section 104(d)(1) citation. 4 FMSHRC at 769. Therefore, the judge concluded that there was

> a reasonable likelihood that the hazards presented by the widely-spaced roof bolts as well as the areas described by the inspector as being loose between the bolts at several locations, constituted a significant and substantial hazard to those miners working and traveling through the cited areas. The danger presented was a roof fall, particularly in the track entry, where the roof bolt spacing was the widest, and the real potential for a fall in any of the locations was the direct result of the violation.

4 FMSHRC at 770.

The sole question before us is whether the roof control violations were "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). We have previously interpreted this statutory language as follows:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

National Gypsum, 3 FMSHRC at 825. Noting that the Mine Act does not define "hazard," we construed the word to "denote a measure of danger to safety or

health." 3 FMSHRC at 827. We indicated further that a violation "'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health.... In other words, the contribution to cause and effect must be significant and substantial." Id. (footnote omitted).

As we stated recently, in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; 3/ (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984).

On review, Consol does not contest the first and fourth elements of proof that is, the judge's finding of a violation or the reasonably serious nature of the injury. Rather, Consol argues that the evidence does not support the judge's conclusions that the over-wide spacing between the roof bolts could contribute to a hazard, and that there was a reasonable likelihood any such hazard would result in injury. We disagree.

As to Consol's first argument, substantial evidence amply supports the judge's finding that the large numbers of over-wide roof bolts created a hazard of roof falls. Mine roofs are inherently dangerous and even good roof can fall without warning. 4/ As Consol's roof control plan states, the plan merely establishes the minimum requirements for adequate roof support. Exh. G-1, at 4.

3/ We note that this case involves a violation of a mandatory safety standard. Pending before us is a case which challenges the application of National Gypsum to a violation of a mandatory health standard. Consolidation Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intimate no views at this time as to the merits of that question.

4/ Roof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining. As we have stated:

> A prime motive in enactment of the 1969 Coal Act was to "[i]mprove health and safety conditions and practices at underground coal mines" in order to prevent death and serious physical harm. One of the problems that greatly concerned Congress was the high fatality and injury rate due to roof falls. The legislative history is replete with references to roof falls as the prime cause of fatalities in underground mines. [Citations and footnotes omitted.]

Eastover Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982).

(Footnote continued)

On October 30, the day of the citation, roof bolts were spaced in excess of Consol's plan in about 350 locations. Some of the bolts in the supply track were 7 to 7 and a half feet apart, i.e., they exceeded by 2 and a half to 3 feet, the 4 and a half foot spacing permitted by the plan. Consol's own general mine foreman conceded that such overwide spacing increased the possibility of roof falls. 4 FMSHRC at 769; Tr. 74. Further, the operator did not rebut the inspector's testimony that in three locations the roof was cracked, loose, or unsupported, and could fall at any time. Thus, we conclude that despite the generally good conditions and the absence of reportable injuries in the previous six months, these over-wide bolts created "a measure of danger to safety or health." National Gypsum, 3 FMSHRC at 827. We therefore affirm the judge's holding that there was a hazard.

The remaining question is whether the judge properly concluded that there was a reasonable likelihood that the hazard contributed to by the roof control violations would result in injury. Substantial evidence also supports this conclusion. The widely-spaced bolts found in 350 locations on October 30, in some instances up to 3 feet wider than permitted, represented a serious deviation by Consol from the minimum requirements of its roof control plan. (As the judge noted, bolts were too widely spaced in these 350 locations even after Consol had added 140 bolts as a result of the October 26 citation.) This large number of widely-spaced bolts and the often considerable distances between the bolts amounted to a widespread and serious departure from the minimum requirements for adequate roof support in the mine. Such major non-compliance dangerously increased the likelihood of roof fall accidents.

As noted above, every miner on every shift for six months was exposed to the hazard created by the over-wide bolts along the supply track. The fact that no one was injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall. There was testimony as to past falls, and the inspector also stated that there was bad roof in three locations in the section. While fewer miners than usual were in the section on October 30 (because Consol had closed the section on October 26), at a minimum the mechanic and the maintenance foreman working there were exposed to the hazard. Had a roof fall occurred, there is a reasonable likelihood of injury because of this exposure. In light of the foregoing, we affirm the judge's holding that a reasonable likelihood existed that the hazard contributed to by the roof control violations would result in injury, and consequently that the violations were a major cause of a danger to safety. 5/

Fn. 4/ continued

Roof falls remain the leading cause of death in underground mines. Despite decreased production and an overall decline in fatalities from 1981 to 1982, fatalities resulting from falls of roof, face, and rib in underground coal mines increased from 41 deaths in 1981 to 52 deaths in 1982. Mine Safety and Health Administration, U.S. Department of Labor, Mine Injuries and Worktime, Quarterly 17 (Closeout Ed. 1981); Mine Safety and Health Administration, U.S. Department of Labor, 8 Mine Safety and Health, inside back cover (Spring-Summer 1983); see also Mine Injuries and Worktime, Quarterly 17 (Closeout Ed. 1982).

5/ We affirm the judge's holding on the bases specified above, but do not otherwise endorse his evidentiary analysis of this issue.

In reaching this result, we reject Consol's subsidiary argument that the judge's holding is inconsistent with National Gypsum. Consol's widespread and serious noncompliance with the minimum requirements of its roof control plan, which created the likelihood of serious injury, is indeed the type of situation we contemplated in National Gypsum. 3 FMSHRC at 825-27.

For the foregoing reasons, we affirm the judge's holding that the violation was significant and substantial.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

I agree with the majority as to the result reached and in their affirmance of the decision of the judge below. However, for the reasons expressed in my dissent in National Gypsum, supra, I disagree with their analytical approach as set forth here and in that decision.

A. E. Lawson, Commissioner

Distribution

Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Anthony J. Polito, Esq.
Corcoran, Hardesty, Ewart, Whyte & Polito, P.C.
Suite 210, Two Chatham Center
Pittsburgh, PA 15219

Michael Holland, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge George Koutras
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 30, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 81-385-M
ENERGY FUELS NUCLEAR, INC.	:	

DECISION

This case involves an alleged violation of 30 C.F.R. § 57.6-116, a mandatory blasting standard. A Commission administrative law judge held that the operator, Energy Fuels Nuclear, Inc. (EFNI), did not violate the standard, and vacated the citation. 4 FMSHRC 1970 (November 1982)(ALJ). We granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we reverse.

On September 9, 1980, Bryan Tate, a contract miner at EFNI's underground uranium mine, was injured in a blasting accident. A Department of Labor Mine Safety and Health Administration (MSHA) inspector issued a citation the following day after completing an accident investigation. The citation alleged a violation of 30 C.F.R. § 57.6-116, which provides:

> Mandatory. Fuse shall be ignited with hotwire lighters, lead spitters, igniter cord, or other such devices designed for this purpose. Carbide lights shall not be used to light fuses.

On the day of the explosion, Tate drilled about 50 holes in the face and 20 holes in the rib. Working alone, he loaded the holes with explosives with full knowledge of the operator's requirement that two miners be present when loading explosives and lighting fuses. See 30 C.F.R. § 57.6-114. Before igniting the fuses, Tate lit a test fuse to determine how long it would be before the first fuse lit in the round

detonated the explosives. Using either a propane or butane torch, 1/ Tate proceeded to apply the torch flame directly to the thermalite connectors that had been affixed to the ends of the safety fuses. 2/ This ignition procedure was contrary to EFNI's established policy that miners must ignite multiple fuses by using igniter cord linked to safety fuses by thermalite connectors. See also 30 C.F.R. § 57.6-114.

Although Tate believed that the test fuse indicated that he had 66 seconds remaining, the explosives in the first hole detonated sooner, knocking him to the ground. A 10-12 second delay in the firing of the second two holes, instead of the anticipated 4-5 seconds, permitted Tate to crawl around the corner before the remainder of the round went off. When the rest of the explosives detonated, Tate was injured by flying rock. 3/

The judge concluded that the Secretary did not establish a violation of the cited standard. He reached this result even though both parties had agreed at the hearing that the standard prohibits lighting of thermalite connectors with a torch, and even though the operator stated in its post-hearing brief that it did not deny the fact of violation. The judge construed the standard literally. He distinguished between thermalite connectors and safety fuses. Because he found that Tate used the torch to light the thermalite connectors and that the connectors in turn

---

1/ From the record it is not clear which type of torch was used, but the conflict is immaterial for purposes of our review.

2/ A thermalite connector is a small metal capsule about 1 to 1-1/2 inches long, filled with an ignition compound that burns with intense heat when ignited. One end of the thermalite connector is crimped onto a safety fuse. The other end has a lip that can be pressed down to secure igniter cord passed under the lip if multiple fuses are to be linked together. Igniter cord is a "fuse, cordlike in appearance, which burns progressively along its length with an external flame at the zone of burning, and is used for lighting a series of safety fuses in the desired sequence." 30 C.F.R. § 57.2. Igniter cord is marked at one-foot intervals, so a series of explosions can be detonated according to the burning rate of the cord. Thermalite connectors can be attached at different points along a length of igniter cord. The miner lights one end of the igniter cord and leaves the blasting area. The cord burns at a speed determined by the burning rate of the particular cord used, igniting each thermalite connector seriatim. The ignition of the compound in the connectors instantaneously ignites the safety fuses. 4 FMSHRC at 1970; Exh. P-2.

3/ The flying rock tore a hole in Tate's back about 3 inches wide and 1-1/2 inches deep. According to Tate, he tried to return to work the next day but was given three days off for disciplinary reasons.

ignited the fuses, he concluded: "Using a ... torch to light the [thermalite connectors] may violate company policy, but it does not violate the regulation." In dicta, he observed that he would have found a violation if Tate had ignited the fuses directly with a torch. 4 FMSHRC at 1972.

Taking into account the intended purpose of section 57.6-116, we hold that the judge erred in concluding that Tate's use of a torch to light the thermalite connectors attached to the safety fuses did not constitute a violation. The purpose of section 57.6-116 is to accomplish fuse ignition in a safe manner. Safety fuse burns inside its cover. Consequently, there can be difficulty in determining if the fuse, rather than just the cover, has been lit and precisely when ignition of the fuse occurred. When a miner does not know with certainty whether, or for how long, a fuse is burning, he may fail to leave the blasting area in time. The fuse ignition devices specified in the standard accomplish safe and reliable fuse ignition by means of an intensely hot flame and a heat source that does not obscure or conceal evidence of the ignition "spit," a visible jet of flame that shoots out of the safety fuse at the moment its powder core is ignited. 4/ The evidence shows that use of an open-flame torch, such as that used in the present case, may obscure the ignition spit emitted by the safety fuse. Thus, ignition of a safety fuse by use of a torch defeats the purpose of the standard by preventing a miner from accurately determining when and if he has ignited the fuse.

4/ The problems attendant to ignition of safety fuses are described in Exhibit P-6, the E.I. duPont de Nemours and Co., Blasters' Handbook, 175th Anniversary Ed. (1977):

> The powder core of safety fuse burns inside its wrapping and cannot be seen after the fire from the initial spit. Some brands emit smoke through the wrapping as the powder burns. Visual discoloration on the outside of the fuse is readily apparent; however, this may be some distance behind the point of the burning core. For this reason it is not a reliable indication of where the core is burning. The end spit is a jet of flame about two inches long that shoots out of the end of the fuse the moment it is lighted. It lasts at least a second and is followed by smoke which rises from the end of the fuse.
>
> Here are some important reminders:
>
> The fuse burns at the core and not at its cover. The cover may burn without the ignition of the core. When properly ignited, the core ignites with a jet of flame called the "ignition spit". This spit shows the core is lit. Practice ignition until you know the ignition spit. Persons who fail to recognize the ignition spit, or who are misled by the burning of the cover, have been killed or injured by trying to relight fuse which has been ignited.

Exh. P-6 at 121-22 (emphasis in original).

When a thermalite connector is crimped onto a safety fuse, the spit emitted upon ignition passes through the end of the thermalite connector. Therefore, as with the direct ignition of safety fuses, when igniting thermalite connectors attached to safety fuses it is essential that the ignition spit be observable and recognizable, and that it not be obscured or concealed by the ignition source. The record in this case indicates that application of the open-flame torch to the thermalite connectors could obscure the spit and result in uncertainty as to when and if the safety fuse ignited. Thus, in the present case, the precise hazard sought to be avoided by the standard is created by the miner's application of an open-flame torch to thermalite connectors attached to safety fuses. Keeping in mind that we are interpreting a mine safety standard, we conclude that on the facts of this case the judge erred in interpreting the standard too narrowly. Rather, we find that the miner's application of an open-flame torch to thermalite connectors attached to the ends of safety fuses defeats the purpose and is contrary to the intent of 30 C.F.R. § 57.6-116. Therefore, on the facts of this case we find a violation.

Accordingly, the judge's decision is reversed, the citation is reinstated, and the case is remanded for assessment of an appropriate civil penalty.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

Distribution

Michael McCord, Esq.
Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

William W. Maywhort, Esq.
Holland & Hart
555 Seventeenth Street
Suite 2900
P.O. Box 8749
Denver, Colorado 80201

Administrative Law Judge Charles C. Moore
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 3 1984

HARRY J. GILPIN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 84-5-D
BETHLEHEM MINES CORPORATION, Respondent	:	MSHA Case No. PITT CD 83-11
	:	Marianna Mine No. 58

ORDER OF DISMISSAL

Before: Judge Broderick

On November 2, 1983, Complainant filed documents with the Commission which were accepted as a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The documents included a copy of the original complaint filed with MSHA dated July 27, 1983. This complaint alleges that Respondent Bethlehem Mines Corporation (Bethlehem) has had a policy of requiring miners to pass a welding test before being awarded jobs as mechanics. On June 6, 1983, employees were awarded jobs as mechanics without taking and passing the welding test. During the week of January 18, 1983, Complainant bid on a mechanic's job and was told that he must take and pass the welding test before he would be awarded the job. Complainant contends that this is discrimination in that some employees have to take and pass the welding test before becoming mechanics and some do not. In his letter to the Commission, Complainant states that he should have been awarded the job, being the senior employee.

On December 8, 1983, Respondent filed an answer, a Motion to Dismiss, a Memorandum of Law in Support of the Motion to Dismiss, and a Motion for a Protective Order. Complainant, who is not represented by counsel, has not responded to the motions.

A complainant appearing pro se is not held to the same pleading requirements that might be expected of a lawyer. He must, however, assert a claim under the Act. The Mine Act does not protect an employee from all forms of discriminatory conduct

on the part of his employer, but only from discrimination for activity protected under the Act, that is, activity related in some way to mine safety and health. The Act does not enforce seniority rules or work rules unrelated to safety.

There is no hint in the documents submitted to the Commission that Complainant was denied a promotion or a job opportunity because he made safety complaints. Rather, he complains of generally unfair application of job promotion rules and failure to follow seniority rules. These are not matters within the jurisdiction of the Commission. See Lane v. Eastern Associated Coal Corp., 2 BNA MSHC ¶ 1082 (1980) (ALJ).

Because I find that the complaint herein does not state a cause of action under section 105(c) of the Act, this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Mr. Harry J. Gilpin, R.D. #1, Marianna, PA 15345 (Certified Mail)

R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, 900 Oliver Building, Pittsburgh, PA 15222 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 10 1984

UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF HENRY BEARD,	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. CENT 83-44-D
Complainant	:	Bronaugh Mine
v.	:	
MIDWESTERN MINING & RECLAMATION, INC.,	:	
Respondent	:	
UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF TERRY LOUDERMILK,	:	
	:	Docket No. CENT 83-45-D
Complainant	:	Bronaugh Mine
v.	:	
MIDWESTERN MINING & RECLAMATION, INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

In each of the above cases, the Complainants filed motions to withdraw their respective discrimination complaints on the grounds that the issues raised in these proceedings have been addressed and remedied by the NLRB in cases brought before that tribunal.

Respondent does not object to the motion.

Therefore, IT IS ORDERED that the motions are GRANTED and these proceedings are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Joyce A. Hanula, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

Robert A. Lieberman, Esq., Linde, Thomson, Fairchild, Langworthy, Kohn & Van Dyke, P.C., 2700 City Center Square, 12th & Baltimore, P.O. Box 26010, Kansas City, MO 64196 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 10 1984

STEPHEN B. WOODY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 80-491-D
v.	:	
	:	MSHA Case No. ID 05-00301
MID-CONTINENT RESOURCES, INC., Respondent	:	Dutch Creek No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Carlson

In response to an order to show cause why this discrimination case should not be dismissed for lack of prosecution, complainant has filed a motion to withdraw his complaint.

Pursuant to Commission Rule § 2700.11, the motion is granted. Accordingly, the complaint is dismissed with prejudice and this proceeding is terminated.

SO ORDERED.

John A. Carlson
Administrative Law Judge

Distribution:

Mr. Stephen B. Woody, 200 Church Street, Grant Town, West Virginia 25674 (Certified Mail)

J. Davitt McAteer, Esq., Center for Law and Social Policy 1751 N Street N.W., Washington, D.C. 20036 (Certified Mail)

Edward Mulhall, Jr., Esq., Andrew O. Norell, Esq., Delaney & Balcomb, 818 Colorado Avenue, P.O. Box 790 Glenwood Springs, Colorado 81601 (Certified Mail)

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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 13 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-28
	:	A.C. No. 36-00856-03504
v.	:	
	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Joseph T. Kosek, Jr., Esq., Rushton Mining Company, Ebensburg, Pennsylvania, for Respondent.

Before: Judge Melick

Hearings were held in this case on November 15, 1983, in Philipsburg, Pennsylvania. A bench decision was thereafter rendered and appears below with only non-substantive changes. That decision is now affirmed.

> This case was of course presented before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 for one violation of the regulatory standard at 30 CFR Section 75.201. The general issue is whether the Rushton Mining Company, which I will refer to as Rushton, has violated the cited regulatory standard and, if so, what is the appropriate penalty to be assessed.
>
> The order before me (No. 1150256) was issued pursuant to Section 104(d)(2) of the Act by MSHA Inspector Donald Klemick on May 7, 1982, and reads as follows:
>
> "The method of mining that was followed in the F-butt 008 section during the 12:00 to 8:00 a.m. shift under the supervision of Ed Snyder, section foreman, exposed the miners to unusual danger from roof falls due to faulty recovery of

the pillar between the number 25 and 26 rooms in that the right side final pushout stump was mined, recovered first head-on and the continuous miner continued to mine toward the caved area, almost removing the entire right side fender."

I should note that the order was amended at the beginning of this hearing and that amendment was subsequently modified. As finally agreed to by the parties, the modification to the order added that the method of mining also violated the roof control plan drawing 7(a).

The standard cited, 30 CFR § 75.201, reads as follows: "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls caused by excessive widths of rooms and entries or faulty pillar recovery methods."

Now, the determinative issue in this case, as both parties have stipulated in essence, is whether, in taking the right side final pushout of the cited stump, the continuous miner operator placed himself under unsupported roof. If the continuous miner operator did indeed place himself under unsupported roof, it is conceded that the operator would have been exposed to unusual dangers from a potential roof fall in violation of the cited standard. On the other hand, if he did not proceed beyond unsupported roof, then it is recognized and conceded that there was no violation.

In this regard, there is evidence on the one hand from the government through the testimony of MSHA Inspector Klemick, based on his observations of the number of support posts placed adjacent to the pushout area and an estimate of the distance between these posts, that the final pushout was cut to a depth of some 24 to 30 feet. I observe at this point that this estimate was itself given with a six foot margin of error, thereby in itself raising some question as to its accuracy.

Since it is undisputed that the miner operator would have been under unsupported roof because of his position on the machine if he cut to a depth of 15 feet or more, according to the testimony of Inspector Klemick the miner operator would have been some 11 to 15 feet beyond supported roof.

I note, however, that even though the inspector had a cloth tape measure with him at the time of his inspection, he did not use it to obtain a more precise measurement. I also note that it is a well established practice for MSHA inspectors to throw such tapes with a weighted object attached into an area too dangerous to enter personally in order to obtain a more precise measurement. This procedure is ordinarily followed in the presence of a representative of the mine operator, and that under those circumstances there can be little dispute over the distance. You have then an objective basis on which you can establish the distance. As I say, this procedure was not followed in this case.

Moreover, according to Mark Naylor, the representative of the mine operator who accompanied Inspector Klemick, he told Inspector Klemick that he thought the cut was only 13 to 14 feet deep. While Mr. Klemick apparently disagreed with this estimate, stating something to the effect that he felt the cut was deeper than that, I note that even then, in spite of the knowledge at that point that his estimate was being questioned and would indeed undoubtedly be questioned and challenged at future proceedings, the inspector nevertheless did not even at that point take a more precise measurement or receive some sort of concurrence as to the depth of the cut from the representative of the operator.

I must point out also that the government's evidence is also tempered by the testimony of the operator's witnesses - miners who were present when the cut was taken - namely, roof bolter Lemuel Hollen; the continuous miner operator, Donald Baker; and the section foreman, Ed Snyder. In addition, there was the testimony of Mr. Naylor, who accompanied Klemick during his inspection. All of these witnesses confirmed that the cut in the final pushout on the right side of this stump did not place the continuous miner operator under unsupported roof.

I find with respect to the operator's witnesses, that the testimony of Don Baker, the continuous miner operator, is particularly significant.

He had only moments before working on the final pushout on the right side been working on the final pushout on the left side. According to his undisputed testimony, some material from the roof had begun falling on him, or falling on the continuous miner, while he was working on the final pushout on the left side. Around the same time he along with the other gentlemen on the scene observed serious roof problems further up. Mr. Baker was, as he testified, also quite aware at that time of other roof falls that had occurred in this mine in which continuous miners had been buried. He was, in fact, in my opinion freshly aware of his mortality at that time and, under the circumstances, would certainly be the last person to work under unsupported roof. I therefore give his testimony that he was not working under unsupported roof special credence.

Under the circumstances, I am compelled to find that the government has just not been able to sustain its burden of proof of the violation. By so finding, this does not mean that I do not believe in the veracity of the government's testimony. Nothing could be further from the truth. I am convinced that the inspector testified truthfully to the best of his ability. I am absolutely convinced of that. I am just compelled to find, for the reasons stated, that I am not convinced that his observations have been sufficiently corroborated by any objective measure and particularly in light of the opposing credible testimony, I just cannot sustain the government's case. I cannot find based on the credible evidence that the continuous miner operator had cut the final pushout to a depth that would have exposed him to unsupported roof.

Accordingly, I find that the violation has not been committed. The order is therefore vacated, and this case is dismissed.

ORDER

Order No. 1150256 is vacated and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Joseph T. Kosek, Jr., Esq., Rushton Mining Company, P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 13 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of GERALD D. BOONE, Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 80-532-D
	:	HOPE CD 80-67
v.	:	
REBEL COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Appearances: Edward H. Fitch, Esq., and Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
Douglas D. Wilson, Esq., Gardner, Moss, Brown & Rocovich, Roanoke, Virginia, for Respondent.

Before: Judge Melick

The Complainant on behalf of Gerald Boone requests approval to withdraw the Complaint in the captioned case acknowledging receipt in full of the monetary damages, costs, and attorney's fees ordered by the undersigned to be paid. Under the circumstances herein, permission to withdraw is granted. 29 CFR § 2700.11. The case is therefore dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Robert A. Cohen, Esq. and Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mr. Gerald Boone, Robertson Subdivision, Prichard, WV 25555 (Certified Mail)

Douglas D. Wilson, Esq., Gardner, Moss, Brown & Rocovich, P.O. Box 13606, Roanoke, VA 24035 (Certified Mail)

Larry Harless, Esq., United Mine Workers of America, P.O. Box 1313, Charleston, WV 25325 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 13 1984

JACK E. GRAVELY, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 83-101-D
v.	:	
	:	HOPE CD 82-52
RANGER FUEL CORPORATION, Respondent	:	Beckley No. 2 Mine

DECISION

Appearances: Belinda S. Morton, Esq., Fayetteville, West Virginia, for Complainant;
W. H. File, Jr. and John L. File, Esqs., File, Payne, Scherer & Brown, Beckley, West Virginia; Fletcher A. Cooke, Esq., Lebanon, Virginia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The complaint was initially filed pro se by the complainant after he was advised by the Secretary of Labor, MSHA, that an investigation of his complaint determined that a violation of Section 105(c) had not occurred. The complainant then retained counsel to pursue his case before this Commission.

The respondent filed an answer denying the allegations of discrimination, and pursuant to notice a hearing was conducted at Beckley, West Virginia, on October 4, 1983, and the parties appeared and participated fully therein. They were given an opportunity to file post-hearing proposed findings and conclusions, with supporting briefs, and the arguments presented therein have been reviewed and considered by me in the course of this decision.

Issue

The issue in this case is whether or not Mr. Gravely's discharge was prompted by his engaging in protected activity

under the Act. Mr. Gravely asserts that he was fired because the respondent held him responsible for a roof fall. According to Mr. Gravely, the respondent expected him to take his work crew beyond a danger board to perform work in supporting the roof area which fell. The respondent contends that Mr. Gravely was discharged because of his asserted failure to properly and adequately supervise his work crew. Respondent contends that this failure on Mr. Gravely's part resulted in damage to two pumps, and that Mr. Gravely's work performance as a foreman was less than adequate.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Testimony and evidence adduced by the Complainant

Ralph D. Carr, shuttle car operator, testified that on or about July 27, 1982, he was working on Mr. Gravely's crew and he was instructed to operate a uni-track machine hauling crib blocks and headers to be used in supporting the top. During the operation of this machine he ran over a pump which was placed in the roadway, and he did so after believing that the person assigned to watch it and move it had done so. Mr. Carr believed that mine foreman Dennis Myers had assigned the person to watch the pump (Tr. 11-15).

Mr. Carr confirmed that a danger board was posted on the section in July 1982, and it was located approximately "one break back from where the top worked" (Tr. 14). Work to support the top was started at the location of the danger board and Mr. Gravely instructed him to start work at the danger board and that is what he did. Mr. Carr stated that Mr. Myers wanted the crew to go further into the dangered area, but he did not do so because it was against the law to go beyond the danger board (Tr. 15).

In response to questions from the bench, Mr. Carr stated that Mr. Gravely was a foreman in charge of his crew and that Mr. Myers was the night shift foreman and was Mr. Gravely's supervisor (Tr. 16).

Mr. Carr confirmed that Mr. Gravely's crew was working on roof support, starting at the danger board and working towards the face and the fall area. Roof headers were installed at the danger board and work proceeded towards the face to support the top. He later learned that Mr. Gravely had been discharged, and Mr. Gravely advised him he had been fired because "we wouldn't go in behind and work on the top and where he had run over the pump" (Tr. 21).

On cross-examination, Mr. Carr stated that starting work at the danger board and working toward the face supporting the roof as they progressed was the normal and proper procedure (Tr. 24). He explained the circumstances surrounding his running over the pump (Tr. 27-30).

Bernard R. Campbell, Jr., testified that he works on the mine "hoot owl" shift, and that he knew Mr. Gravely when he worked as a foreman. Mr. Campbell stated that he was on Mr. Gravely's shift in July 1982, working at the posted danger board area installing roof supports at the track entry. Mr. Gravely was supervising the work. The work began at the danger board and progressed inby, and no one "coaxed" him to go any further than where they were actually working (Tr. 34).

Mr. Campbell stated that during the time he worked for Mr. Gravely he never asked him to do anything which would violate the law. Mr. Campbell stated that while there was no roof fall at the danger board area, the area at the cross-cut inby that area "fell some" (Tr. 35).

In response to bench questions, Mr. Campbell stated that there was no violation at the danger board area because the roof was permanently supported there. No MSHA inspectors were present on the evening in question, and as far as he knows the company was not cited for any loose roof violations (Tr. 37).

Mr. Campbell stated that he is a UMWA safety committeeman, was aware of the danger board situation, and that no one complained about the roof being loose, when asked if he knew what this case was about, he responded as follows (Tr. 38-39):

> JUDGE KOUTRAS: Do you know what this case is all about?
>
> THE WITNESS: Not exactly.
>
> JUDGE KOUTRAS: Do you know what Mr. Gravely is complaining about?

THE WITNESS: Being discharged over pumps and bad top is the only thing I can understand.

JUDGE KOUTRAS: He claims -- at least part of his claim here is that he was required to take -- that part of the reason for discharge was that he refused to take his crew into an area that he thought was unsafe.

Do you have anything to contribute to that allegation, based on your own personal knowledge?

THE WITNESS: Well, if Mr. Gravely says that we have to go in here to save this place, if I hadn't of been there the employees still didn't have to go in by it, they could ask for a committeeman, then they would have had to have got a hold of me and the mine foreman. But still, for a bad top, it's common knowledge to try to save it if you can.

Mr. Campbell stated that when work started at the danger board Mr. Gravely had the responsibility to make sure the area was safe to start work and he made the decision that it was. Work was completed the first night, and he returned to the area on the next working shift and continued installing roof supports (Tr. 41). Mr. Gravely never indicated that he did not want to go beyond the danger board (Tr. 43).

Jim L. Ellis, currently employed by Phillips Coal Company, testified that he was employed by the respondent from December 1980 until November 1982, as a foreman. He worked with Mr. Gravely over a period of a year and a half, but on different shifts (Tr. 45-46).

Mr. Ellis stated that it was company policy to post a list of persons assigned to work weekends. He recalled a shift during the Memorial Day weekend in 1982, and that Mr. Gravely's name was not posted. Mr. Ellis worked that weekend as a fire-boss (Tr. 47-48).

Mr. Ellis confirmed that a member of his crew destroyed a pump approximately a year and half ago during the summer of 1982. He also confirmed that the shuttle car operator who ran over it was not disciplined because it was not his fault (Tr. 50). Mr. Ellis also stated that it was his responsibility to watch the pumps, that he assigned no one to watch them, and that no one was written up over this incident (Tr. 53).

On cross-examination, Mr. Ellis confirmed that the shuttle car operator was not careless or negligent and that is why he was not reprimanded (Tr. 54). He also confirmed that he left the respondent's employ when the mine shut down and he found another job (Tr. 55).

Eric Coleman, roof bolter operator since 1979, testified that in July 1982, he worked the "hoot owl" shift, and that he "probably" worked on Mr. Gravely's shift as he had done on several different occasions (Tr. 57). He recalled the posted danger board and indicated that he and his roof bolter helper were assigned there to bolt the top. The roof "was working too bad" and no bolting took place until the area was cleaned up (Tr. 58). He considered Mr. Gravely to be a safe foreman (Tr. 59).

When asked about the danger board incident, Mr. Coleman responded as follows (Tr. 62):

> JUDGE KOUTRAS: At any time during this entire episode, this one or two nights now that this incident took place about the headers and the danger board and all that business, did anyone ever instruct you specifically to go beyond the danger board to expose yourself to any hazard or anything?
>
> THE WITNESS: No.
>
> JUDGE KOUTRAS: Mr. Gravely or anybody else?
>
> THE WITNESS: No.
>
> JUDGE KOUTRAS: Do you know whether Mr. Gravely asked any of his crew to do that?
>
> THE WITNESS: Not that I recall.
>
> JUDGE KOUTRAS: Did Mr. Myers or anyone else from management, to your personal knowledge, instruct Mr. Gravely to take his crew beyond the danger board?
>
> THE WITNESS: Not that I can recall. I don't remember.

Clifton P. Chandler, testified that he previously worked for the respondent for 12 years in various foreman positions but left when the mine shut down in November 1982.

He worked with Mr. Gravely, and he did not see Mr. Gravely's name on any list to work the Memorial Day weekend in 1982. Mr. Chandler stated that he didn't work, but that he checked the posted list and did not see Mr. Gravely's name on it (Tr. 67).

In response to further questions, Mr. Chandler stated that while his name was not posted to work the weekend in question, if he were notified by a superior to work he would do so (Tr. 68-69).

Gary Lee Kiblinger testified that he has been employed by the respondent for four years as a plow operator. He stated that in July 30, 1982, he was working under Mr. Gravely's supervision while operating a continuous miner "scraping bottom." He explained the circumstances under which he ran over and damaged a pump. He was not disciplined by Mr. Gravely, and he believed the pump could have been avoided if the pump line had been moved (Tr. 160-163).

Mr. Kiblinger confirmed that he worked the "hoot owl" shift on July 27, 1982, and that the work involved pinning and timbering the roof at the area where it had been dangered off with a danger board. He worked again on July 28, but he was not there when the roof actually fell, but he did indicate that at the time he was working to support it "it had bellied, it hadn't lacked much falling. It was bellying when we was putting them six by eight headers up" (Tr. 164). He also indicated that the roof condition was bad, and that "It was going to fall, don't matter what they put under it, it was going to fall", and that "when we put the three by eights up it started bowing" (Tr. 165-166).

On cross-examination, Mr. Kiblinger stated that the pump casing was pierced, and that in order to use it again it would have to be repaired. The usual way to repair it is to install a new casing (Tr. 167). He also indicated that pumps have been "burned up" through negligence when they are allowed to "sit there and burn up" (Tr. 167).

Jack E. Gravely, Jr., testified that he is currently employed as a salesman for the 84 Lumber Company, and that he previously worked for the respondent from February 13, 1981 to July 30, 1982, as a section and construction foreman. As construction foreman on the midnight shift his job entailed doing "everything," and he worked on different sections with different crews (Tr. 75). His salary during 1982 was approximately $2600 a month (Tr. 98).

Mr. Gravely stated that he was never reprimanded in March 1982, and he denied ever being verbally reprimanded by Harrison Blankenship or Dennis Myers during his employment with the respondent. He did confirm that he received a three day suspension from Bill Ward for missing a day of work the Saturday, May 29, before Memorial Day. Mr. Gravely stated that he was told he was scheduled to work, but he insisted that his name was not on the work list and no one told him to work (Tr. 77). Mr. Gravely explained the procedure for posting the work list, and he indicated that while he was informed that his suspension would be without pay, he was in fact paid for the three days he was suspended (Tr. 78-82).

Mr. Gravely denied that he was ever reprimanded over an incident concerning a continuous miner operator being off center on a 20 foot cut, and that he in fact had reprimanded the miner operator over that incident (Tr. 82-82).

With regard to the incident concerning Mr. Carr running over a pump, Mr. Gravely explained the circumstances. He indicated that Mr. Carr was not at fault, and that the person assigned to watch and move the pump was moved to another location by Dennis Myers, and since Mr. Myers was his supervisor, Mr. Gravely did not question his decision (Tr. 84-86).

Mr. Gravely stated that on July 27, 1982, his crew was composed of Ralph Carr, Gary Kiblinger, and Kenny Davis. The crew intended to work on scraping the bottom, and after some preparation work he checked the roof and found that "it was working pretty bad." He instructed the crew not to scrape bottom and they began setting timbers. Mr. Myers came to the area, and after looking at the top, ordered some headers, and Mr. Gravely's crew worked the rest of the shift on the top. Mr. Gravely left the danger board for the next shift coming on the section (Tr. 88).

Mr. Gravely stated that he next returned to work on the midnight shift on July 28, 1982, and Mr. Myers was his shift supervisor that night. Assistant shift foreman Larry Burgess informed him that the top on the section was bad and that he had placed the danger board all the way out into the entry and that any roof support work would have to be started at the location where the danger board had been moved. Mr. Gravely then proceeded to work his crew for the entire shift, starting at the danger board, and they proceeded inby to secure the roof, but at 5:00 a.m. that morning a roof fall occurred inby the area where they were working (Tr. 90).

When asked whether anyone told him to go any further than where he was working on July 28, Mr. Gravely responded as follows (Tr. 90-91):

> Q. Did anyone tell you to go any farther than where you were working?
>
> A. Well, Mr. Myers told me that, you know, it would have been a lot better if I could have started further in, but it would have placed my whole crew and myself in imminent danger had we went any further in. And the next day, Harrison Blankenship told me that I definitely should have went further in there and secured the area that fell.
>
> Q. Did you hear any crackling noise from the top?
>
> A. Oh, you can always hear the top breaking up if it's bad. You see it dripping.
>
> Q. Had you had any run-ins before with Mr. Blankenship or Mr. Burgess as to the techniques that you used with your men?
>
> A. No, ma'am.

When asked why the respondent terminated him, Mr. Gravely responded as follows (Tr. 91-92):

> Q. So why do you believe that Ranger Fuel terminated you?
>
> A. They told me -- on Friday the 30th, I worked that same section. There was another roof fall that wouldn't have been classified as a legal roof fall by MSHA regulations because it wasn't bolted yet. Larry Burgess again told me that he had been on that section, that they had cut a break-through through from both sides and the top was too bad -- they bolted it on one side and they cut it on the other side without it being bolted, and then give me two men, Eric Coleman and Dennis Cello to bolt it and three men to scrape bottom. I called Dennis Myers, and he come and looked at it and decided that he wanted to take the miner in and clean the rock up. So he called and got more people and got

all kinds of timbers and headers and stuff and started securing the area into that roof fall. We timbered the roadway down there and everything and made it pretty safe just to get in the area, but by the time we had done all that it had fell in some more. And at that time, Dennis decided that we just crib it off and leave it and go ahead and take them down and scrape the bottom, but he told me they were thinking about firing me over allowing the first roof fall.

And, at Tr. 99:

Q. Are you sure that's the only reason that Ranger Fuel discharged you was because of the danger board incident?

A. Yes, ma'am.

Q. He specifically said that when he discharged you?

A. Harrison Blankenship, yes, ma'am, he told me specifically that I should have gotten that top secured. And Dennis Myers had already told me before that, that they were thinking about firing me over that fall.

Mr. Gravely testified as to the circumstances surrounding a second pump which was damaged at the same water hole where the first pump had been destroyed. Miner operator Gary Kiblinger caught the pump hose with his miner while it was laying by the rib after being disconnected by electrician Randy Johnson. The pump was dragged some 75 to 100 feet, and Mr. Gravely believed that only the "goose neck" used to hook on the discharge hose was damaged and that this piece cost eight to ten dollars. Mr. Kiblinger was not reprimanded and the electrician was under the supervision of maintenance foreman Floyd Holthouser (Tr. 95-97).

Mr. Gravely stated that the value of the second pump was probably two or three thousand dollars, and he denied that he had ever previously been blamed for destroying material on his shift (Tr. 98).

Mr. Gravely confirmed that he was not given a written letter of discharge. He was advised orally by Mr. Blankenship and mine manager Walt Crickmer that he was discharged (Tr. 100).

On cross-examination, Mr. Gravely denied that he was ever given a company personnel termination form. He also denied that Mr. Blankenship ever advised him he was being discharged because two pumps were damaged during his shifts and that he had been warned about this on July 27, 1982. He also denied that Mr. Crickmer ever told him that he was being discharged for these reasons. Mr. Gravely stated that Mr. Blankenship "gave me the reason that I was being discharged over the roof fall, and on the 30th there was the second roof fall" (Tr. 101).

Mr. Gravely denied that Mr. Blankenship ever advised him that he would be suspended on March 16, 17, or 18, 1982, because cribs had to be installed on the No. 3 entry when the ribs were cut off center. He also denied that he was in fact suspended on those days (Tr. 103-104).

Mr. Gravely identified exhibit R-2 as a report he prepared and filed with his superior as part of his duties as a foreman. The report reflects that miner operator Rick Stewart cut certain areas too wide on March 3, 5, and 12, 1982, and that Mr. Gravely verbally warned Mr. Stewart about the incidents (Tr. 109-112). Mr. Gravely denied that Mr. Blankenship reprimanded him on March 12, 1982, nor did he suspend him (Tr. 113).

Mr. Gravely identified exhibit R-3 as a mine map, and that the No. 2 entry is the intake air entry, a track entry, and a belt entry. He confirmed that this is the entry where the pump incidents occurred and where the danger board in question was placed (Tr. 115-117). He denied that the principal roof fall occurred in the No. 1 entry, and stated that it occurred in the break-through between the No. 1 and 2 entries, and that it actually blocked the break-through and not the entry. He indicated that the fall was some 30 feet from the No. 2 entry and that it was not possible to approach that area from another direction other than going by the danger board on No. 2. He also indicated that the area could not be approached by going in the No. 1 entry outby the danger board because the area was solidly cribbed off (Tr. 121).

Referring to the mine map, Mr. Gravely contended that the area where he was criticized for not going with his crew was "inby that danger board and to the left in the break" (Tr. 122). Mr. Gravely stated that at no time did he refuse to go into an area because it was beyond the danger board, and he further testified as follows (Tr. 123-124):

> Q. And did anyone direct you to go into an area beyond the danger board?

A. Did anyone "direct" me?

Q. Yes; order you to?

A. No.

Q. And did any of your men refuse to go intc an area that was marked or dangered off?

A. I had better sense than to take my men into an area like that; and, because I didn't take them in there, they didn't have to refuse.

Q. So you didn't refuse to go and the men didn't refuse to go. Is that correct?

A. We didn't go. My men, nor myself went into that area.

Q. And the fall that later occurred, and it was a rather large fall, was over at the break-through near or in the No. 1 entry. Is that not correct?

A. It was in the break-through, yes.

Q. But no one ever specifically -- did anyone ever specifically tell you to go to correct that?

A. Specifically tell me to correct that; yes, sir.

Q. Who did that?

A. Dennis Myers and Larry Burgess.

Q. And why did you not do it?

A. I started where they told me to start.

Regarding his conversations with Mr. Myers and Mr. Blankenship over the pumps, Mr. Gravely testified as follows (Tr. 124-125):

Q. Now, when you were called in after the second event relating to the pump, who was present at that time?

A. After the second one?

Q. Yes.

A. Dennis Myers and Harrison Blankenship.

Q. And was anyone else present?

A. No, sir.

Q. Did you have a conversation with Walter Crickmer about it?

A. That was later, that wasn't at the time that I was called in.

Q. And what did Walter Crickmer state to you?

A. Walt just told me that I was being discharged. Harrison Blankenship had already talked to me, all I was seeing Walt for was to turn my equipment in.

Q. What did Mr. Blankenship say to you in particular as to why you were being discharged?

A. For not getting in that area and timbering that fall.

Q. Did he say anything else to you about the pumps?

A. No, sir, not to my knowledge.

Q. Now, he talked to you. Would it have been to your knowledge?

A. Well, that's a year and a half ago and I don't remember word for word his specific conversation.

Q. You're not prepared to state under oath that he did not tell you that you were being fired because of the pumps, are you?

A. I'm not prepared to say under oath that he did or didn't. I'm saying under oath that it was a year and a half ago and I don't remember word for word what he said.

And, at Tr. 126:

Q. Mr. Gravely, then you do not deny that you were told -- since you cannot recall, you do not

deny that you were told that you were being discharged because you had permitted an employee to run over and destroy a pump on the 27th, and that you had permitted the same thing to occur and seriously damaged a pump on the 30th?

A. Yes, sir, I do deny that.

Q. You deny it?

A. Yes, sir.

Q. Well, a minute ago you said you couldn't remember.

A. I couldn't remember his exact words, but I can remember that I wasn't told all of that.

Mr. Gravely stated that he was never told to go into an unsafe area, and that therefore, he did not refuse to go into an unsafe area (Tr. 128). He confirmed that a danger board is moved as the work progresses inby to support the roof, and that he would always be working in the vicinity of the danger board as it is moved inby with the roof support work (Tr. 129).

Mr. Gravely denied that Mr. Blankenship, Mr. Burgess, or Mr. Crickmer ever specifically counseled him about his work or the way he was carrying out his duties (Tr. 129-130).

When asked about the roof fall that Mr. Gravely contends caused his discharge, he stated as follows (Tr. 147-152):

JUDGE KOUTRAS: Mr. Gravely, in your earlier statement that you filed, the written statement, you say that Mr. Myers had told you that Mr. Blankenship had said that they were going to fire you for the fall that occurred on the 28th.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And then your statement says that Mr. Blankenship told you that he was firing you because of the fall that occurred on the 28th.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Did he blame you for the fall that occurred on the 30th, too?

THE WITNESS: He didn't mention the fall. I just said there had been another fall there and he didn't say that I was to blame for that.

JUDGE KOUTRAS: So he didn't lay the responsibility for the July 30th fall on your shoulders?

THE WITNESS: No, sir.

* * * *

JUDGE KOUTRAS: What was your response to him when he allegedly told you that's why they were firing you?

THE WITNESS: I told him that the top was too bad, that we started where I had been instructed to start.

* * * *

JUDGE KOUTRAS: Did you tell Mr. Crickmer that Mr. Blankenship fired you because he wanted you to go into an area that you thought was unsafe?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And what was his response?

THE WITNESS: His response was that there was nothing wrong and that I had destroyed the pump.

And, at Tr. 153-155:

JUDGE KOUTRAS: Okay. So the nuts and bolts of your complaint is your contention that the company fired you for failing to take care of a roof fall to the satisfaction of your supervisor or your superior?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And your response to that is that you weren't responsible for the roof fall and that you weren't about to go into an unsecured area with your crew and do some work?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: But nobody from the company, none of your superiors or anybody ever suggested to you directly that you do that. Is that right?

THE WITNESS: Mr. Blankenship did.

JUDGE KOUTRAS: But this happened after the fact.

THE WITNESS: Oh, he told me that after.

JUDGE KOUTRAS: But at all times when you and your crew were down in the section addressing the roof fall conditions starting at the danger board and all that, did anybody suggest to you specifically how you were to go about your duties of addressing the roof fall?

THE WITNESS: Well by the time anybody came to check on me -- which would have been Mr. Myers -- I was already doing it.

JUDGE KOUTRAS: But nobody from management, none of your superiors, suggested to you that you were to take your crew in by a danger board?

THE WITNESS: Well, Dennis said it would have been better if I would have got started further in, which would have been in by the --

JUDGE KOUTRAS: When was this though?

THE WITNESS: That would have been during the shift, probably two or three o'clock in the morning.

JUDGE KOUTRAS: And you told Dennis -- what did you say to him?

THE WITNESS: I started where Larry Burgess had told me. Larry Burgess was the man who had dangered the area off initially.

JUDGE KOUTRAS: But no one said anything to you at that point, Mr. Myers or no one else said anything to you other than maybe you should have started in a little further?

THE WITNESS: No, not at that point.

Testimony and Evidence Adduced by the Respondent

Walter B. Crickmer, III, testified that he is a graduate geologist and has worked for the Pittston Company for eight years. At the time of Mr. Gravely's discharge he was the mine manager at Ranger Fuel Company's Beckley No. 2 Mine. He stated that prior to Mr. Gravely's discharge, he discussed his work performance with him. He described the nature of these discussions as follows (Tr. 178-179):

A. Well, it was a repeated history. Over a period of time -- it could go back as far as maybe even up to a year or eight or nine months before the discharge took place. I had five superintendents working for me at the time, Harrison was one in charge of production; I had people in charge of construction; a superintendent at each level, and it was our job to reorganize the mine and get the mines back on the right track. We discussed all the foremen at different times.

We had Harrison, and Jack worked for him on production. He had a problem with keeping Jack's crew on-center. I'm not saying that that was the only problem with Jack. We had Jack -- we moved him from production to construction, construction to general work all over the mine, on every shift, on every production shift, you know, day, evening and owl, trying to find a place for Jack to work. We had problems in each category.

It kept going right along, and all of a sudden I started noticing, one of the miner foremen mentioned something to me that well, maybe Jim Campbell, one of the general work superintendents, said we have a problem with absenteeism with Jack. We looked at this record and started to see that every Friday and every Monday he was off; every Friday and every Monday he was off -- I mean not every one but a tremendous majority, 30 or 32 days or something within a year's period. He was always off Mondays and Fridays.

And we kept moving him from shift to shift and from one section of the mine from construction to production and these pump episodes came up and, you know, I've been through this with the Unemployment Commission and MSHA and all this before and there wasn't ever any question of Jack's discharge ever being involved with this roof problem.

When Harrison approached me that morning after he had talked with Dennis about a second pump being destroyed -- it wasn't destroyed, we repaired it for $800 -- he approached me with the thought that: okay, we have another pump

> incident; we already had the first one, we lost it totally, $3500. I knew Jack had been involved with the center episode, with the absenteeism, with this and that all the way along continuously, continuously. He had been reprimanded before. He said: now, we've got two pumps back to back, what are you doing to do? He said: I'd like to fire him. I said: I agree.

Mr. Crickmer identified exhibit C-1 as Mr. Gravely's "discharge paper", and he confirmed the "W.C." shown at the bottom of the document are his initials evidencing the fact he approved the discharge (Tr. 180).

Mr. Crickmer stated that in 1982 it was possible for a foreman to be paid when in fact he had not reported to work. He explained that this was possible because of poor management and record keeping and that foremen were permitted to turn in their own time sheets. Since that time, company policy brought about changes and improvements (Tr. 182). Mr. Crickmer stated that Mr. Gravely was paid for three days on June 2, 3, and 4, 1982, because he turned in his own time. Mr. Crickmer stated that he was aware that Mr. Gravely had been suspended on those days, but he didn't know that he had been paid "until all these things started taking place" (Tr. 183).

Mr. Crickmer stated that while Mr. Gravely's discharge paper lists only the pump as the reason for his discharge, every other reason is not always listed (Tr. 181).

On cross-examination, Mr. Crickmer confirmed that his present employer is Clinchfield Coal Company, and that Ranger Fuel and Clinchfield are divisions of the Pittston Company Coal Group. Mr. Crickmer confirmed that he appeared and testified at a hearing before the West Virginia Department of Employment Security on September 23, 1982 (Tr. 185).

Mr. Crickmer stated that Mr. Gravely's alleged absenteeism was not a factor in the decision to discharge him, and he explained his answer as follows (Tr. 188):

> A. No, not a factor of his discharge. His discharge was brought about by his inability to control his crew; his inability to perform under each one of the superintendents; his constant moving from one job area to another; my discussions with Jack personally on these problems that he was having with staying on-centers;

> Harrison talked to me about staying on-centers; Jim Campbell talking to me about problems, whatever, and then came up with these back-to-back destruction of the pumps; you know, you go to a certain point you reach, you say; is this man worthwhile keeping. You know, always in the back of your mind you think about the days absent and so forth, why does a man miss so many days; but, you can't discharge a person because of that, ma'am.

Mr. Crickmer testified as to the value of the two pumps which were "destroyed," and he stated that the first pump was "completely destroyed" and that the second one was "damaged severely." He could not state the precise costs for the pumps (Tr. 198-201).

Mr. Crickmer stated that Mr. Blankenship suspended Mr. Gravely on March 16 and 17, 1982, for "being off-center; controlling his crew," but he did not know whether it was written or verbal (Tr. 201-202).

Mr. Crickmer identified exhibit R-4 as a copy of an invoice from the respondent's records indicating that the cost to repair the second pump in question was $854 (Tr. 206). He also identified exhibit R-5 as copies of Mr. Gravely's attendance record for the period February to December 1981, and January to July 1982 (Tr. 208).

After referring to Mr. Gravely's attendance records, Mr. Crickmer stated that they reflect that he worked on March 17 and 18, 1982, but missed March 16 (Tr. 218). Respondent's counsel conceded that Mr. Crickmer had no personal knowledge as to whether Mr. Gravely was actually suspended on March 16 and 17, 1982 (Tr. 224-225). Under the circumstances, the payroll records, exhibits R-5 and R-6 were rejected and not admitted (Tr. 226).

With regard to Mr. Gravely's alleged failure to work over the Memorial Day weekend, Mr. Crickmer conceded that his name was not posted on a work list but that he was personally informed verbally by his immediate supervisor that he had to work (Tr. 229-230).

In response to bench questions, Mr. Crickmer stated that aside from the matter of Mr. Gravely not working on the Memorial Day weekend, none of the other asserted disciplinary actions, counseling, warnings, etc., were ever reduced to writing (Tr. 235).

Billy G. Smith, testified that he is employed by the respondent and was employed at the mine in 1982. He stated that on the Memorial Day weekend of May 29 and 30, 1982, Larry Burgess was scheduled to work, and after "kidding him" about it, Mr. Burgess informed him that he was going to put Mr. Gravely's name on the work list for that weekend. Later, when Mr. Smith mentioned this to Mr. Gravely, Mr. Gravely told him "I'm not working Saturday" (Tr. 262).

On cross-examination, Mr. Smith stated that while he did not hear Mr. Burgess tell Mr. Gravely that he had to work, he did see Mr. Gravely's name "on the board where Larry had marked his out and put Jack's" (Tr. 262). The board is in the foremen's office where a foreman would normally go to make notations in the books (Tr. 263). Mr. Smith did not know whether Mr. Gravely ever saw the list when it was posted on Wednesday (Tr. 267).

Larry Burgess, assistant shift foreman, second shift, testified that he was so employed in 1982. He stated that he scheduled Mr. Gravely to work the Memorial Day weekend by crossing out his own name from the posted list and inserting Mr. Gravely's. He did so after clearing it through mine foreman Bill Ward and Mr. Blankenship, and he stated that he told Mr. Gravely about the change (Tr. 271-272). The change was made on a Wednesday, and Mr. Gravely informed him that "hell, no, I ain't going to work" (Tr. 274).

When asked to evaluate Mr. Gravely's work performance, Mr. Burgess responded as follows (Tr. 274-276):

> Q. Well, in the time that he worked for you prior to May and up until the time he was discharged, did you have any opinion about the type of work he was doing and whether or not --
>
> A. Yes, sir, I did.
>
> Q. -- it was satisfactory work?
>
> A. It was very unsatisfactory. Jack resented me for some reason or another, and it was my section to look after and I would make checks of it and I'd give him my opinion of what needed to be done and what I wanted him to do and so forth.
>
> Q. And what reaction did you get to that?

A. Well, he acted like he resented me all the time, and he didn't pay a whole lot of attention to what I had to say. And there was several problems I had with Jack; one of them was the centers; one of them was with floating out through dinner, running the miner through dinner, which we're supposed to do, and I asked Jack to do it and he never did do it. And several times I come on the section and everybody would be in the dinner hole.

Q. Had you ever recommended that he be terminated prior to the time he was?

A. Yes, sir. I had been in trouble over Jack several times through my superiors for center lines, how critical it would have to be for the belt going through. Mr. Campbell, which is over construction, he was over the belt lines and all, he called me into his office several times over it; and, Harrison, we had discussed Jack several times. I couldn't do a thing with him.

Q. Is it true from what you say that the center lines are very important in driving the --

A. Yes, sir.

Q. And that if they're off three to six feet, does that create a problem?

A. It sure does if it's in your belting, absolutely.

Q. So you would have to come back and straighten it out. Is that right?

A. Yes, sir. What time that you have to back up to shear your ribs, that's time that you're losing in production in the face. You know, you could be getting a cut of coal for what time you was getting two or three buggies to straighten up the miss and taking it back to the face up here and bolting the ribs, and it's a lot of time and a lot of loss in production.

Q. Is there also a lot of risk of violations of regulations?

A. Well, sure. It's a state law that all places must have a center line in before the cut. Several

times I had went on a section and caught them cutting without a center line. They'll put a center line up and get two cuts before they would put the next one up. I mean there's a lot of that that went on.

Q. Was this under Jack's supervision?

A. Yes, sir.

On cross-examination, Mr. Burgess stated that no violations were ever issued against the respondent for cutting the places in question too wide (Tr. 276). He also stated that while he could have disciplined Mr. Gravely for not working over the weekend in question, he did not do so and turned the matter over to Mr. Ward and Mr. Blankenship (Tr. 282).

When asked about the events of July 27 through 30, 1982, and the roof fall, Mr. Burgess testified as follows (Tr. 284-285, 286, 288):

JUDGE KOUTRAS: Are you aware of the events of July 27th, 28th, 29th, and 30th, this roof fall business and all that?

THE WITNESS: Yes, sir, I was.

JUDGE KOUTRAS: Tell me in your own words what you know about that.

THE WITNESS: Well, it's my opinion if it was taken care of the way it should have been to start with we wouldn't have had all the problems that we had.

JUDGE KOUTRAS: That's a little too broad and too general.

THE WITNESS: No. Seriously, if the intersection where the top had give way had been supported like it was supposed to have been to start with, the top wouldn't have took off. I mean it has to break out somewhere.

* * * *

JUDGE KOUTRAS: All right. But on the 27th, do you agree that they were sent down to do some scraping and that they encountered a bad top?

THE WITNESS: I don't know what the dates were, but I know that Harrison give me the same diagram that he give Jack to go by. And Harrison explained it to me -- you know, Harrison was the day shift man and I was the evening shift man and he knowed I'd seen Jack before Jack went in.

JUDGE KOUTRAS: Okay.

THE WITNESS: Harrison explained to me what he wanted done up there, and I had the map. All right. When I come out that evening I told Jack, I said: Jack, I've got a map here -- he said I've got one, too. And I said, well, let me show you what Harrison wants, and he said: I know what he wants.

* * * *

THE WITNESS: No, sir. I showed him the map of --

JUDGE KOUTRAS: Of what he was expected to do?

THE WITNESS: That's right.

JUDGE KOUTRAS: At what area?

THE WITNESS: In No. 1 intersection.

JUDGE KOUTRAS: In No. 1 intersection?

THE WITNESS: That's right.

JUDGE KOUTRAS: And his response to you was?

THE WITNESS: He knowed what to do.

JUDGE KOUTRAS: Did he take the map from you?

THE WITNESS: No, he had his own map.

Harrison L. Blankenship, Jr., assistant mine foreman, testified that in 1982 he was the mine production superintendent, and that he has 12-1/2 years of mining experience. Mr. Blankenship stated that he first became aware of a problem in the No. 1 and No. 2 entry area on the morning of July 26, 1982, when either Mr. Gravely or an electrician reported a bad top in the No. 1 entry and asked him to look at it. Mr. Blankenship went to the area, which he described as the last open cross-cut in the No. 1 face between the No. 1 and No. 2 entries (Tr. 298). The entry itself is used for air return.

Mr. Blankenship stated that he found some cracks in the roof and he instructed evening shift foreman Burgess to install some "turn cribs" to support the roof and to allow "a hallway to work No. 1 Face" (Tr. 299). He described the area on exhibit R-7, and he stated that he gave Mr. Burgess a sketch, and also gave one to the "hoot owl" shift supervised by Mr. Myers. Mr. Myers sent Mr. Gravely to install the cribs, but they were not installed according to his instructions and the sketch, and he explained how they were installed (Tr. 301-303).

Mr. Blankenship stated that when he returned to the area the next morning, July 27, he found that the cribs had been installed improperly and contrary to his instructions. He examined the roof, and while it did not look any worse he decided to let Mr. Gravely's "hoot owl" shift install additional cribs in the way he had explained the day before. He personally drew a diagram on a yellow pad and told him how he wanted the roof cribs installed. At that time no danger board had been put up, and he does not know when the board was put up or who put it up. He was aware of a danger board in the No. 2 entry approximately 130 to 140 feet out by the bad top area (Tr. 306).

Mr. Blankenship stated that when Mr. Gravely went to the area which he sketched out for him, he found a danger board and started his work at that point. Mr. Blankenship believed the danger board "was put or set much too far out by the bad top," and six hours after his shift the top in the No. 1 entry intersection fell in, and it sheared off at the extension over the area where the cribs had been installed. Mr. Blankenship stated that there was no doubt that the fall would not have occurred if his initial orders to install "turn cribs" had been followed (Tr. 308).

Mr. Blankenship stated that at the time the roof condition initially developed it was possible to approach the intersection from two directions. He stated that six cribs were set in the No. 1 entry along the left rib, but there was still room to take a piece of equipment up to the entry. There was no danger board at the approach to the No. 1 entry, and the only danger board was set at the No. 2 entry (Tr. 309).

When asked whether it would have been unsafe for Mr. Gravely and his crew to have done anything that he either ordered or asked him to do in regard to the roof situation, Mr. Blankenship responded as follows (Tr. 309-310):

A. To start with, the conditions changed from my shift to his shift, it was a period of at least eight hours, that the top conditions is subject to change in minutes. At the time I left the top was safe enough for even equipment to run through it. The danger board was put there after I left and by the time I got there the top had fallen in. So to answer your question truthfully I can't.

Q. Well, I think what you're talking about is on the 28th.

A. Yes, sir.

Q. Now, on the 27th, was there anything that you asked him to do or which your plan required which would have been in your opinion unsafe for them to have done at that time?

A. No, sir. There was no danger board; the top hadn't started to fall. They took the unitrack and hauled cribs all the way through this work site, but just set them improperly.

Mr. Blankenship identified exhibits R-8 through R-12 as records which he maintained on Mr. Gravely, and they include references to an incident on March 12, 1982, his suspension of March 16 and 17, 1982, his failure to work on May 29, 1982, his suspension of June 2-4, 1982 for his failure to work, the pump incidents of July 27 and 30, 1982 (Tr. 310-318).

Mr. Blankenship reviewed the actions shown on the records in question and stated that he personally informed Mr. Gravely of the first suspension, that he approved of the second one and that Mr. Ward informed Mr. Gravely of this. Mr. Blankenship also stated that he personally discussed the pumps with him (Tr. 314, 318).

With regard to Mr. Gravely's failure to timber the fall area as instructed, Mr. Blankenship stated as follows (Tr. 316-317):

Q. Now, you did not take any action or give any reprimand or discipline as a result of this event that took place, did you?

A. No, sir. I did talk to Mr. Gravely about this. I explained to him that there was a time

frame between the time I had written this note and the time that he was actively engaged in this type work and that things happened and that there was a danger board there which wasn't when I left; that he has to correct the danger board first and that the top fell in and that that's something we will have to deal with later, but I did also mention to him that if it had been cribbed right to start with that it wouldn't be on the ground.

Q. But you did not take any disciplinary action, did you?

A. No, sir.

With regard to the second pump incident, Mr. Blankenship stated (Tr. 317-319):

Q. On July the 30th, which is two days later, of course, you state that the same or a similar occurrence with regard to the loss of a pump took place. Is that not correct?

A. Yes, sir.

Q. Was this pump located at the same spad number as the one before?

A. Yes, sir.

Q. 1944. And that's the same sump area that served the same pump. Is that correct?

A. Yes, sir.

Q. And you state here: "When I asked Mr. Gravely about this, he said he had no explanation." Did that take place?

A. Yes, sir.

Q. And then, did you tell him that you had no choice but to relieve him from his duty because of negligence?

A. Yes, sir.

Q. Now, what did you do after that in carrying out your statement as to what you should do?

A. Well, the first thing I done, I got the pump and made sure that the pump had been destroyed as called out by the owl shift. And after I saw the pump, then I brought Mr. Gravely in and Mr. Myers and we talked about it and decided to discharge him. And I got the okay from my superior to discharge him.

Q. And who was your superior?

A. Walter Crickmer.

Q. Did you at the time you terminated Mr. Gravely prepare a personnel termination form?

A. Yes, sir, I did.

Q. I hand you what purports to be such a form dated July the 30th. Is that filled out by you?

(Witness examines the above-referred to document.)

(Pause in proceedings.)

A. Yes, sir, it is.

Q. And did you give Mr. Gravely a copy of that?

A. Yes, sir, I did.

Q. And I believe you said you did that after talking to Mr. Crickmer?

A. Yes, sir.

With regard to the discharge, Mr. Blankenship stated as follows (Tr. 324):

Q. Do you remember the gist of the discussion you had with him about the reasons for discharging him?

A. Yes, sir. We talked about it several minutes and we decided -- and we even talked with Jack in our presence -- that the reason that he was being discharged wasn't because of the top falling in and not going in by the danger board, but just multiple events that led up to the discharge.

Q. Well, was this a true and correct statement of your reason for the discharge?

A. Yes, sir, it was.

Q. Mr. Blankenship, if a foreman, or a man or employee, not a foreman, were to tell you they were apprehensive or afraid to go in an area in which the top was working, would you respect their opinions on that?

A. Yes, sir. And on occasion I have even gone out on an out-shift and worked with them on a top that they were afraid of.

Mr. Blankenship could not recall asking Mr. Gravely to sign the termination form in question. Mr. Gravely, Mr. Ward, and Mr. Myers were all present at the time the form was completed, and Mr. Ward completed part of the form from information from Mr. Gravely's personnel files. The form was presented to Mr. Gravely with an explanation as to why he was being discharged (Tr. 327-330).

With regard to Mr. Gravely's suspension on March 16 and 17, 1982, Mr. Blankenship stated that if Mr. Gravely in fact worked on those days "it was an oversight on somebody's part." He explained that 60 or 65 foremen are at the mine and it is difficult to keep up with all of them (Tr. 343).

Mr. Blankenship stated at least four or five other foremen have been suspended, fired, or asked to resign for offenses similar to those engaged in by Mr. Gravely, and that Mr. Gravely has not been treated in any harsher manner. Some of these actions against foremen were before and after Mr. Gravely's discharge. Mr. Blankenship named at least four foremen who were suspended. One was suspended for five days for a first offense for "getting off centers" (Tr. 369). He also indicated that three of the foremen opted to quit rather than being fired (Tr. 370).

Mr. Kiblinger and Mr. Carr were recalled in rebuttal by Mr. Gravely's counsel. They testified further with respect to the roof control cribs which were set at the break between the No. 1 and No. 2 entries, as well as the danger boards mentioned in this case.

Mr. Gravely was recalled by me, and except for his suspension for three days in June 1982, which he readily acknowledged, he denied that he had otherwise been disciplined, suspended, or counseled about his work (Tr. 383). Mr. Gravely reiterated his belief that when Mr. Blankenship attempted to

blame him for the roof fall, he (Gravely) concluded that the only way he could have prevented the fall was to go inby the posted danger board to do something to prevent it (Tr. 387).

Findings and Conclusions

Mr. Gravely's discrimination complaint is based on his belief that he was discharged by the respondent after being held accountable and to blame for a roof fall which occurred on the section where his crew had engaged in some roof support work. Mr. Gravely asserted that assistant mine foreman Harrison Blankenship expected him to take his work crew inby an area which had been "dangered off" by the posting of a danger board sign to perform certain work to support the roof.

The respondent's defense in this case is based on its assertion that Mr. Gravely was discharged from his management position as a foreman because of an accumulation of prior incidents and conduct which occurred during his employment tenure. These incidents and allegations by the respondent with regard to Mr. Gravely's work performance include the following:

1. Lack of proper supervision by Mr. Gravely over his work crew which resulted in the destruction or damage to two sump pumps.

2. Lack of proper supervision by Mr. Gravely over his work crew which resulted in the continuous miner operator making certain coal cuts "off center."

3. Excessive absences during weekends, and the failure by Mr. Gravely to report for work on a weekend when he was previously scheduled to work.

In support of its allegations concerning Mr. Gravely's work performance, the respondent presented testimony by former mine manager Walter Crickmer, assistant shift foreman Larry Burgess, and assistant mine foreman Harrison Blankenship.

Mr. Crickmer testified that prior to the discharge, he had discussed Mr. Gravely's work performance with him and that Mr. Gravely had been assigned and reassigned to various foreman positions in an effort to find a place for him to work, but that in each instance management had problems with him. Although conceding that none of the prior warnings or suspensions given to Mr. Gravely for his work performance were reduced

to writing, Mr. Crickmer confirmed that he was aware of Mr. Gravely's alleged absenteeism, his failure to report to work when scheduled, his suspension which resulted because coal was cut "off center," and the incidents concerning the damaging of the sump pumps. Mr. Crickmer also confirmed that after the pump incidents, Mr. Blankenship advised him that he wanted to fire Mr. Blankenship, and Mr. Crickmer agreed that this should be done.

Mr. Burgess testified that he considered Mr. Gravely's work performance to be unsatisfactory, and that he had previously made recommendations that Mr. Gravely be terminated because of the incidents concerning the "off center" coal cuts. Mr. Burgess conceded that he had been in trouble with his own superiors over these incidents, and he believed that Mr. Gravely resented him and paid little attention to his instructions.

Mr. Blankenship testified as to certain suspensions given to Mr. Gravely prior to his discharge, and he produced his personal records and notes to support these suspension actions. Mr. Blankenship stated that he personally informed Mr. Gravely of the first suspension, and that he approved a second suspension. He also confirmed that he personally discussed the damaged pumps with Mr. Gravely, as well as Mr. Gravely's failure to follow instructions as to how certain roof cribbing should have been installed at the roof fall area.

Mr. Blankenship testified that after the second sump pump was damaged he decided to discharge Mr. Gravely for negligence, and he did so after obtaining Mr. Crickmer's approvel. Mr. Blankenship also testified that he advised Mr. Gravely that he was not being discharged because of the roof fall, but because of "multiple events."

Mr. Gravely took issue with the reported prior disciplinary actions taken against him. In his defense, he testified as to certain mitigating circumstances surrounding the damaged pumps, and attempted to establish that even though he was the foreman in charge, the damage to the pumps resulted from actions by other foremen and by the negligence of the individuals who were assigned to watch the pumps.

Although Mr. Gravely denied that he was ever reprimanded by Mr. Blankenship or Mr. Myers, he confirmed that he received a three day suspension for missing a day of work over a Memorial Day weekend. Mr. Gravely insisted that he was not scheduled to work, and even though the suspension was to be without pay, he stated that he was in fact paid for the days he was suspended.

Mr. Gravely denied that he was ever suspended or reprimanded during March 16-18, 1982, because an entry was cut too wide. In fact, he asserted that he verbally reprimanded the miner operator. Mr. Gravely made reference to certain mine records which he stated support his claim that he worked on the days of the purported suspension. */

Mr. Gravely's arguments in defense of his prior disciplinary encounters with his management superiors were obviously offered to support inferences that the respondent is somehow attempting to conceal the real reason for his discharge. While it may be true that the respondent's personnel practices leave much to be desired, particularly with respect to the lack of specific documentation and lack of record-keeping concerning the prior suspensions and disciplinary actions taken against Mr. Gravely, I cannot conclude that the respondent has somehow fabricated these incidents so as to support the discharge after-the-fact. To the contrary, I find Mr. Crickmer, Mr. Burgess, and Mr. Blankenship to be credible witnesses, and I find their testimony concerning the prior suspensions, warnings, and counseling with regard to Mr. Gravely's work performance to be believable. Further, absent any showing of a violation of the Act, or a showing that the discharge was motivated by protected safety activities, I believe that disciplinary matters between mine management and its management staff are best left to those parties for resolution.

I find nothing in the record here to support a conclusion that Mr. Blankenship or any other member of mine management ever directly or indirectly requested, directed, ordered, or otherwise suggested that Mr. Gravely take his work crew inby any danger board, or inby any hazardous area of the mine at any time prior to any "work refusal." Although shuttle car operator Ralph Carr stated that night shift foreman Myers asked the crew to go further into the dangered area, the crew did not proceed any further, and Mr. Carr's assertion is not further supported by any credible testimony or evidence.

Two members of Mr. Gravely's crew who testified at the hearing in this case did not support Mr. Gravely's assertion that the crew was expected to work inby the danger board.

Bernard Campbell worked on Mr. Gravely's shift, and Mr. Campbell is also a member of the UMWA safety committee. He testified that work to support the roof started at the danger board, and that no one "coaxed" him to go any further inby than where the roof was supported. He also testified that Mr. Gravely said nothing to him about not wanting to go beyond the danger board.

*/ Submitted post-hearing by Mr. Gravely's counsel by letter and enclosures of October 28, 1983. The records are copies of shift reports for March 16 and 17, 1982, containing Mr. Gravely's signature.

Eric Coleman, a roof bolter who believed he worked on Mr. Gravely's shift during the danger board incident, testified that no one ever instructed him to go beyond the posted danger board. Mr. Coleman also testified that he could not recall or remember Mr. Gravely, Mr. Myers, or any other manager instruct Mr. Gravely to take his crew beyond the danger board.

Gary Kiblinger, another member of Mr. Gravely's crew, said nothing about anyone ever instructing or ordering the crew to work inby the danger board in question.

Mr. Gravely himself testified that at no time did he take his crew beyond the danger board, and that at no time did anyone ever direct or order him to do so.

I take note of the fact that while Mr. Gravely asserted on the one hand that Mr. Blankenship blamed him for the first fall which occurred on July 28, Mr. Gravely also asserted that Mr. Blankenship never mentioned the subsequent fall which occurred on July 30, nor did he blame him for it. Mr. Gravely's testimony in this regard is rather contradictory, and it occurs to me that if Mr. Blankenship wanted to rely on the roof falls as the basis for Gravely's discharge, he would have blamed both of the falls on him.

Even if I were to accept Mr. Gravely's assertion that the roof fall was the reason for his discharge, there is no evidence to support a conclusion that Mr. Gravely was ordered or requested to do anything which was not safe. Further, there is no evidence that Mr. Gravely's discharge resulted from his refusal to take his crew inby the danger board area in question.

I believe that Mr. Gravely's belief that Mr. Blankenship "expected" him to take his crew inby the danger board stems from the fact that Mr. Gravely believes that he was fired for allowing the roof to fall. In this regard, he apparently relied on a purported statement by Mr. Myers that he should have started the roof support work further in from where he actually did, and Mr. Blankenship's purported statement that he should have started his work further in to secure the roof area that fell. Mr. Gravely also apparently relied on Mr. Myers' purported statement that mine management was thinking about firing him over an earlier fall. Mr. Myers did not testify in this case, and Mr. Blankenship denied that Mr. Gravely's discharge was in any way connected with the danger board situation.

It seems clear to me from the record in this case that any criticism of Mr. Gravely's asserted failure to properly set the roof cribs to Mr. Blankenship's satisfaction, as well as Mr. Blankenship's belief that the roof fall could have been avoided had Mr. Gravely followed his instructions, came <u>after</u> the roof fell.

With regard to the sketch and Mr. Blankenship's instructions as to how the roof was to be supported, Mr. Gravely did not believe that he ever received a copy of the sketch. However, he did acknowledge a conversation the morning after the fall when Mr. Blankenship became "disgusted" with him over the fall (Tr. 384). Further, when asked whether Mr. Myers ever gave him any instructions as to how to crib the roof area in question, Mr. Gravely first answered "no," and he then said "if he did, it was on-the-spot instructions when he was there with me" (Tr. 384). Mr. Gravely then stated that he was sure that Mr. Myers did instruct him as to how to crib the area (Tr. 385). Mr. Gravely also acknowledged that he was aware of the method of using roof supports laid out in an "arc," and that there is nothing unusual about this type of roof support. However, in his opinion, even if he had cribbed the roof in this fashion, it would still have fallen (Tr. 401). Given these circumstances, Mr. Gravely's initial assertions that he had no instructions or knowledge that Mr. Blankenship wanted the roof area which fell cribbed in any particular manner are less than candid.

Mr. Blankenship's testimony reflects that his displeasure over the roof fall stemmed from his belief that Mr. Gravely failed to follow certain instructions which he had given him as to how to support the roof which eventually fell. Mr. Gravely testified that he took corrective action to support the roof at the danger board location where Mr. Myers and Mr. Burgess instructed him to start. Mr. Burgess testified that when he attempted to discuss the proposed roof support work with Mr. Gravely, including going over a diagram or a map, Mr. Gravely advised him that he knew what Mr. Blankenship wanted done. Mr. Burgess also said that Mr. Gravely had his own map.

After careful review of Mr. Blankenship's testimony, I conclude that his explanation as to how he expected the bad roof area to be corrected is both reasonable and plausible. After viewing Mr. Blankenship on the stand during the hearing, I find him to be a credible and straightforward witness. I believe that Mr. Blankenship had given Mr. Gravely certain instructions as to how the roof support work should have proceeded, but that Mr. Gravely did not follow instructions.

It seems obvious from the record in this case that the respondent was not too enchanged with Mr. Gravely's work performance as a foreman, and that his discharge came about after a series of incidents which finally convinced mine management that Mr. Gravely should not continue on as a foreman.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that Mr. Gravely was discharged because of poor work performance and not because of his refusal to take his work crew inby any dangered off mine area. I further conclude and find that the respondent did not discriminated against Mr. Gravely, and that his rights under the Act have not been violated. Accordingly, his discrimination complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Belinda S. Morton, Esq., Fayette County Nat'l Bank Bldg., Box 636, Fayetteville, WV 25840 (Certified Mail)

Fletcher A. Cooke, Esq., P.O. Box 4000, Lebanon, VA 24266 (Certified Mail)

W. H. File, Jr., Esq., File, Payne, Scherer & Brown, P.O. Drawer L, Beckley, WV 25801 (Certified Mail)

/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 13 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-93
	:	A.C. No. 46-03887-03505
v.	:	
	:	Mine No. 108
BETHLEHEM MINES CORPORATION, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Thomas W. Ehrke, Esq., Bethlehem Mines Corporation, Bethlehem, Pennsylvania, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing on the operator's notice of contest of a 104(d)(1) citation and a 104(a) S&S citation issued in connection with a fatal roof fall accident. During the recess between the first and second day of the hearing, the parties negotiated a settlement which, after adducing further evidence, they asked the trial judge to approve.

Because the record disclosed some unusual and troubling aspects of the operator's compliance procedures and MSHA's enforcement procedures, I deem it advisable to set forth the following findings and conclusions as a preamble to confirmation of my bench decision.

Anatomy Of An Institutional Failure

On the afternoon shift of Monday, August 2, 1982, a massive roof fall occurred in the No. 3 entry, 1 Left Section of Mine No. 108. The fall resulted in the death of Louis N. Hodges

who, at the time, was performing the duties of a continuous-miner operator helper 1/ and the temporary entrapment of William D. Singleton, continuous-miner operator. Mr. Singleton was protected by his canopy and extracted himself from the fall without injury. 2/ Mr. Singleton had 12 years mining experience of which 7 were as a continuous-miner operator. The section foreman was Thomas J. Binns. Mr. Binns had 11 years mining experience of which 7-1/2 years were as a foreman.

The accident occurred while the operator was engaged in a full pillar recovery operation. 3/ More specifically, while Singleton was making his initial or "A" cut of 18' x 10' in the No. 3 Pillar from the No. 3 Entry he noticed a slip crack running diagonally across the roof from the left rib. He ignored or did not appreciate the significance of the condition and when he finished the "A" cut, backed the miner into the entry to position it to make the "B" run and square up the split.

Both Binns and Singleton as well as their superiors were aware of the fact that to make the "B" cut a full 10 feet in width would require the removal of coal from the No. 3 Pillar on a line immediately adjacent to or under a clay vein six inches in width that ran at a right angle across the roof of the No. 3 entry and into the pillar. The clay vein was plainly visible to anyone who looked and had been supported with 2 by 8 headers and bolts since the entry was originally developed in 1975. (See attached sketch.)

1/ Mr. Hodges was a 23 year-old miner with five years underground experience. This was the second roof fall fatality at the #108 Mine in 1982.

2/ Where continuous-miner operators are protected by canopies, their instructions are to stay in their cabs and to try to tram their machines out from under imminent roof falls. While this may be good for production, it is hard on helpers if the CMO does, as was shown in this case, and cuts down loose roof that triggers a massive roof fall. In the last nine years 435 miners have been killed on the job as a result of roof falls. Thus, on the average 4 miners a month die as the result of roof falls.

3/ Pillar removal is inherently dangerous--perhaps one of the most hazardous operations conducted in the underground mining environment. To accomplish it safely requires special training and rigid adherence to the safety precautions set forth in the mandatory standards, including the operator's roof control and pillar recovery plans.

Singleton knew of should have known that it was highly likely that the crack running from the left rib might intersect the clay vein if he made a full cut on the "B" run. Further, Binns and Singleton both knew that when a clay vein was encountered the "B" cut should be shortened so that sufficient coal would be left to support the roof until permanent additional support could be supplied. Despite this Binns did not tell Singleton to shorten the "B" cut and made no preparations to provide additional roof support.

While Binns and Singleton denied knowledge of the existence of the clay vein, 4/ Singleton admitted he knew of the crack and counsel for the operator judicially admitted that "the clay vein just inby the head of the continuous mining machine (as shown in the sketch) was visible to the crew well in advance of the fall." I find that because cracks and clay veins are very common in the Redstone Coal Seam and Mine No. 108, neither Binns nor Singleton considered the crack or the clay vein's presence unusual. 5/ Both men visually observed the roof conditions in the No. 3 Entry and Binns may have drummed it once or twice. Neither man drummed the entry or the split in the area of the crack in the "A" cut before the "B" cut was begun. Both miners knew, of course, that cracks and clay veins are signs of an abnormal or dangerous roof condition and that when encountered they should be carefully evaluated and supported before proceeding to mine coal.

After Singleton loaded two shuttle cars of coal from the "B" run a large piece of draw slate (18" x 6" x 4") fell from the roof near the rib through which the clay vein ran. It hit the continuous miner and startled Singleton and the other miners in the area. Singleton stopped the miner and

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4/ I find Binns position on this incredible. He should have seen the clay vein during his onshift roof check of the entry on August 2 and during his preshift examination of the area on Friday, July 30, 1982, just two days before the accident occurred. Why Binns chose to absent himself from the face during the time Singleton was making the "B" cut was never explained.

5/ Nevertheless every properly trained miner knows that "a clay vein area is very hazardous and must be treated with extreme caution." Guide to Geologic Features Affecting Coal Mine Roof, MSHA Information Report 1101 (1979).

got out of the cab to observe the roof. He saw some flaking and dribbling of the roof near the clay vein but quickly decided the roof was not working and without advising Binns of the incident started cutting coal again.

After taking one or two more shuttle cars of coal, Norman Woods the roof bolter who was standing with Hodges inby the miner near the right rib of the pillar split watching the clay vein observed the roof commence to work violently. He shouted a warning and ran down the right rib behind the miner and looked at the roof on the left rib. It was creaking, groaning and starting a heavy dribble of rock, slate and clay. He yelled to Hodges and Singleton that the roof was coming down and to get out. Singleton, following his standing instructions, put the miner in reverse and started to back out. Hodges started to run, but stopped to lift the trailing cable from where it had jammed at the corner of the split and was cut down and crushed by a massive fall of rock before he could get to the crosscut.

Lanny Rauer, the mine superintendent, testified he believed both Singleton and Binns acted in accordance with the operator's standing instructions and good mining practice. He said Singleton's instructions were to cut down loose roof, wherever encountered, and therefore he could not fault Singleton for proceeding with the "B" run even in the presence of clear evidence of an abnormal roof condition. He also believed Binns adequately checked the roof in the entry before the shift began and while the pillar recovery was in progress. He admitted, however, that his standing instructions on how to handle loose roof in the presence of clay veins might have contributed to the roof fall.

Mr. Crumrine, a roof control expert for MSHA, said Singleton should have backed the miner out of the "B" cut as soon as he saw the rock fall from the area of the clay vein. At that point, Binns should have been advised and should have taken action to provide additional roof support as required by safe mining practice, the mandatory standards and the roof control plan. He was, however, sympathetic to Mr. Rauer's claim that Mr. Binns should not be stigmatized with an unwarrantable failure violation and agreed, as conference officer, to change the (d)(1) citation to an (a) citation.

As a result of its investigation, the West Virginia Department of Mines found that all persons should have been withdrawn from the area when the roof was first observed to

be working, i.e., when the draw slate fell and hit the continuous miner.

The UMWA Safety Committee issued a statement saying that "after hearing the testimony of the people involved, we feel that [the roof fall fatality of August 2, 1982] was an unavoidable accident and that Management, the Section Foreman or any one else involved was in no way responsible."

The Manager of the Bethlehem Mines Division as well as MSHA's accident investigation found the immediate cause of the roof fall was the undermining of the intersection of the crack running diagonally across the split from the left rib with the clay vein running down the right rib of the split. Neither investigation expressed any doubt about the presence and visibility of the clay vein or the crack. The clay vein was six inches in width and the crack at least 1/64th of an inch. The area was well illuminated and Singleton saw the crack while making the "A" run.

It was not until Singleton undercut the intersection of the crack and the clay vein that the former's significance became apparent to him and by then it was too late. Singleton's failure to appreciate the significance of the crack can only be attributed to a lack of adequate training in the evaluation of abnormal roof conditions. Singleton's and Binn's failure to appreciate the significance of the clay vein was inexcusable. Binn's failure to supervise the operation and to instruct Singleton to shorten his cut in the presence of the clay vein was responsible for the creation of an imminent danger. Rauer's instructions to cut down loose roof, wherever encountered was contrary to safe mining practice. Further, for Rauer to permit partial pillaring on the left side of the section was, as the Division Manager found, a factor that contributed to override pressure on the roof.

Responsibility for the roof fall must be attributed to the entire chain of command--from the mine superintendent to the continuous miner operator. What occurred was not an act of God nor an unavoidable accident. Both Mr. Singleton's and Mr. Binns's evaluation of the situation was deplorable. And if Mr. Rauer is to be believed, their training and instructions were fatally deficient. Mr. Rauer's sharp disagreement with his own Division Manager over the contributing causes of the fall indicates a disarray on the part of top management that is hardly reassuring. Based on the evidence considered as a whole, I would have to agree that as MSHA found:

> The accident occurred due to the failure of management and the workmen to properly evaluate

the roof where a clay vein and roof crack existed and was intersected.

The Rounded Corner Violation

As a result of the accident investigation a 104(a) S&S citation was issued for creating an excessive width (23') in the mouth of the pillar split. The evidence clearly supported MSHA's determination that under accepted practice as well as the drawings attached to the roof control plan the operator was allowed to round or notch the corner of a pillar split and thereby widen the mouth to more than 20' and narrow the outby fender to less than the 12.5 feet for a distance of 12 to 18 inches in order to get the continuous miner positioned to make the "A" run. The technical violation involved did not contribute to the roof fall. Accordingly, the motion to vacate this citation was approved as part of the overall settlement of this matter.

The District Conference

Shortly after the investigative report issued, this matter came on for a conference at the District Office in Morgantown, West Virginia. 30 C.F.R. 100.6. 6/ The District Manager designated Robert L. Crumrine, an experienced CMI and roof control expert, to act as the Conference Officer. Present at the conference was Larry Rauer, the mine superintendent, and later John Dower the inspector responsible for the citations and investigative report.

Mr. Dower was about 45 minutes late for the conference and by then Mr. Crumrine had made up his mind about the matter. 7/ This was not unusual as in 9 out of 10 cases the issuing inspector is not permitted to attend the conference. 8/

6/ The conference procedure is a method of informal adjudication not specifically provided for under the Act. Under this procedure, District Managers are encouraged to eschew the role of vigorous enforcers and become "cooperative regulators."

7/ Mr. Dower said he was late because he was not alerted to the fact that his presence was requested until shortly before the conference convened on the morning of October 6, 1982. He said he was delayed by his unsuccessful efforts to obtain copies of the citations and his notes which were locked up in his supervisor's office.

8/ While the governing instructions provide that "MSHA inspectors will participate in the review of the citations and orders," this is subject to the discretion of the District Manager. 47 F.R. 22293 (1982).

While Mr. Rauer had a copy of the fatal roof fall accident report approved and signed by the District Manager, Mr. Keaton, and reviewed, approved and issued by headquarters of MSHA in Arlington, Virginia two weeks earlier, neither Mr. Crumrine nor Mr. Dower had a copy of the report at the time of the conference. Mr. Crumrine said he did not need to read the report to decide the matter. He made his decision on the basis of his discussion with Mr. Rauer and after reading a statement by Mr. Binns. Mr. Binns statement claimed he sounded the roof in the No. 3 entry in the area where the "B" cut was to be started while Mr. Singleton was positioning the continuous miner for the "B" run. He did not deny that he left the area after sounding the roof instead of staying to supervise and control the dimensions of the "B" cut.

Mr. Crumrine said he was satisfied there was a violation of 75.205 but felt the charge of an unwarrantable failure to sound the roof was unfair to Mr. Binns. 9/ Mr. Crumrine believed Binns had adequately sounded the roof in the No. 3 entry before the "B" run was started. Since he left the area immediately thereafter and was not present when Singleton encountered the loose roof, Crumrine did not think he could be held accountable for Singleton's failure to properly evaluate the situation.

With respect to Mr. Singleton's actions, Mr. Crumrine said it is against MSHA policy to hold an operator responsible for unwarrantable failure violations attributable to contract miners. 10/ Thus when he concluded that Mr. Binns, the section foreman, had sounded the roof adequately and was not responsible for the failure to provide additional roof

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9/ The graveman of the case presented by the solicitor turned on the failure of Binns and Singleton to provide additional roof support in the presence of the dangerous condition revealed by the initial working of the roof near the clay vein with knowledge, by Singleton, of the crack observed while making the "A" run.

10/ This policy fails to take into account situations where the contract miner's actions are properly imputable to the operator because of faulty training or instructions. Whether miners acting as adjudicators under the informal procedures that prevail at district conferences can be expected to apply the nuances of the law of vicarious liability seems doubtful.

support in the face of an obviously abnormal roof condition he advised Mr. Rauer and Mr. Dower that the (d)(1) citation would be converted to a 104(a) S&S citation.

Mr. Rauer was satisfied with this disposition as it removed the stigma of the unwarrantable failure finding both as to Mr. Binns and the operator. Mr. Dower on the other hand felt that he had not had a fair opportunity to be heard especially in view of Mr. Crumrine's haste to convene and conclude the matter without considering the report and findings, so recently approved by the District Manager and MSHA, with respect to management's responsibility for the fatality. He protested Mr. Crumrine's decision to his supervisory inspector Mr. Vasicek. Mr. Vasicek, after consultation with Mr. Lawless, assistant to the District Manager, told Mr. Dower that Mr. Crumrine's ruling would not be adopted by the District Manager and that the citations were affirmed as issued. This was confirmed by letter of October 14, 1982 from the District Manager to Mr. Rauer.

To placate the operator, Mr. Vasicek told the assessment office on December 14, 1982 that "The negligence of both the foreman and the machine operator (Binns and Singleton) contributed to the accident. The machine operator should have backed out all the way and stayed out when he saw the roof was 'working.' The penalty should be fairly low." (Emphasis supplied.)

Why the supervisory inspector undertook to suggest the assessment office ignore the inspector's evaluation of the operator's negligence is puzzling. Especially since the inspector who wrote the citations and the investigative report was, until the hearing, never told that his supervisor, whom he was led to believe supported his evaluation, had sought to persuade the assessment office to let the operator off with a "fairly low" penalty. 11/

11/ If this account accurately reflects MSHA's policy of conferencing in action, it is small wonder there are widespread reports of how the new enforcement philosophy has demoralized rank-and-file inspectors. Such behind-the-scenes manipulation of MSHA's ostensible role as chief enforcer of the Mine Safety Law can lead to the perception that cooperation is being used as a cloak for capitulation. A recent report by the International Health and Safety Committee of the UMWA expressed concern over "the frequency with which MSHA supervisors cave in to operator pressure and downgrade

Following the suggestion from the District Office, MSHA's assessment office in Arlington, Virginia wrote a special assessment that found that while the violation resulted from management's negligence and was serious the amount of the penalty warranted was only $2,000. Prior to the era of nonadversarial enforcement such a violation would have been specially assessed at $5,000 to $10,000. Compare, Southern Ohio Coal Company, 4 FMSHRC 1459 (1982).

Bethlehem, not satisfied with this "fairly low" assessment, filed a notice of contest. In due course, the solicitor filed the Secretary's proposal for penalty with the Commission. After assignment, the trial judge issued a pretrial order. In response, the operator raised as a defense, Mr. Crumrine's ruling at the conference of October 6, 1982.

On or about May 19, 1983, the solicitor called the trial judge to seek a postponement for compliance with Part B of the outstanding pretrial order on the ground the District Manager had decided to settle the matter by reinstating Mr. Crumrine's ruling of October 6, 1982 and accepting a penalty of $500. To expedite the matter, the District Manager directed the inspector, Mr. Dower, to issue the modifications necessary to effect a reduction of the charge in the (d)(1) citation and to vacate the 104(a) citation. Mr. Dower followed orders but the modifications were rescinded when the trial judge refused to approve the settlement.

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fn. 11 (continued)
citations that have been issued by the inspectors in the field." The same report also noted that:

> Unfortunately, these days, it seems that the MSHA inspectors who are not afraid to enforce the Act wind up having to defend themselves, not only against the operators but also against their own supervisors. Committee members related conversations with MSHA inspectors that confirmed the view that the weakened enforcement approach we have seen in the field results from the message that has been sent down from the top agency heads. Vigorous enforcement of mandatory health and safety standards has been viewed as "nit picking" and the message to the inspector in the field has been clear: back off, and if you cite a condition at all, cite it as a non s&s (nonserious) violation.

Thereafter the matter came on for trial of the operator's defense, inter alia, that Mr. Crumrine's ruling of October 6, 1982, as confirmed by the District Manager on May 19, 1983, was res judicata and therefore the Commission had no authority to adjudicate the matter de novo. This defense dissolved in the light of disclosures that, to say the least, reflected poorly on the independence, objectivity and neutrality of the district conference procedure.

As pictured in this record, the district conference procedure has a potential for seriously undermining the deterrent effect of the civil penalty provisions of the Mine Safety Law. 12/ In this case, the conference officer on the basis of an informal discussion with a representative of the operator chose to dismiss the unwarrantable failure charges on the roof fall violation because he did not want to stigmatize a member of supervisory management. This myopic view of what actually occurred was then used to justify a reduction in the amount of the civil penalty warranted for the institutional failure responsible for the fatality. Without even reading the official MSHA fatal accident report, Mr. Crumrine, based solely on what the operator's mine superintendent told him, concluded that because Mr. Binns was not alone guilty of an unwarrantable failure violation and Mr. Singleton was not, under MSHA policy, chargeable with such a violation Bethlehem, as operator, was responsible only for a strict liability, no fault violation to which no culpability would attach. The District Manager sub silencio, followed through on this evaluation by indicating to the assessment office that the negligence of Binns, Singleton and the operator be considered

12/ While a new administration has the right to try a new philosophy of enforcement implicitly endorsed by the democratic process, it is axiomatic that the leaders of every administration are required to adhere to the dictates of statutes that are also products of democratic decisionmaking. Unless this administration can convince Congress to change those provisions of the Mine Safety Law it finds objectionable, it is its duty to enforce the statutory mandate in a manner consistent with the original Congressional intent. A new administration may not refuse to enforce a law of which it does not approve. Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., _____ U.S. _____ 77 L. Ed 2d 443 n. June 24, 1983) (Rhenquist, J. in concurring). Prosecutorial discretion does not extend to nullifying or recreating law without changing it through the legislative process. There are statutory and constitutional limits on the discretion of policy makers to disavow the will of Congress.

"low" and the penalty "fairly low." As we have seen, the District Manager thought "fairly low" meant $500. Under the circumstances, I believe it would have been shockingly low.

The solicitor was compelled to seek approval of the settlement only because Congress, in its wisdom, changed the law in 1977 to require approval of penalty settlements by the Commission's judges. The legislative history of section 110(k) of the Act shows that Congress felt the public interest in vigorous enforcement is best served when the process by which penalties are assessed is carried out in public, "where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process." S. Rpt. 95-181, 95th Cong. 1st Sess. 44-45 (1977). As the Senate Report continued, "the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." Id.

The conference procedure permits MSHA to circumvent the statutory protection against the abuses found by Congress. Recent studies show that the average penalty assessed has dropped from $177 to $80, a reduction of some 45%, since the conference procedure was inaugurated. The disturbing conclusion is that the philosophy of deregulation made manifest in the conference procedure has led to a marked reduction in the deterrent effect of the civil penalty and thereby encouraged operators to flout the law. 13/

The civil penalty assessment was designed to encourage management at all levels to respond positively to health and safety concerns. The legislative history of the Mine Safety Law shows Congress intended to place responsibility for compliance with the Act on those who control or supervise the operation of mines as well as on those who operate them on a day-to-day basis. S. Rep. 91-411, 91st Cong. 1st Sess. 39 (1969); S. Rep. No. 95-181, 95th Cong. 1st Sess. 40 (1977). Upper level management decisions such as those

13/ Since May 1982, approximately 75% of all violations charged have been assessed at $20. A recent study shows that the policy of cooperative enforcement has resulted in a sharp upturn in fatality rates in underground and surface bituminous coal mines. Weeks and Fox, Fatality Rates and Regulatory Policy in Bituminous Coal Mining, United States, 1959-1981, 73 AJPH 1278 (1983).

affecting capital expenditures, the basic nature and scope of corporate safety and health programs, the hiring of top mine management officials, and other policy matters have a profound effect upon safety and health conditions at individual mines. Civil penalties should therefore be structured to influence all levels of decisionmaking. An average penalty of $80 for serious violations provides no incentive to voluntary compliance, and does violence to the principle of proportionality. Further, the single or de minimis penalty assessment of $20 is a positive disincentive to management's commitment to safety and a triumph of expediency over effective enforcement.

As a recent report by the National Academy of Sciences found, top managements' commitment is of primary importance in achieving compliance with safe mining practices and must be constantly reinforced by strict and effective enforcement at the federal level. The movement toward compromise and dilution of the federal enforcement effort reflected in this record indicates the forces of change may have shifted too far in the direction of deregulation. 14/

14/ Thought should be given to returning enforcement to its traditional role. Experience under the Coal Act demonstrated that confusion of the policing or enforcement function with the consultative and adjudicatory functions is bad policy and detrimental to both effective enforcement and fair adjudication.

I thought that in 1977 Congress made a conscious decision to structure the regulatory scheme so as to preclude trade-offs to vigorous safety enforcement. The legislative history of the Mine Act shows the enforcement function was transferred from the Department of the Interior because of its conflict with that Department's responsibility for maximizing production of the nation's coal resources. It was felt that "no conflict could exist if the responsibility for enforcing and administering the mine safety and health laws was assigned to the Department of Labor since that Department has as its sole duty the protection of workers and the insuring of safe and healthful working conditions." Sen. Rep. 95-181, supra, 5. A safe mining operation is not a function of the art of the cost accountant. It requires a strong, almost a "religious," commitment by management, labor, and the regulatory agency. BNA Interview With David A. Zegeer, Assistant Labor Secretary for Mine Safety and Health, December 9, 1983, published in Current Report, Mine Safety & Health Reporter, December 26, 1983, at 605.

The Problem With the Mandatory Standard

The (d)(1) Citation charged a violation of section 302(f) of the Act, 30 C.F.R. 75.205, Roof testing. The standard provides:

> Where miners are exposed to danger from falls of roof face and ribs the operator shall examine and test the roof, face and ribs before any work or machine is started, and as frequently thereafter as necessary to insure safety. When dangerous conditions are found they shall be corrected immediately.

By contrast, the approved roof control plan provides:

> Where miners are exposed to danger of falls of roof, face and ribs the workmen shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as necessary to insure safety. The roof shall be examined visually and by the sound and vibration method. Except the sound and vibration method shall not be conducted where adverse roof conditions (slips, clay veins, etc.) are detected during visual examinations. When dangerous conditions are found, they shall be corrected immediately. (Emphasis supplied.)

Inspector Dower testified that his understanding of the mandatory standard and the roof control plan was that the continuous miner operator, Singleton, who denied knowing of the existence of the clay vein in the right rib of the "B" cut, was required to examine the roof visually and by the sound and vibration method when he observed the large rock (18" by 6" by 4") fall on his machine during his first cut of the "B" run and that his failure to do so was unwarrantable. Mr. Dower felt the standard made no exception for the "adverse roof conditions" referred to in the roof control plan but recognized that it might be unsafe to use the sound and vibration method to "test" a roof as loose and dangerous as that encountered in the "B" cut.

Mr. Crumrine, MSHA's roof control expert, said that when visual observation such as the falling rock and/or the flaking and dribbling from the clay vein signalled the presence of a loose roof condition the safe and prudent course of action was to withdraw the machine to a position under supported roof and then set such roof support as would be necessary to insure the hazardous condition was abated. He cautioned against drumming or sounding the roof until some temporary support was provided as this might in itself trigger a roof fall.

He did not subscribe to Mr. Rauer's instruction which was to cut down loose roof wherever encountered at the face with the continuous mining machine. Mr. Crumrine said the reason the roof control plan differs from the mandatory standard is because the standard, literally applied, is hazardous to the safety of the miners. MSHA, he explained, was aware of the ambiguity but, he said, repeated efforts to have the standard modified or amended were to no avail. The language added to the safety precaution in the roof control plan was intended to ameliorate, if not resolve, the conflict. It is intended that the language of the precaution take precedence over the standard and to say, in effect, that notwithstanding the provisions of the mandatory standard a roof should not be "tested" by the sound and vibration method in the presence of a dangerous, hazardous or adverse condition such as a slip or clay vein.

A further difficulty that should be clarified is the fact that the Inspection Manual states that "The word 'Operator' in this provision [75.205] means the operator as defined in Section 3(d) of the Act. However, roof tests can be made by persons designated by the operator." Inspection Manual II-219 (1978). If this means what I think it means, Singleton may not have been the individual designated by the operator to make a sound and vibration test of the roof. At least no evidence was offered by MSHA to show that he was. The evidence shows only that Binns the section foreman made the tests. And certainly if Singleton and the other facemen were not qualified to make a sound and vibration test there is reason to question their competency to correctly evaluate a hazardous roof condition on the basis of visual observation alone--a much more difficult task.

The roof control plan, on the other hand, authorizes "workmen" to "examine and test" the roof which may mean that Singleton, as a faceman, was presumably qualified to test the roof. Thus we have another inconsistency between the standard and the roof control plan which makes for difficulty in assigning individual responsibility for the alleged unwarrantable failure to evaluate properly the roof condition.

On September 2, 1983, MSHA issued a preproposal draft of revisions to the roof control standards. 48 F.R. 40165. The standard on roof testing has been redesignated as 75.210 and in pertinent part provides:

§ 75.210 Roof Testing and Scaling

(a) A visual examination of the roof, face and ribs shall be made in all underground areas immediately before any work or machine is started and thereafter as conditions warrant. If the visual examination does not disclose a hazardous condition in areas that are not permanently supported, sound and vibration roof tests shall be made. The sound and vibration test shall:

(1) Be conducted after the ATRS system is pressured against the roof inby the area to be tested; or

(2) Begun under permanently supported roof and progress no more than 5 feet into the unsupported area. This test shall be made only for the purpose of preparing to manually install roof support when an ATRS system is not required by § 75.207.

(b) When a hazardous condition is detected, the condition shall be corrected immediately or a danger sign posted at a conspicuous location prior to leaving the area.

(c) Overhangs and loose roof, faces and ribs shall be taken down or supported.

(1) A bar for taking down loose material shall be provided on all face equipment, except haulage equipment.

(2) Each bar used to take down loose material shall be of a length and design that will enable a person to perform work from a location that will not expose the persons to injury from falling material.

(3) Loose material shall be taken down from an area supported by permanent roof supports or an ATRS system. If an ATRS system is not required by § 75.207 and the loose material cannot be taken down from a permanently supported area, at least two temporary supports on not more than 5 foot centers shall be set between any person and the material being taken down.

Adoption of this revision would do much to clarify and resolve the confusion that attends the present roof testing provision. Some provision should be made, however, for assigning responsibility to either the section foreman or his designee for making roof tests. Designations of contract or day rate miners should be in writing and furnished to MSHA to be kept as part of the operator's records.

A review of the proposed revision confirms that Mr. Rauer's instructions for cutting down loose roof with the mining machine does not accord with commonly accepted safety standards. 15/ It confirms Mr. Crumrine's view that the existing standards do not contemplate using the sound and vibration test under unsupported roof for more than 5 feet into the unsupported area. It also establishes that once the rock fell Singleton should have withdrawn his machine, set temporary supports, tested the roof, "discovered" the clay vein, traced the slip crack, consulted with Binns and, if necessary Rauer, and then on the basis of a considered judgment decided whether to go for the coal or abandon the pillar as too risky. Instead Singleton on the basis of faulty training and instructions made a snap judgment to go for production and subordinate safety that cost Hodges his life and put several other lives at risk. And in the long run, as Rauer testified, the operator had to abandon the coal in the entire pillar line. Once again the teaching is that a safe operation is the most productive operation.

Since enactment of the Coal Act in 1969 over 1200 miners have died in the nation's underground mines--42% of them as the result of roof or rib falls. MSHA's studies show that fatalities due to roof and rib falls are attributable to two main reasons: (1) failure to follow safe procedures, and (2) hazardous conditions that went undetected until too late. Both of these reasons were present in the case of Mr. Hodges' death.

Summing Up

Summing up I conclude there was more than enough blame to go around. The contract miners had the last clear chance to prevent the roof fall; instead they triggered it. The

15/ See also, Bureau of Mines Instruction Guide 17, Roof and Rib Control; Programmed Instruction Book, Roof and Rib Control, National Mine Health and Safety Academy.

section foreman failed in his responsibility to supervise and oversee an operation which he knew or should have known was hazardous. The mine superintendent failed to provide the training, instruction and leadership that would have instilled in his subordinates an attitude toward safe mining practices and procedures that would have prevented the accident. Lastly the division manager took no steps to discipline the mine superintendent for his failure to supervise his subordinates properly or to provide the training and instructions that would insure a safe operation.

The real problem at the #108 mine, of course, was attitudinal. At every level the supervisors and workers had been indoctrinated with the need to subordinate safety to production. How else explain such a take-a-chance policy as that embodied in the superintendent's instructions to cut down loose roof in the presence of clay veins and slip cracks. Mr. Crumrine's sympathy for Mr. Binns notwithstanding, it is beyond doubt there was an institutional failure here that demands immediate correction.

The collective failure of management and the contract miners warranted the imposition of a penalty that underscores the gravity of the institutional failure--a failure that resulted from faulty engineering, poor training and lax enforcement. Such a disposition is fairer than singling out Mr. Binns. While it is natural to seek a scapegoat for disaster, the institutional responsibility in this case transcends the individual responsibility of Mr. Binns.

For these reasons, I approved a settlement that involved the payment of a $5,000 penalty and vacation of the unwarrantable failure charge as to Mr. Binns.

Accordingly, it is ORDERED that the bench decision approving settlement of this matter be, and hereby is, CONFIRMED and the captioned matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

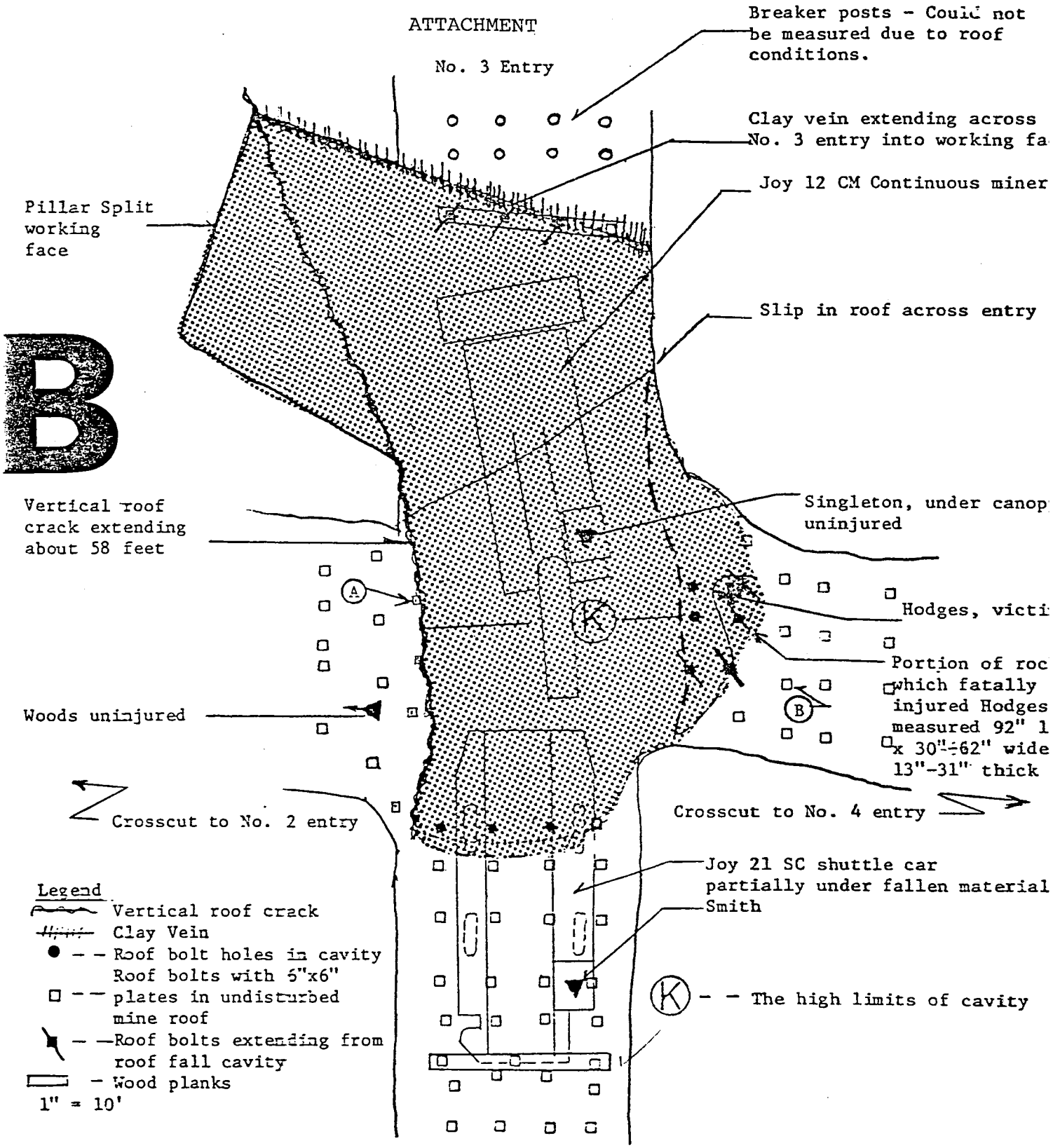
Attachment

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Thomas W. Ehrke, Esq., Bethlehem Mines Corporation, Room 1871 Martin Tower, Bethlehem, PA 18016 (Certified Mail)

/ejp



No. 1 Sketch of Fatal Roof Fall Accident
Mine No. 108 (ID No. 46-03887)
Bethlehem Mines Corporation
Hodgesville, Upshur County, West Virginia
August 2, 1982

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 16 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF JACK LEWIS KIEFER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 83-96-D
	:	MSHA Case No. DENV CD 82-26
v.	:	King Coal Mine
NATIONAL KING COAL, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

The parties have submitted a stipulation and settlement agreement which, if approved, will resolve all issues in this discrimination case.

Under the terms of the agreement, respondent, National King Coal, Inc. (National), agrees to pay to Jack Lewis Kiefer the sum of $7,500 as back wages and compensation for all other alleged damages resulting from his discharge. National further agrees to expunge from complainant's employment record any adverse references to his discharge.

Complainant, in turn, relinquishes any claim for reinstatement with National.

Having reviewed the file and considered the circumstances, I conclude that the settlement should be approved. Accordingly, the agreement of the parties is approved in its entirety.

Pursuant to the payment terms incorporated in the agreement, National shall tender to Jack Lewis Kiefer through the United States Department of Labor at 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, the following installment sums on the following dates: $2,500.00 on or before January 15, 1984; $2,500.00 on or before February 15, 1984; and $2,500.00 on or before March 15, 1984, for a total sum of $7,500. Additionally, should National fail to tender any installment due under this order within 30 days after its due date, it shall pay to Jack Lewis Kiefer, through the United States Department of Labor, at the address aforesaid, a penalty in the amount of $1,000.00, which shall be in addition to and not in lieu of any existing remedies for failure to comply with an order of this Commission.

Further, in accord with its agreement, National shall, within 30 days of the date of this order, expunge from the employment record of Jack Lewis Kiefer any adverse references to his discharge.

In view of this settlement, this discrimination proceeding is dismissed.

SO ORDERED.

John A. Carlson
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building,
1961 Stout Street, Denver, Colorado (Certified Mail)

Neil O. Andrus, Esq., Musick, Peeler & Garrett
718 Seventeenth Street, Suite 1500, Denver, Colorado 80202
(Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 17 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-402-M A.C. No. 04-00010-05027 A
v.	:	Crestmore Mine
ROBERT KLEIN, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Vail

This is a civil penalty proceeding filed by the petitioner against Robert Klein, (hereinafter "Klein"), as an individual agent of the Riverside Cement Company, the corporate operator of the Crestmore Mine located in Riverside, California. Klein in this case was acting as the operator's safety director at the Crestmore Mine.

On November 1, 1979, Order No. 375785 was issued by the Mine Safety and Health Administration to the Riverside Cement Company, pursuant to section 107(a) of the Federal Mine Safety and Health Act, 30 U.S.C. 817(a), citing a violation of safety standard 30 C.F.R. § 57.15-5. 1/ Said order reads as follows:

> A serious accident occurred at the Crestmore Mine when an employee entered the feed hopper at the dynapactor (crusher) to free a bridged material hangup. The bridged material broke through dropping the employee onto the pan feeder and loose material from above came down covering the employee. Safety belts, lines, and a person in attendance on the line were not being used in this dangerous location.

1/ 30 C.F.R. § 57.15-5 provides as follows:
Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Riverside Cement Company has paid an uncontested civil penalty assessment of $5,000 for the foregoing violation under MSHA Assessment Office Case No. 04-00010-0511-I.

Klein was charged in this case under section 110(c) of the Act, 30 U.S.C. § 820(c), with knowing, authorizing, ordering, or carrying out said violation charged above against Riverside Cement Corporation, as their agent.

The petitioner filed a civil penalty proceeding against Klein, proposing the assessment of a $300.00 civil penalty. This matter was set for hearing on November 16, 1982 in Riverside, California. On November 15, 1982, the petitioner and Klein filed a joint motion for approval of a settlement and for dismissal of this case. Klein tendered a check for $100.00 in settlement of the proposed civil penalty and indicated he no longer wished to contest the charges against him.

The parties represent that there was a serious violation in this case involving an accident wherein a miner sustained back injuries, multiple abrasions and lacerations. However, as a mitigating factor, Klein was not directly supervising the injured miner at the time of the accident. Also, Klein showed good faith after notification of the violation in helping to implement, at a mine safety meeting, proper procedures for when and where to use safety belts and lines to guard against a future occurrence of a similar accident.

Based on a review of the record in this case and the representations of the parties, I find the settlement proposed is in accord with the purpose and policy of the Act.

ORDER

Accordingly, it is ORDERED that the motion by the petitioner and Klein be, and hereby is, GRANTED. It is further ORDERED that upon clearance of Klein's tendered $100.00 check as payment of the offered sum herein, the captioned matter is DISMISSED.

Virgil E. Vail
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor
United States Department of Labor, 4015 Wilson Boulevard
Arlington, Virginia 22203 (Certified Mail)

Enos C. Reid, Esq., Reid, Babbage and Coil, 3800 Orange Street
P.O. Box 1300, Riverside California 92502 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 17 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 81-406-M
	:	A.C. No. 04-00010-05025 A
v.	:	Crestmore Mine
WAYNE KENDALL, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Vail

This is a civil penalty proceeding filed by the petitioner against Wayne Kendall, (hereinafter "Kendall"), as an individual agent of the Riverside Cement Company, the corporate operator of the Crestmore Mine located in Riverside, California. Kendall in this case was acting as the operator's plant manager at the Crestmore Mine.

On November 1, 1979, Order No. 375785 was issued by the Mine Safety and Health Administration to the Riverside Cement Company, pursuant to section 107(a) of the Federal Mine Safety and Health Act, 30 U.S.C. 817(a), citing a violation of safety standard 30 C.F.R. § 57.15-5. 1/ Said order reads as follows:

> A serious accident occurred at the Crestmore Mine when an employee entered the feed hopper at the dynapactor (crusher) to free a bridged material hangup. The bridged material broke through dropping the employee onto the pan feeder and loose material from above came down covering the employee. Safety belts, lines, and a person in attendance on the line were not being used in this dangerous location.

1/ 30 C.F.R. § 57.15-5 provides as follows:
Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Riverside Cement Company has paid an uncontested civil penalty assessment of $5,000 for the foregoing violation under MSHA Assessment Office Case No. 04-00010-0511-I.

Kendall was charged in this case under section 110(c) of the Act, 30 U.S.C. § 820(c), with knowing, authorizing, ordering, or carrying out said violation charged above against Riverside Cement Corporation, as their agent.

The petitioner filed a civil penalty proceeding against Kendall, proposing the assessment of a $300.00 civil penalty. This matter was set for hearing on November 16, 1982 in Riverside, California. On November 15, 1982, the petitioner and Kendall filed a joint motion for approval of a settlement and for dismissal of this case. Kendall tendered a check for $100.00 in settlement of the proposed civil penalty and indicated he no longer wished to contest the charges against him.

The parties represent that there was a serious violation in this case involving an accident wherein a miner sustained back injuries, multiple abrasions and lacerations. However, as a mitigating factor, Kendall was not directly supervising the injured miner at the time of the accident. Also, Kendall showed good faith after notification of the violation in helping to implement, at a mine safety meeting, proper procedures for when and where to use safety belts and lines to guard against a future occurrence of a similar accident.

Based on a review of the record in this case and the representations of the parties, I find the settlement proposed is in accord with the purpose and policy of the Act.

ORDER

Accordingly, it is ORDERED that the motion by the petitioner and Kendall be, and hereby is, GRANTED. It is further ORDERED that upon clearance of Kendall's tendered $100.00 check as payment of the offered sum herein, the captioned matter is DISMISSED.

Virgil E. Vail
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor
United States Department of Labor, 4015 Wilson Boulevard
Arlington, Virginia 22203 (Certified Mail)

Enos C. Reid, Esq., Reid, Babbage and Coil, 3800 Orange Street
P.O. Box 1300, Riverside California 92502 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 17 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 82-12-M A.C. No. 04-00010-05026 A
v.	:	Crestmore Mine
BEN POWELL, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Vail

This is a civil penalty proceeding filed by the petitioner against Ben Powell, (hereinafter "Powell"), as an individual agent of the Riverside Cement Company, the corporate operator of the Crestmore Mine located in Riverside, California. Powell in this case was acting as the operator's plant manager at the Crestmore Mine.

On November 1, 1979, Order No. 375785 was issued by the Mine Safety and Health Administration to the Riverside Cement Company, pursuant to section 107(a) of the Federal Mine Safety and Health Act, 30 U.S.C. 817(a), citing a violation of safety standard 30 C.F.R. § 57.15-5. 1/ Said order reads as follows:

> A serious accident occurred at the Crestmore Mine when an employee entered the feed hopper at the dynapactor (crusher) to free a bridged material hangup. The bridged material broke through dropping the employee onto the pan feeder and loose material from above came down covering the employee. Safety belts, lines, and a person in attendance on the line were not being used in this dangerous location.

1/ 30 C.F.R. § 57.15-5 provides as follows:
Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Riverside Cement Company has paid an uncontested civil penalty assessment of $5,000 for the foregoing violation under MSHA Assessment Office Case No. 04-00010-0511-I.

Powell was charged in this case under section 110(c) of the Act, 30 U.S.C. § 820(c), with knowing, authorizing, ordering, or carrying out said violation charged above against Riverside Cement Corporation, as their agent.

The petitioner filed a civil penalty proceeding against Powell, proposing the assessment of a $300.00 civil penalty. This matter was set for hearing on November 16, 1982 in Riverside, California. On November 15, 1982, the petitioner and Powell filed a joint motion for approval of a settlement and for dismissal of this case. Powell tendered a check for $100.00 in settlement of the proposed civil penalty and indicated he no longer wished to contest the charges against him.

The parties represent that there was a serious violation in this case involving an accident wherein a miner sustained back injuries, multiple abrasions and lacerations. However, as a mitigating factor, Powell was not directly supervising the injured miner at the time of the accident. Also, Powell showed good faith after notification of the violation in helping to implement, at a mine safety meeting, proper procedures for when and where to use safety belts and lines to guard against a future occurrence of a similar accident.

Based on a review of the record in this case and the representations of the parties, I find the settlement proposed is in accord with the purpose and policy of the Act.

ORDER

Accordingly, it is ORDERED that the motion by the petitioner and Powell be, and hereby is, GRANTED. It is further ORDERED that upon clearance of Powell's tendered $100.00 check as payment of the offered sum herein, the captioned matter is DISMISSED.

Virgil E. Vail
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor
United States Department of Labor, 4015 Wilson Boulevard
Arlington, Virginia 22203 (Certified Mail)

Enos C. Reid, Esq., Reid, Babbage and Coil, 3800 Orange Street
P.O. Box 1300, Riverside California 92502 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

20 JAN 1984

WILLIAM A. HARO, Complainant	:	DISCRIMINATION PROCEEDINGS
v.	:	Docket No. WEST 79-49-DM
	:	MD 79-05
	:	Docket No. WEST 80-116-DM
MAGMA COPPER COMPANY, Respondent	:	MD 78-43
	:	San Manuel Mine

DECISION

Appearances: Paul F. Tosca, Jr., Esq., Tucson, Arizona, for Complainant;
N. Douglas Grimwood, Esq., VanCott, Bagley, Cornwall & McCarthy, Phoenix, Arizona, for Respondent.

Before: Judge Morris

On November 30, 1982, the Federal Mine Safety and Health Review Commission remanded Docket No. WEST 80-116-DM and instructed the judge to analyze whether respondent Magma Copper Company, "proved that it would have transferred Haro anyway for legitimate business reasons, regardless of his protected refusal to cut the B.O. car", 4 FMSHRC 1935, 1941. Subsequently, in a separate order, the Commission directed the judge to make his findings as to the merits of the respondent's defenses on the basis of the record presently before him, 5 FMSHRC 805.

Prior to ruling on respondent's defense the parties were granted an opportunity to file briefs. After receipt of the briefs, and a review of the issues, the judge entered an interim order reaffirming complainant's claim of discrimination. The interim order, with a few clarifying changes, is restated here.

Inasmuch as the interim order reaffirmed the claim of discrimination it became necessary, by virtue of the order of remand, to determine what amount, if any, was due to complainant. In lieu of a further hearing on damages the parties submitted a stipulation concerning back pay, interest, attorneys fees and special damages. The stipulated facts are discussed, infra, together with the issues raised in a subsequent brief filed by respondent.

Analysis of respondent's defense

The Commission order of remand directs the entry of findings of fact and conclusions of law on the evidence relevant to respondent's defense. The principal thrust of the defense is that Haro was transferred because he placed a telephone call outside of the "chain of command" at the mine without trying to work out the problem with his supervisor; further, that a conflict of personalities necessitated Haro's transfer.

The evidence relevant to respondent's defenses appears in the evidence of both parties. Such evidence is summarized in this decision in the same order as it was received at the hearing. It follows:

Complainant William Haro

The discrimination occurred on June 13, 1978 when dispatcher Lockhart instructed Haro to remove a bad order (B.O.) car on the production train. Lockhart is the dispatcher of supervisory personnel with the same pay rate as Stonehouse. Haro refused because Lockhart would not assign another person to assist him (Tr. 15, 60-61).

After Haro refused to remove the B.O. car, Stonehouse recommended that Haro call Frank Torres, (Haro's supervisor) at his home. Stonehouse, the shaft boss, reports to Cothern (Tr. 18, 59, 60, 62). In the ensuing telephone conversation Torres told Haro to return to his maintenance work (Tr. 66).

Before this incident occurred Haro had received written instructions, in the form of a company memorandum, to the effect that two men were to be used when a railroad car was cut from a train (Tr. 57, Exhibit C2).

Haro did not contact Cothern about his refusal to cut the B.O. car; nor did he contact the mine mechanic supervisor (Tr. 18, 64-65).

After the tail light bracket incident (which occurred the following day) Haro submitted a grievance. At Torres's request Haro held the grievance until he [Torres] had an opportunity to look at it (Tr. 70, 71).

On two prior terminations Haro quit respondent to seek employment elsewhere (Tr. 53). Haro did not recall any specific conflicts with supervisors (Tr. 53).

After the B.O. car incident Navarro told Haro he was moving him from dump mechanic to another underground position on straight days. This was because Navarro wanted to protect Haro from Cothern. It was Navarro's responsibility to keep harmony among

the crews (Tr. 71, 72). Durago, the shift boss, told Haro he thought he and Cothern had a personality conflict. Cothern denied that there was a personality conflict (Tr. 73). Bob Zerga told Haro the same thing about the personality conflict (Tr. 73).

Haro felt threatened by Traynor's statement about his (Haro's) activities stirring up more conflict in the mine operating division (Tr. 74).

The purpose of the meeting on June 23rd with Traynor and Navarro was to try to work out differences with Cothern. The meeting didn't go any further than the second step of the grievance procedure. Haro received a letter from the general manager indicating it was not a proper subject for a grievance and he refused to hear it (Tr. 78-82).

On June 23 (or June 25) Haro received a notice that he was being removed as dump mechanic and placed on straight days (Tr. 225, 226). He then called MSHA (Tr. 226, 227).

The "stress" started about June 13th (Tr. 227).

Witness Frank Torres

Frank Torres, a supervisor in the mechanical division, was familiar with the incident of June 13, 1978. On this date a dispatcher (Lockhart) asked Haro to remove a B.O. car from a production train (Tr. 89-92, 111). Because he was to do it alone Haro refused and called Torres at home.

Torres told Haro they would have someone help him remove the car (Tr. 91-92). It would violate company policy not to provide Haro with an assistant to remove the car (Tr. 92). In their phone conversation, Torres asked Haro to request that his shift boss furnish someone to assist (Tr. 92-93). Stonehouse was the shaft foreman. Further, Torres told Stonehouse on the extension to help Haro himself or to provide someone to assist. Stonehouse agreed (Tr. 111). Torres assumed Stonehouse provided the assistant to cut the ore car (Tr. 92-93). Torres and Stonehouse are on about the same management level (Tr. 111-112).

Haro was acting in accordance with instructions from Torres when he called him at home (Tr. 93). Torres tells this to each of his dump mechanics. They may call Torres or his supervisor, Navarro (Tr. 93).

On June 15 Haro came to Torres with a grievance regarding the conflict over the tail light matter that had occurred between Haro and Cothern (Tr. 105-106). Torres told Haro to hold onto his grievances a couple of days. Torres wanted to try to smooth it over without going through the grievance procedure (Tr. 105-106).

On June 22, 1978 Torres discussed with his supervisor, Navarro, the conflict problems between Cothern and Haro (Tr. 106). Torres felt they should look into it, or he (Navarro), as Torres' supervisor, should look into it (Tr. 106). Navarro would be the more appropriate one to investigate because he is on a level closer to Cothern (Tr. 106).

Witness Rudy Navarro

This witness is section foreman of the three shaft area.

Navarro testified that Haro's transfer to the surface job could be a direct result of the airslusher accident (Tr. 126).

Concerning the ore cars: Mechanics are to go to the mine operating department and get a helper. They are not to remove the ore cars by themselves (Tr. 132).

Navarro put Haro on straight days because of the conflict with Cothern. The statements were made by Cothern that Haro was arguing, and a big shot. Cothern didn't want him (Tr. 133-134).

Witness John Zagorsky

It seemed to this witness, who replaced Haro as dump mechanic, that "they" were pressuring Bill Haro all of the time (Tr. 174). By "they", Zagorsky means management consisting of Frank Torres, John Traynor, Tom Traynor, and Rudy Navarro. The pressure included undue stress. Also there was a silent period when they refused to talk to Haro. They would also needle him and ask more than the usual questions. There was more silent treatment than needling (Tr. 186).

The Torres to Haro conversation [about the grease line] was more of a form of harassment than an explanation (Tr. 187). Haro is not a troublemaker. But he is conscious of what is safe around him and willing to speak up (Tr. 174, 175).

Harry Miller, Thomas Traynor, Tom Howard, Gregory Korn, and Donald Graham also testified for Haro. However, those witnesses did not offer any evidence relevant to the issues now being considered.

Respondent's Evidence
Witness Robert Zerga

Robert Zerga, Magma's development superintendent, is responsible for the maintenance division (Tr. 285).

Zerga did not recall the chronological order, but the first personnel problem involving Haro was when Frank Bunch related to him that he had a confrontation with Haro off the job. Further,

there was some indication from Haro that he felt that the confrontation was going to run over onto the job (Tr. 290). Zerga told Bunch, the area supervisor, that if there were any problems on the site with Haro, he was to exclude himself and let his foreman handle them (Tr. 291).

The next matter was the problem between Haro and Cothern. The problem came to the attention of the mine operating group because Haro had called the maintenance people instead of dealing with Cothern who was in his chain of command (Tr. 291). The immediate result was that Cothern and Haro met to solve the problem and rectify the situation (Tr. 292). The meeting went poorly and it did not resolve the problem but amplified it. There were grievances turned in by Haro saying he was being set up and discriminated against (Tr. 292).

After discussing the matter with Haro's foreman, Zerga felt the only reasonable position the company could take was to separate the two individuals because of an irreconcilable difference or conflict. They were separated. Haro was taken off as dump mechanic and put in the same area working for the mechanical foreman (Tr. 292). Zerga felt Haro required more supervision than he was receiving as a dump mechanic (Tr. 292).

At the time of Haro's removal from the dump mechanic position the scenario was this: Cothern said that he didn't like someone going off the job when he [Cothern] could have resolved the problem. And he had never asked Bill Haro to do anything that was unsafe or out of line. Haro said he was being harassed and intimidated, further he claimed Cothern was trying to set him up to get him fired (Tr. 314).

Lockhart was not Haro's boss and the problem was that Haro did not go to Cothern (Tr. 315). Stonehouse, the shaft foreman, worked for Cothern (Tr. 315).

Subsequent to the Bunch and Cothern incidents, Haro's pattern of personality conflicts repeated themselves in subsequent incidents (Tr. 319). Through the grievance procedure it was claimed that Navarro, Torres, and Traynor were trying to "get" Haro. Pursuant to Haro's request he was moved to the surface. After that he had problems in the new area into which he had been moved. He had problems with Leno Gonzales over the use of telephones and over the use of wrong grease (Tr. 319). He had problems where he [Haro] said "they're just harassing me" (Tr. 320).

Witness Zerga had problems with finding a solution to Haro's grievances. Concerning the grease line: Haro said he tried to explain the situation to Torres but he (Torres) wouldn't let him (Tr. 335-336).

Witness Rudy Navarro

This witness (recalled) had been Haro's supervisor for one and a half years. One of his welders told Navarro that Haro had smoked a marijuana cigarette. Navarro contacted Haro. He said it wouldn't happen again. 1/

The marijuana cigarette incident occurred six months before Haro was assigned as a dump mechanic (Tr. 339, 340). It is a violation of company policy for a worker to have drugs in his possession while working (Tr. 342-343).

Discussion

The Commission has ruled that an operator may produce evidence in support of its legitimate business reasons to justify the challenged adverse action. In the words of the Commission "ordinarily an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question," Bradley v. Belva, 4 FMSHRC 982, at 993 (June 1982). Belva does not exclude other avenues of evidence that would establish legitimate business reasons to justify the operator's defense.

But in this case respondent's evidence does not approach any of the criteria mentioned in Belva. To the contrary, the evidence establishes that Haro was transferred as a direct result of having engaged in a protected activity.

The pivitol evidence arises from the testimony of witness Robert Zerga. This individual, as the person responsible for personnel problems, clearly establishes the reason why Haro was transferred. In the words of witness Zerga: "The problem came to my attention because the mine operating group brought to my attention that Mr. Haro had, instead of dealing with Mr. Cothern on a problem, had gone outside and called maintenance people instead of dealing with the line of command that was at work" (Tr. 291).

Notwithstanding whatever "line of command" existed at the mine, Haro was justified in calling his superior at his home. His supervisors, Torres and Navarro, told him he could call "outside" (Tr. 93, 267). Such authorization was not only given to Haro but to "each one" of the dump mechanics (Tr. 93).

1/ Haro denies the use of drugs (Tr. 229).

Supervisor Torres states the rationale: "We have three or four of them [dump mechanics] that are on rotating shifts, that if for some reason they cannot work with the shaft foreman or the assistant shift boss in regard to cutting off cars, which ordinarily they furnish somebody to help and assist on this certain thing, that if there was any question, they could not get anybody, they'd either call me or Mr. Navarro, which is my supervisor" (Tr. 93).

Respondent claims Cothern was upset because Haro called outside to maintenance. Although Cothern did not testify, as an assistant superintendent, he should have knowledge of the instructions given to the dump mechanics by their supervisors.

Haro claims, and it is now the law of the case, that his refusal to cut the B.O. car was a protected activity. In this regard he established a prima facie case. Commission decision, 4 FMSHRC at 1941.

Was his subsequent telephone call to Torres a further protected activity? Or, as the defense urges, did that call violate respondent's chain of command.

Under some circumstances a telephone call to an operator's supervisor off of the worksite might not be a protected activity. But here the telephone call directly interconnected with Haro's refusal to remove the railroad car. It was, in these unique circumstances, a protected activity.

Additional uncontroverted evidence indicates Haro did not unilaterally call Torres. Stonehouse, the shaft boss, recommended the call be made (Tr. 59-62).

I agree with respondent that it is clear that Haro did not contact Cothern concerning the B.O. car. No such contact was necessary. Stonehouse, the shaft boss, recommended that Haro call Torres. At that point Stonehouse hadn't been aware of the policy to provide a worker to assist the dump mechanic when an ore car is removed from the train (Tr. 62, 268). However, in talking to Torres, Stonehouse agreed to provide such an assistant (Tr. 111). That concluded the matter. No further purpose would be served by Haro going beyond Stonehouse and contacting Cothern.

Additional evidence in the case requires review. Witness Zerga testified concerning a personnel problem involving Frank Bunch and Haro. This problem apparently arose out of a confrontation between Bunch and Haro off of the job. Zerga handled this by instructing Bunch, an area supervisor, to exclude himself from any problems involving Haro. He [Bunch] was to let his foreman handle any problem (Tr. 291).

For several reasons there is a failure of proof that these events played any part in causing respondent to remove Haro as the dump mechanic. The initial reason is that Zerga's testimony presents no time frame relating to the Bunch/Haro confrontation. It could have been as early as 1972, when the personnel records show Haro was hired or at any subsequent time (Exhibit R8). In addition, witness Zerga is clear that he didn't know the chronology between the Bunch incident and the Cothern incident.

Without further supportive evidence I give no weight to a view that the Bunch incident was involved in the decision to remove Haro as dump mechanic.

An additional issue arising from the evidence concerns witness Navarro's testimony that Haro's transfer to the surface could have been a direct result of the [airslusher] accident (Tr. 125-126).

The foregoing evidence is entitled to zero weight. Whether something "could" have caused Haro to be transferred lies within the realm of possibilities and conjecture.

A final point raised by the evidence concerns the incident where it is claimed that Haro smoked a marijuana cigarette. The use of drugs violates company policy. No one claims this was involved in Haro's transfer. Respondent apparently thought nothing of the incident because it subsequently assigned Haro to the position of dump mechanic.

Respondent's contentions after remand
and before interim order

In its brief filed after the order of remand and before the entry of the interim order respondent urges various arguments in support of its position. The initial condition:

Respondent states that Haro could well be obstreperous. He had been reassigned on six (6) different occasions due to his inability to get along with supervisors. These reassignments, respondent states, were not alleged to have been motivated by unlawful motives (Brief, page 5, paragraph 1).

I disagree with respondent's contentions. No evidence supports the view that Haro was transferred on six different occasions. Respondent's assertions do not cite any part of the transcript. Further, I find no evidence supporting respondent's statement. The evidence concerning transfers by Haro are stated in the foregoing summary of the evidence. There are two such transfers. Both occurred after the B.O. car incident. The first was when Navarro transferred Haro off of the position of dump mechanic. The second was when Haro requested a transfer to the surface because he was being harassed.

Respondent's personnel records (R8) fail to show any such transfers. In fact, the personnel records show nothing after May 25, 1976.

Respondent's claim that Haro was fired because he couldn't get along with his supervisors seems contradicted by the records (R8). The records show Haro quit in July 1972. Further, he was dropped as an employee in February 1973 (AWOL), in April 1973 (excessive absenteeism), as well as August 1973 (AWOL). These are legitimate business reasons to terminate and to refuse to rehire a worker. But the contradiction lies in the fact that Haro was rehired after each of these terminations.

Respondent's brief does not cite any portion of the transcript in its assertion that Haro couldn't get along with supervisors. There is evidence that Haro "had problems" with Anderson, Zunica, and Pena as well as Gonzales (use of telephone and wrong grease). Even if I assume these men were Haro's supervisors I cannot overlook the obvious. These "problems" all occurred after Haro refused to remove the B.O. railroad car. Further, the record does not disclose what the "problems" were between Haro and the first three individuals.

Respondent's second contention: On June 13, 1978 Haro was asked by a co-worker to cut a "bad order" car by himself. He refused to do so. Instead of referring the matter to Cothern, his supervisor on shift, he called a supervisor off shift at the supervisor's home (Brief, page 5).

This contention has been discussed. To restate the holding: Stonehouse, the level boss, recommended the phone call and he concurred in Torres' suggestion. Haro did not have to take the matter to Cothern.

The third contention: Cothern deeply resented the Haro telephone call to another supervisor. Cothern told Haro he would try to have Haro removed from his shift for that reason. Cothern gave the same explanation to Zerga, who had made similar decisions regarding Haro in the past (Brief, page 5).

Cothern did not testify and in fact he wasn't shown to have been on the shift at the time. But there is sufficient evidence to infer Cothern's reaction to Haro. However, no defense is established. Haro was engaged in a protected activity. Cothern told Haro he would get him removed. He did.

Magma's claim that Zerga had made "similar decisions" concerning Haro can, on this record, relate only to the Bunch/Haro incident. As previously discussed the Bunch/Haro incident is without any reference to a time frame. Further, it is obvious

from Zerga's testimony that it played no part in the decision to remove Haro as dump mechanic.

The fourth contention: The decision was made to place Haro directly under a mechanical supervisor, so that any questions could be resolved on shift (Brief, page 5).

This view really asserts that when a miner engages in a protected activity he can be demoted under a guise including the one that more supervision is required. But Zerga's stated reason for removing Haro was because of the telephone call to the maintenance people on the "outside." If a protected activity in part causes adverse action against a miner then a violation of the Act occurs. As a matter of fact such a transfer as occurred here would eliminate the necessity of any telephone calls. A supervisor would then be "on shift."

The fifth contention: Not one supervisor ever told Mr. Haro he had been wrong in refusing to cut the B.O. car (Brief, page 5).

I am unable to perceive how this assertion establishes a defense. Haro followed company policy and refused to cut the B.O. car without assistance; then he called "outside" as he had been instructed to do. It is not relevant whether a supervisor tells a miner whether his actions are wrong. Haro, Torres, Navarro and the company memorandum all clearly establish a mechanic was not to remove a railroad car without an assistant (Haro 15-16; Torres 92-93; Navarro 132; Exhibit C2).

The sixth contention: The San Manuel Mine employs 1,500 persons underground. Miners, craft persons and laborers are assigned work by their supervisors pursuant to orders which the supervisors themselves are given. The orders are carried out in an environment of noise, dust and frequent darkness amid heavy machinery and explosives. If a supervisor loses control over the men he supervises, disaster can result. In the present case, Cothern did not order Haro to do an unsafe act. A co-worker made that request. Haro did not discuss it with Cothern or otherwise follow the chain of command. He solicited instructions from a supervisor off the job. This was in derogation of the authority and responsibility given to Mr. Cothern as a supervisor (Brief, pages 5-6).

This contention was previously discussed, but to briefly restate it: Magma's brief (pages 1, 2) shows a chain of command with Haro as dump mechanic on a level with Lockhart. On the next echelon it shows the "level boss" to be Stonehouse. On the next level Cothern is listed as shift boss. Zerga is shown as the final supervisor. When Stonehouse, on a level above Haro, decided the issue, that concluded it. Cothern should know Haro had been

authorized to call maintenance people on the outside. Further, the telephone call was legitimate since Stonehouse didn't know about the company policy.

Magma's final statement in its brief is that neither Cothern's request that Haro be reassigned, nor Zerga's granting of that request, were so weak, so implausible or so out of line with normal practice, to be considered as mere pretext seized to cloak discriminatory motive. Zerga was merely trying to keep two employees from creating conflicts which were inhibiting the productivity of both of them (Brief, page 6).

The issues raised by this contention have been previously reviewed. In sum, the evidence does not establish that respondent transferred complainant Haro for legitimate business reasons but to the contrary he was transferred for engaging in a protected activity.

Respondent's contentions after issuance of interim order

After the parties filed their stipulation concerning damages the parties were granted an additional opportunity to file briefs. Complainant Haro did not file. Respondent did. Respondent's contentions all address the interim order that was entered reaffirming the original discrimination concerning the B.O. car incident. The issues raised were in addition to those previously raised and discussed when respondent filed its brief after the order of remand and before the entry of the interim order. Magma's contentions entitled "Exceptions to order after remand," are basically credibility arguments. They follow:

Contention No. 1:

> The Order draws a negative inference in several places from the failure of Supervisor Cothern to testify. (e.g., p. 6 paragraph 3; p. 8 paragraph 5) Mine Superintendent, Bob Zerga, testified that Mr. Cothern was then employed by Freeport Mining Co., in West Irian, on the Island of Java, in Indonesia, and that he was not available to testify (Tr. 293). Further explanation of his failure to appear would seem superfluous.

It is true that the evidence is uncontroverted that Cothern was out of the country at the time of the hearing. It is not necessary to explore whether an adverse inference was drawn from his failure to testify or whether it was a recitation of a fact. In any event the evidence from both complainant and respondent support Haro's authority to call "outside."

Contention No. 2:

The Order states that Mr. Haro call Mr. Torres at Torres' home at the suggestion of Mr. Stonehouse (Tr. 62; p. 2 of Order). This account differs substantially from the account given by Mr. Haro in his written account at the time of the event (p. 1 Complaint of Haro to MSHA in Review Commission Record), his deposition given on July 18, 1980 (see Tr. 63-64), and his direct examination (Tr. 19).

In his complaint to MSHA, Haro goes into exquisite detail concerning the personnel involved, their level assignments and the conversations he had with each one. At no time does he mention that Stonehouse told him to call Torres.

In an attempt to destroy Haro's credibility on this point respondent initially cites Haro's complaint to MSHA "in the Review Commission record."

Haro's statement to MSHA was not offered as an exhibit nor did any party request the judge take official notice of such statement. Accordingly, the statement is not part of the evidenciary record and not before me.

Respondent further cites Haro's direct examination, citing the transcript at pages 19, 63-64.

In order to analyze these points I deem it necessary to set forth the pertinent portions of the transcript.

The direct examination at pages 16-19 of the transcript shows the following:

> A. Yes, sir. Mr. Tosca: Your Honor, this is a memorandum of Magma Copper Company which directly related to the questions I just asked. I offer it into evidence.
>
> (Whereupon the above mentioned Exhibit was marked for identification at this time.)
>
> Judge Morris: C-2 has been offered in evidence. It's a memo from a J. Herndon. Any objection to C-2, Mr. Grimwood?
>
> Mr. Grimwood: Your Honor, no, there's no objection and

the company will stipulate that Mr. J. Herndon did prepare this memorandum and post it on the date indicated.

Judge Morris: May 8, 1976.

Mr. Grimwood: May 8, 1976, yes.

Judge Morris: Exhibit C-2 will be received together with the stipulation.

(Whereupon the above mentioned Exhibit was received into evidence at this time.)

By Mr. Tosca:

Q. Will you please read that short memorandum to the Court, please?

A. "May 8, 1976, Subject, Production Training Message. In the last 30 days there has been two instances of mud trains losing cars on the main line. From this day forward there will be no cutting of cars from the production train to service development or any other reason except to cut out a B.O. car.

When a B.O. car is cut, a supervisor will be present. The safety hooks and couplings are to inspected as often as necessary and cleaned if necessary."

Q. Well, according to your testimony, Mr. Haro, Mr. Lockhart apparently asked you to break company policy; is that right?

A. That's correct.

Q. Did you ask your supervisor?

A. I asked him that the policy be followed.

Judge Morris: You asked for what?

The Witness: I asked that the policy be followed.

By Mr. Tosca:

Q. You were aware of this memo at the time?

A. Yes, I was, sir.

Q. What was Mr. Lockhart's response to your request?

A. Mr. Lockhart asked me if I was refusing to do the job as assigned.

Q. And your response?

A. No, sir, that I wasn't refusing to do the job, that I was just asking that the policy be enforced as stated.

Q. Did you cut the ore car from the train?

A. No, sir.

Q. What was the result of that?

A. At that point in time, I called my immediate supervisor, Mr. Frank Torres at his home as I had been told to do by Mr. Torres if I had run into this situation and at that point in time Mr. Torres explained over the telephone to myself and the shaft foreman, Mr. Stonehouse, the procedure as stated in the memorandum. (Emphasis added).

Then Mr. Torres called Mr. Lockhart and explained the procedure to Mr. Lockhart and I was never asked after that point in time to go out and cut the car.

Q. And that was the end of that issue?

A. At that point in time, sir.

Q. On June 14, 1978, were you working under a Mr. Cothern, a foreman for Magma Copper Company?

A. Yes, sir, Mr. Cothern was an assistant chief foreman.

Q. On that date did you have a conversation with Mr. Cothern regarding the tail light on the rear of one of these ore cars?

A. I did, sir, on two different occasions on the same date.

Q. Can you give me, in substance, a brief synopsis of that conversation?

A. Yes, sir, Mr. Cothern instructed me to tie with bailing wire, a light to the end of the production train and when I brought Mr. Cothern's attention to the policy stating that we did not tie lights on the end of trains, that we installed them on light brackets, the tail car of the trains, and I showed Mr. Cothern that one of these tail cars that

was equipped with a light bracket and a light, that was in working order, was in the middle of the train, that that's all he needed to do was to remove the car from the middle of the train and put it on the back of the train as the procedure calls for it.

Mr. Cothern asked me if I was refusing to do a job order as instructed.

Q. What was your response?

A. I told him, "No, sir, I wasn't."

Further relevant verbatim testimony appears in Haro's cross-examination:

Transcript at 61-64:

Q. And Mr. Lockhart was a dispatcher?

A. That's correct, sir.

Q. Was Mr. Lockhart in, well, he wasn't in that chain of command I just described was he?

A. Oh yes.

Q. Where does he fit in?

A. He is a dispatcher of supervisory personnel. I imagine he's probably the same pay rate as Mr. Stonehouse.

Q. Right, but at least as far as Mr. Stonehouse being your card signing boss, Mr. Stonehouse reporting to Mr. Cothern, he's not in there any place, but he did ask you to do something.

A. Yes, sir.

Q. Okay, so isn't it true that when Mr. Lockhart asked you to do that and you told him that you didn't want to do it, it was against policy and you pointed out that thing, isn't it true that you simply, at that time, went over to the telephone and called Mr. Torres? I believe that's what your testimony was. You immediately went and placed a call to Mr. Torres; is that correct?

A. This is at the conclusion of three conversations that I had with Mr. Lockhart in reference to cutting the B.O. car out.

Q. Well, you testified as to those, I'm sure, didn't you testify in full as to whatever conversations you had with Mr. Lockhart; right?

A. Yes, sir.

Q. And then so you just went ahead and just got on the phone and called up Mr. Torres at his home. He was off shift at that time, right?

A. Sir, I believe my first complaint will show that I went to the 2075 and I reported to Mr. Stonehouse. I told Mr. Stonehouse what the policy was. I told Mr. Stonehouse what the situation was at that point in time and I asked him for his suggestion.

Mr. Stonehouse indicated to me that he did not have any knowledge of such policy and that he himself recommended that I call Mr. Torres as Mr. Torres told me to do if I ran into this situation. (Emphasis added).

Q. Okay, what I'm saying though, Mr. Haro, is that's not the way you testified on direct examination and I believe--

Mr. Tosca: I don't believe the question was asked whether he had called Mr. Torres on direct or not. It wasn't asked.

Judge Morris: Well, we don't have a full question here. I believe, that's where it trailed off so you can hold your objection for a minute.

Mr. Grimwood: Well, the record will reflect whether the question was there or not.

Judge Morris: Well, you haven't asked him a question, Mr. Grimwood. How can he answer it? Do you want to ask him a question and if Mr. Tosca has an objection he can make it, but right now there's no question.

By Mr. Grimwood:

Q. Okay, Mr. Haro, do you recall when I took your deposition on July 18, 1980, about three weeks ago on this matter, on these discrimination charges, do you recall that?

A. Do I remember the deposition?

Q. Yes.

A. Yes, sir.

Q. Okay, I refer to page 14 of the deposition, which is in the record and I ask, I direct your attention to the events of June 13, 1978, "What happened on that date?" Answer: "On June 13, 1978, I informed Mr. Lockhart that car 222 had a B.O. safety latch. Mr. Lockhart told me to remove the car from the train and to replace it with a good car. I asked Mr. Lockhart for assistance in this and he refused to comply with my request so I referred him to the memorandum and Mr. Lockhart asked me if I was refusing to do a job as was given to me. I informed Mr. Lockhart that I was not refusing to do a job, that I was merely trying to comply with the memorandum policy as stated.

I, at that time, called Mr. Torres at home and informed Mr. Torres of the situation." Now is that pretty much how it happened?

A. First of all, sir, during the deposition I tried to explain my answers as throughly as I possibly could. If I deleted the conversation that I had with Mr. Stonehouse prior to that, I didn't do it purposely.

It is on the record on my first complaint with MSHA and I did put that in. If you'd care to check those records, it's in writing.

Q. Well, there's been quite a bit of writing here. Well, okay, so at least you talked to Mr. Lockhart. Mr. Lockhart didn't give you satisfaction. Now you say you also talked to Mr. Stonehouse. Did you talk to Mr. Cothern about this situation?

A. Mr. Stonehouse indicated to me that Mr. Cothern and Mr. Corwin were not available.

Q. Well, were they on that shift?

A. They were, sir, but they were not in an area where they could be reached at.

Contrary to respondent's contentions I find Haro's testimony that Stonehouse suggested he call Torres to be very credible.

In his direct examination, Haro is explaining his telephone call to Torres (Tr. 18, lines 8-14). At this point, without any leading question or suggestion, Torres, on the telephone, is explaining the procedure to Haro "and the shaft foreman, Mr. Stonehouse." (Tr. 18, lines 12, 13).

Haro's cross examination, as set forth above, further amplifies the testimony.

Haro's evidence on this point is uncontroverted. Stonehouse did not testify. I find Haro's evidence credible and no contrary evidence causes me to reject it.

Concerning Haro's deposition: the broadly worded question (Tr. 63, 64), of "what happened on that date?" [June 13, 1978] does not require a party to state every detail of the events of that day.

The concluding paragraph of respondent's argument again refers to Haro's written complaint to MSHA. As previously stated that evidence is not before me.

For the foregoing reasons I conclude that Stonehouse in fact suggested that Haro call Torres.

Contention No. 3:

> Mr. Torres specifically instructed Mr. Haro and other mechanics involved not cut B.O. cars by themselves. Torres' specific instructions were to contact him at home only after having contacted the shift foreman and the shaft boss on duty and not having gotten satisfactory response from them (Tr. 102-103).

In support of its position respondent cites the transcript at pages 102, 103. This portion of the testimony is as follows:

> Q. Okay, Mr. Torres, Mr. Haro has testified here today about some problems he had with Mr. Cothern in the mine operating division and that sort of thing. Do you give your mechanics, you said you had three or four of them who work on B and C shift, any special instructions about handling these kinds of problems that they might run into with operating people?
>
> A. Yes, sir, let me explain this. On B and C shift there is no mechanical supervisor in this area where we work and they work, the dump mechanic works for the shaft foreman which the shaft foreman answers, in this particular case, to Mr. Cothern who was assistant shift foreman or shift foreman of this crew, and I have given them instructions as to, if they asked, say for instance, to cut a B.O. car off the train to if they ask them to go cut it off to ask for assistance. To try, if they cannot get anywhere with the shaft boss, his immediate supervisor at that time, to ask to talk to the assistant shift foreman or the shift foreman whichever the case may be, to get some help to do the job of cutting off cars or whatever.

Q. Does it sometimes happen that mine operating people who have essentially mine responsibilities and mine mechanical people who have what you call support responsibilities, take a different attitude or a different approach to certain problems?

A. I don't believe I understand that.

Q. Well okay, I'll withdraw the question. You've testified that the mechanic who works on B and C shift does not have an immediate mechanical supervisor that moreorless is responsible to, that the mine operating division--in your opinion is it important to have someone with some degree of diplomacy or at least some common sense to work in this position, to work with the mine operating people?

A. Yes, sir, it's very important to cooperate, yes, sir.

Additional evidence on this point, not cited by respondent, appears in the direct testimony of Torres at page 93 of the transcript. It follows:

Q. Do you know if--who was it you gave those instructions to?

A. Mr. Stonehouse at the time was the shaft foreman in that area on B shift or whatever shift that it is that we are talking about.

Q. To your knowledge, do you know if Mr. Stonehouse provided assistance to Mr. Haro to cut an ore car from the train?

A. I would assume he did, yes.

Q. But you have no personal knowledge whether he did or not?

A. No.

Q. When Mr. Haro called you at home on June 13, 1978, was he acting in accordance with your instructions?

A. Yes, he was. I tell this to each one of my dump mechanics. We have three or four of them that are on rotating shifts, that if for some reason they cannot work with the shaft foreman or the assistant shift boss in regard to cutting off cars, which ordinarily they

> furnish somebody to help and assist on this certain thing, that if there was any question, they could not get anybody, they'd either call me or Mr. Navarro, which is my supervisor.

A fair reading of the foregoing portions of the transcript does not establish the strict construction urged by respondent. But in any event Torres indicated Haro could call "if there was any question" (Tr. 93). There were in fact serious questions. One of these was that Lockhart would not assign another worker to assist Haro (Tr. 15). In reply, Haro was asking that the written company policy be enforced (Tr. 15, 16). Another question arises from the fact that Stonehouse himself "wasn't aware of any such policy" (Tr. 268). This may be the reason why Stonehouse was on the extension when Haro talked to Torres.

> Contention No. 4:
>
> Contrary to the language of the Order, the law does not hold that "[i]f a protected activity in part causes adverse action against a miner then a violation of the Act occurs." The petitioner's proof in a "mixed motive" case merely shifts burden to the respondent to articulate a ligitimate business necessity for his action.

The law of the case has been clearly articulated by the Commission in its order of remand, 4 FMSHRC 1935. The Commission has directed the judge to analyze respondent's legitimate business reasons. The analysis is made here, and for the reasons stated herein, I reject that defense.

> Contention No. 5:
>
> Mr. Haro was never "transferred", but he was re-assigned (e.g., Tr. 298). Transfers are shown on the personnel card, assignments to crews or working places are not.

The parties have agreed on the damages incurred by Haro. Whether the adverse action against Haro is called a "transfer" or a "reassignment" is of little consequence.

> Contention No. 6:
>
> The fact that Mr. Haro was never told that he was wrong in requesting assistance in cutting a B.O. car shows absence of respondent's animus toward a protected activity. The irritation of Mr. Cothern arose out of Haro's choosing to telephone off the property without having consulted Mr. Cothern as Mr. Torres told him to do. Haro's testi-mony that Stonehouse told him to make the call is in-

consistent with all his previous accounts of the event, as stated above.

The issues raised in this contention have already been thoroughly explored and found contrary to respondent's views. Respondent's animus is apparent. Complainant engaged in a protected activity. He was transferred for that activity.

Contention No. 7:

Mr. Cothern was an operations supervisor. Mr. Torres was a maintenance supervisor. Mr. Cothern can hardly be charged with knowledge of instructions given by supervisors in other departments. Furthermore, Cothern's instructions were consistent with those given by Torres: contact the highest responsible person on the job before calling off the property.

I disagree with respondent's initial statement. A management supervisor should have knowledge of a written company safety memorandum. Further, particularly in matters relating to safety, he should know how unsupervised workers handle safety complaints.

The second statement in contention No. 7 has already been discussed.

Contention No. 8:

The Order confuses Haro's reassignment from dump mechanic to maintenance mechanic (underground) to maintenance mechanic (surface). Mr. Zerga granted Mr. Haro's request for the latter reassignment because of the Helmer accident.

The parties have stipulated on Haro's damages. No purpose can be served by exploring this issue.

After considering the record and for the reasons stated herein I conclude that complainant's claim of discrimination arising from the B.O. car incident should be affirmed.

Stipulation Concerning Damages

The parties, by their respective counsel, in a written stipulation agreed that if a final order finding unlawful discrimination is to be issued an accurate computation of the amounts to which complainant would be entitled are as follows:

Back pay	$3,219.71
Interest	2,099.36
Attorney fees	5,644.52
Compromise of Special Damages	361.20

The figure entitled "compromise of special damages" arises from a dispute of whether an additional $722.40 is due complainant. The parties compromised their dispute on this point.

The stipulation concerning damages is in order and it is approved.

Based on the facts recited in this decision and on the conclusions of law herein I enter the following:

ORDER

1. Complainant's claim of discrimination concerning the B.O. railroad car is affirmed.

2. The employment record of William A. Haro is to be completely expunged of all comments and references involved in his refusal to remove and replace the B.O. railroad car.

3. Respondent is ordered to pay the following sum to complainant for the amounts indicated:

Back pay	$ 3,219.71
Interest	2,099.36
Attorney fees	5,644.52
Compromise of Special Damages	361.20
Total	$11,324.79

John J. Morris
Administrative Law Judge

Distribution:

Paul F. Tosca, Jr., Esq., 807 Pioneer Plaza
100 North Stone, Tucson, Arizona 85701 (Certified Mail)

N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills
1700 TowneHouse Tower, 100 West Clarendon
Phoenix, Arizona 85013 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 23 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 79-99-M A.C. No.30-00013-05003
v.	:	
CALLANAN INDUSTRIES, INC., Respondent	:	South Bethlehem Quarry and Mill

DECISION APPROVING SETTLEMENT

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Harry R. Hayes, Esq., Hayes & Lapitina, Albany, New York, for Respondent.

Before: Judge Melick

This case is before me on remand for reconsideration of a petition for assessment of civil penalty under Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement as to the one remaining citation and to dismiss the case. Respondent has agreed to pay the proposed penalty of $78 in full. I have considered the representations and documentation in the case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $78 within 30 days of this order.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, 1515 Broadway, New York, NY 10036 (Certified Mail)

Harry R. Hayes, Esq., Hayes & Lapitina, 111 Washington Avenue, Room 602, Albany, NY 12210 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 26 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 83-117 A. C. No. 15-06365-03504
v.	:	No. 1 Surface Mine
WEST VIRGINIA REBEL COAL COMPANY, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Steffey

Counsel for the Secretary of Labor filed on January 9, 1984, in the above-entitled proceeding a motion to withdraw the proposal for assessment of civil penalty and dismiss the proceeding or, in the alternative, a motion for approval of settlement. The alternative motions are accompanied by data showing that respondent paid in full the civil penalties totaling $120 proposed by MSHA for six alleged violations of the mandatory health and safety standards. Respondent paid the proposed penalties by a check dated March 31, 1983, which was just 17 days after the proposal for assessment of civil penalty was filed on March 14, 1983.

There was apparently a lack of communication between the personnel who paid the proposed penalties and the personnel who are responsible for the filing of answers to proposals for assessment of civil penalty because respondent failed to file an answer to the proposal for assessment of civil penalty until after the Chief Administrative Law Judge had issued a show-cause order on June 20, 1983, requiring respondent to file an answer or be held in default and be ordered to pay the penalties proposed by MSHA. Respondent filed on July 1, 1983, an answer in reply to the show-cause order. The answer denies that any violations occurred and requests that a hearing be held "on all said matters".

The Secretary's motion cites the Commission's decision in Mettiki Coal Corp., 3 FMSHRC 2277 (1981), in support of his request for permission to withdraw the proposal for assessment of civil penalty. In that interlocutory review case, the Commission held that granting a motion to withdraw a proposal for assessment of civil penalty was a satisfactory resolution of the controversy in circumstances showing that respondent had agreed to pay in full civil penalties totaling $10,000 for seven alleged violations and had withdrawn its notice of contest. The Commission also stated

in the Mettiki case that its ruling did not preclude a judge from denying a request to withdraw if "* * * the record discloses that resolution of the matter pending would best be served by the Commission's settlement procedures or by an evidentiary hearing. This situation is not presented in this case" (3 FMSHRC at 2277).

It does not appear that the Commission's settlement procedures would best serve the resolution of the issues in this proceeding either when it is considered that respondent paid in full the total penalties proposed by MSHA just 17 days after the proposal for assessment of civil penalty was filed. The Secretary's counsel commendably filed his motion in the alternative and provided ample reasons in support of his alternative motion for approval of settlement if I had found that approval of the parties' settlement agreement would provide the best method for resolution of the issues in this proceeding. Another reason for granting the motion to withdraw, instead of granting the alternative motion for approval of settlement, is that MSHA has already received the check for full payment of the proposed penalties so that there is no need for me to issue an order requiring respondent to pay the penalties proposed by MSHA.

In the circumstances described above, I find that the Secretary's motion for permission to withdraw the proposal for assessment of civil penalty should be granted.

WHEREFORE, it is ordered:

The motion for withdrawal of the proposal for assessment of civil penalty is granted, the proposal for assessment of civil penalty is deemed to have been withdrawn, and all further proceedings in Docket No. KENT 83-117 are dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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

Carl A. Tibbetts, Esq., Gardner, Moss, Brown & Rocovich, Suite Nine Hundred, First National Exchange Bank Building, 213 E. Jefferson Street, P. O. Box 13606, Roanoke, VA 24035 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 26 1984

ALBERT B. ZEISEL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 83-9-DM
v.	:	
	:	MD 82-80
ASARCO, INC., Respondent	:	

DECISION

Appearances: Ronald E. Gregson, Esq., Denver, Colorado, for Complainant;
Earl K. Madsen, Esq., Bradley, Campbell & Carney, Golden, Colorado, for Respondent.

Before: Judge Carlson

This case arose upon a complaint of discriminatory discharge filed by the complainant with the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act). The Secretary, after investigation, declined to prosecute the complaint. The complainant, Albert B. Zeisel, then brought this proceeding directly before this Commission as permitted under section 105(c)(3) of the Act.

Mr. Zeisel alleges that he was discharged in violation of section 105(c)(1) of the Act. 1/ The essence of his complaint

---

1/ Section 105(c)(1) provides:

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

is that he was discharged from his job as a motorman's helper by ASARCO, Inc. (ASARCO) after he protested that a jack he was using was unsafe. He seeks reinstatement, back pay and bonuses, and restoration of seniority.

Mr. Zeisel's original complaint, filed pro se, indicated that he had been compelled to use a jack which was not working properly, but the pleading contained no direct allegation that he had made a safety complaint to the operator. Thereafter, Mr. Zeisel secured counsel who at a formal pretrial hearing was permitted to amend the complaint by adding the following allegation:

> [D]uring the incident that led to the second warning notice the Complainant made a complaint directly to Mike Mosher, his shift boss, concerning the safety of the jack ... which he was using. (Prehearing transcript at 4 and 5).

A full hearing on the merits was held in Denver, Colorado, following which both parties submitted extensive briefs.

REVIEW OF THE EVIDENCE

There was little agreement between the parties as to most of the facts concerning complainant's firing. The undisputed evidence does show that Mr. Zeisel had worked in the operator's underground metal mine at Leadville, Colorado from September 1981 to his discharge on or about May 25, 1982. At the times material here, he was a motorman's helper. In that capacity he worked, successively, under three shift bosses: Dennis Vetrano, Glen Anderson, and Mike Mosher. On October 5, 1981, he received a warning notice from Vetrano (complainant's exhibit A). The notice specifies that he failed to follow orders and performed unsatisfactory work. Although the "explanation" portion of the notice simply notes "employee not doing job correctly," there was general agreement that Vetrano was dissatisfied with the speed with which Zeisel and fellow crewman were mucking a ditch.

The witnesses also agreed that a second warning was issued, this time by Mosher, on April 29, 1982, (respondent's exhibit 8), but there was disagreement about the particulars of the incident.

The parties did agree as to the nature of the event which led Mosher to issue a third and final notice on May 25, 1982. This event involved Zeisel's use of his finger to hold a latch on a hand-operated track jack which he and his motorman were using to

replace a derailed muck car on the track. Mosher observed the incident and issued a warning notice for "safety rule violation" and "unsafe work habits." This notice triggered a decision by higher management to discharge Zeisel.

Complainant insists that ASARCO ended his employment because he made a complaint to Mike Mosher that the jack he was using to put a derailed car back on the track was defective. He did this, according to his testimony, at the very time that Mosher was reprimanding him for using his finger to hold the malfunctioning latch. Beyond that, Zeisel testified that he had a reputation as a safe and effective worker, and that Mike Mosher had evidenced a dislike for him from the first day he reported for work on Mosher's crew. Finally, Zeisel maintained that Robert Russell, the mine superintendent, resented him because he had purchased a house from ASARCO which had been the house of Russell's boss, the unit manager.

Witnesses for ASARCO testified that the complainant was discharged because he had repeatedly engaged in unsafe practices and was not an effective worker. They also maintained that the firing occurred after a series of incidents for which formal warnings were given in accordance with established disciplinary procedures.

In resolving the evidentiary disagreements some review of the testimony relating to each incident is necessary. Mr. Zeisel acknowledged that his first shift boss, Vetrano, for whom he worked about three months, had once criticized him for failing to muck a ditch far enough or deep enough. Zeisel indicated that he never saw a written notice, nor signed one. The evidence does indicate, however, that Vetrano filed one with management on October 5, 1981 on which he checked boxes marked "failure to follow orders" and "unsatisfactory work", and upon which he also wrote "Employee not doing job correctly." (Complainant's exhibit A.)

Zeisel testified that he received another warning notice for allegedly mishandling a section of rail which he and motorman Mike Dunn were lifting. According to Zeisel, Dunn's hand slipped and he dropped the rail. Zeisel asserted that he got a warning slip from his then shift boss, Mike Mosher, although Dunn himself did

not consider the incident significant and "couldn't believe" Mosher had issued a warning slip. Leroy Allan Eversole, safety director for the ASARCO Leadville unit, was called by complainant as a witness. He testified that Dunn had indicated that the dropped rail was not a "big deal." The warning slip in question (complainant's exhibit B), issued on April 4, 1982, by Mosher, shows a checkmark before the phrase "unsatisfactory work," and contains this written explanation: "not doing job properly and being unsafe." Eversole testified that he was asked by Mosher at about this time how to spell Zeisel's name because he was "thinking about" giving Zeisel a warning slip because Zeisel had been "kind of unsafe." Mosher mentioned the dropped rail incident in this connection. According to Eversole, Mosher also mentioned that Zeisel "was not totally responsive as a helper." Mike Dunn, when called as witness for ASARCO, testified that he had complained to Mosher that Zeisel had let go of the rail, which led to Dunn's finger being "smashed," and that he may have told Mosher that Zeisel had jumped between moving cars on the track. Dunn testified that he asked Mosher that Zeisel be taken off the crew.

Mosher himself, in testifying for ASARCO, indicated that Dunn had asked him to transfer Zeisel because he was "too unsafe." Mosher said Dunn had told him of Zeisel's standing on the track while signaling Dunn to back up the motor. According to Mosher, the April 4, 1982 reprimand was for Zeisel's unsafe signaling practice as reported by Dunn, not the dropped rail incident, which he did not believe "serious." Mosher testified that he moved Dunn to a different crew because of his safety complaints about Zeisel (Transcript 207).

The crucial incident is that involving Zeisel's use of the jack. That episode triggered Zeisel's discharge and furnishes the basis for his complaint in this proceeding. The undisputed evidence shows that the track jacks used to replace derailed cars on the track sometimes malfunction because particles of muck or debris jam the latch mechanism which has to be pushed to allow the jack to be raised. When this occurred it was common for one miner to use a wrench (a buzzy) to depress the latch while another operated the handle which raised or lowered the jack. On or about May 25, 1982 Zeisel was working as helper for motorman Robush when a derailment took place. The two men used a jack to get the derailed cars back on the track. No one disputes that Zeisel used his finger, rather than a buzzy, to hold the jammed latch on the jack, and that Mosher saw him do it.

Zeisel insisted throughout his testimony that use of a finger to hold the latch was not uncommon. When pressed on the matter, he stated that he had seen Dunn use a finger on a latch once and Robush do so once. Zeisel also insisted that he had never been specifically instructed in the use of the jacks, but he learned through observing the motorman. Both motormen, in their own testimony declared the practice unsafe, and denied having ever used it.

Robush and Zeisel agreed that they alternated holding the latch and operating the iron bar used on the jack handle. Zeisel insisted that he used his finger because neither man had a buzzy to use instead. Robush contradicted this, claiming that he had a buzzy which he used, and which he offered to Zeisel. According to Robush, Zeisel used it for a while, but then used his finger, which he was doing when Mosher happened on the scene for a second time. The first time when Mosher came by, Robush asserted, he himself was holding the latch with his buzzy. Robush claimed that he had warned Zeisel not use his finger and was ignored. Zeisel denied that Robush said anything.

They agreed, however, that Mosher reprimanded Zeisel on the spot. Robush testified that Mosher warned that if the jack slipped it could cut off a finger. He also testified that he told Mosher the jack was not working properly, to which Mosher replied that the jack should be "bad ordered" and sent to the surface for repair. Zeisel agreed that Mosher warned him about using his finger, but denied that Robush told Mosher anything or that Mosher "bad ordered" the jack.

The testimony differs as to what, if anything, Zeisel said to Mosher that could be considered a safety complaint. Zeisel's own testimony on this matter was not wholly clear. Early in his direct testimony, this colloquy occurred:

> Q. Was it dangerous to use your finger?
>
> A. Not at all. I mean, you either use a buzzy or you use your finger in order to get that jack to work properly if its not working at all. (Tr. 20.)

Then following this testimony:

> Q. What did you say to Mike Mosher when he said it was unsafe?
>
> A. I said it wasn't unsafe, that the whole jack or the jack itself was not working properly and that it just wouldn't -- thats all we had to work with.
>
> xxx
>
> Q. Did he say he'd do anything about the jack being unsafe?
>
> A. I'm sorry?

Q. Did he say he'd do anything about the jack being unsafe?

A. He didn't say another word. He just walked off. (Tr. 22).

On cross examination of Zeisel, this testimony took place:

Q. You told him [Mosher] the jack was not working properly and what you were doing was really not unsafe?

A. Pushing it in, no. To my knowledge it isn't because its common practice. So I told him the jack was not working properly and this was how we had to to make it work. [Emphasis added]

Q. Did you say anything else to him?

A. Basically that was it. Just talking about the jack, just saying it wasn't working. And he just walked off. (Tr. 44).

Still later in the cross examination Zeisel insisted he told Mosher, specifically, the jack "was unsafe, it wasn't working right" (Tr. 46).

Under further cross examination, after being asked to review his affidavit given to an MSHA investigator, he appeared to retreat from that position:

A. Yeah, I told him the jack wasn't working properly.

Q. But there is no reference to your using the term safe or unsafe or safety?

A. Well, they go together if its not working properly.

Q. Thats in your opinion.

A. Its a fact, it seems like.

Q. But you didn't say that.

A. No, but if its not working properly .... (Tr. 49.)

Upon examination by the judge, complainant became more explicit:

Q. Now when you were describing the incident that apparently led to your discharge, you indicated, if I followed your testimony, that you and the motorman used your finger on the latch of the jack because you didn't have a buzzy. Now that implies to me that had you had a wrench you would have preferred to use that to your finger; is that right?

A. Well, its easier to use, yes sir.

Q. Is that the only reason you use it, 'cause its easier to use than your finger?

A. It would be, yeah.

Q. Not because its safer to use than your finger?

A. No. Using your finger could not get you hurt. (Emphasis added.) (Tr. 71-72).

Robush, who was called as a witness by complainant, agreed that Zeisel did complain about the jack to Mosher after being warned by Mosher about using his finger. Robush testified as follows:

Q. What, if anything, did Mr. Zeisel say to Mr. Mosher that you heard?

A. He told him that we had trouble with the jack from the very beginning.

Q. Anything else?

A. No. (Tr. 111).

Robush reiterated this recollection under questioning by the judge:

Q. I want you to think before you answer this question. Did Mr. Zeisel say anything to you or Mr. Mosher about the safety or lack of safety or anything concerning danger relative to the use of the jack? Did that subject come up in his conversation?

A. No, I don't believe so. (Tr. 122-123).

ASARCO officials who participated in the actual decision to terminate the complainant's employment testified at length for the company. Curtis A. Johnson, the unit manager for the Leadville unit, testified that he had the ultimate responsbility for firings. Johnson maintained that he made the decision to dismiss Zeisel after a consultation with Dave Russell, the mine superintendent. Beyond the circumstances which resulted in warning slips, Russell, he said, informed him that Zeisel was a "slow worker," and that other workers were "carrying some of his weight." The essence of Johnson's testimony was that complainant was discharged out of belief that the miner displayed unsafe work habits (although he had never had an accident), and for a general failure to perform his job properly. Johnson claimed to have no knowledge of any alleged safety complaint before the firing (Tr. 150).

Russell's testimony was in essential agreement with that of Johnson. He, too, denied any knowledge that Zeisel had made any sort of safety complaint about the jack (Tr. 228). In this regard, Russell indicated that he had discussed the two most recent warning slips with Ray Bond, the mine foreman, who in turn had talked to Mosher. Bond made no mention of any safety complaint from Zeisel.

Management's witnesses also suggested that the complainant's discharge was the natural consequence of his having received three formal warnings for work violations. Personnel records of other discharged miners were produced in an attempt to show that Zeisel's termination was consistent with an established company policy of discharge for cumulative warnings for on-the-job misconduct.

Management officials did not contend that the company had a specific rule forbidding using fingers on a sticking latch.

Basically, they contended that common sense barred such a practice. Further, unit manager Johnson believed that the practice was covered by a general provision in the company's safety rule book distributed to all employees. Rule 3 on page 1 of the book provides:

> No set of rules can more than outline a few safety procedures. Plan your work and do your work in conformity with these rules, but use good judgment. This book must be supplemented by common sense. (Respondent's exhibit 7 at 1).

All witnesses except Zeisel appeared to share a belief that use of a finger to depress a sticking latch was dangerous.

DISCUSSION

The burden of proof of an alleged discriminatee under the Act is set forth in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, (1980) rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981). In Pasula the Commission held that complainant must carry the initial burden of showing that he engaged in a protected activity and that the protected activity was a motivating factor in his discharge or some other discriminatory act.

Having carefully considered all the evidence and the arguments of the parties, I must conclude that the complainant in this proceeding failed to establish the initial element. No case for protected activity can be made out unless the complaining miner makes known his complaint to the mine operator. Put another way, an operator can scarcely be said to have discharged a miner for making a safety complaint it knew nothing about. In Dunmire v. Northern Coal Co., 4 FMSHRC 126 (1982), the Commission considered the minimum requirements of a health or safety complaint in connection with a work refusal. The resulting holding made clear that a communication is "ordinarily" essential. Exception may be found where no representative of the operator is present, where "exigent circumstance require swift reaction," or where an attempt to communicate would be futile. The Commission amplified this concept as follows:

> We stress that our purpose is promoting safety, and we will evaluate communication issues in a common sense, not legalistic manner. Simple brief communication will suffice, and the "communication" can involve speech, action, gesture, or tying in with others' comments. We are confident that the vast majority of miners are responsible and will communicate such concerns in any event. (Id. at 134.)

Complainant, of course, was not involved in a refusal to work. On the contrary, assuming that he did in fact feel the jack unsafe, he nevertheless proceeded to join Robush in its use. His complaint, if he made one, came only after he had been verbally reprimanded for using his finger on the latch. This does not mean, however, that he could not have voiced a perfectly valid complaint at the time of the reprimand. The most favorable part of his testimony is that in which he maintained that he told the shift boss that the jack was "unsafe." One can conceive of a situation where a miner, fearful for his livelihood and having already received two warning slips, might indulge in an unsafe act where he believed he was expected to do so in conformity with a common practice in the mine. Zeisel, it will be remembered, maintained the use of the finger on the track jack was common, and no one disputed his contention that the jacks were frequently jammed with muck particles.

My difficulty with his testimony begins at this point, however. Robush, whom Zeisel called as his own witness, emphatically denied that he ever used his own finger on the jack, as did Dunn, the other motorman, who testified at the behest of the operator. These two were the only miners whom Zeisel supposedly saw using their fingers. More important, the complainant, when closely examined on the matter, ultimately acknowledged that he recognized no safety problem in using his finger on the latch, and that his only statement to Mosher was that the jack "was not working properly." Ignoring Mosher's own testimony that Zeisel said nothing about the condition of the jack, and indeed did not speak at all, I must agree with the operator that a statement that the jack "was not working properly," if made, did not rise to the level of a cognizable safety complaint. I specifically reject complainant's argument that such words carried with them a reasonable connotation that the speaker was concerned about the safety of the jack. It is far more likely that Mosher, or any reasonable person, upon hearing such words, would have assumed that they were offered as a spur-of-the-moment excuse or justification for the miner's own breach of safety principles, not as a complaint of an unsafe condition inherent in a jack with a stuck latch.

In reaching this conclusion, I have not ignored the attempts of complainant's counsel, in his excellent brief, to place his client within the exceptions to the necessity for an explicit complaint as outlined in Dunmire. The facts simply do not fit those exceptions. A management representative was present and complainant had a clear opportunity to register a complaint. I find no credible evidence that Zeisel believed that the making of a complaint would have been futile or useless. On the contrary, at the hearing he maintained that he did make a complaint by declaring that the jack was not working properly.

Although I am convinced that Mr. Zeisel made no safety-related complaint, I should add that the credible evidence also demonstrates that no such complaints ever reached the unit manager (Johnson) or the mine superintendent (Russell), who together made the decision to terminate the complainant's employment. Thus, if Zeisel did declare to Mosher that the jack was not working and Mosher managed to construe this to mean that Zeisel had a concern over the safety of the device, there is no indication that Mosher ever communicated any of this to any higher management official, let alone to those who made the decision to fire.

Complainant seeks to show a management awareness of a complaint through the following testimony by mine superintendent Russell concerning his conversation with foreman Bond:

> We Discussed why someone would stick their finger in a jack when they're jacking the car up when they've

> got a buzzy and if there's muck in the jack why don't they get it out and make things safe. Well, not safe, but make the jack work, you know, if its jammed or whatever. (Tr. 228.)

This statement does not lead to a reasonable inference that Russell somehow knew that Zeisel had lodged a complaint about the safety of the jack. Taken in the context of Russell's full testimony, it stands for nothing more than a reflection of management's dismay over a miner's use of his finger on the latch mechanism. I should note that I find that the company's concern over the use of a finger on the jack was genuine. I also find that the practice was in fact hazardous.

Some mention should also be made of the significance of shift boss Mosher's "bad ordering" of the jack when he was told that it wasn't working properly. Complainant suggests that this action should be construed as an admission that using a jack with a jammed latch was unsafe per se. (Curiously, Zeisel himself denied that Mosher issued a "bad order" (Tr. 22)). The question thus raised is whether ASARCO recognized that a jack with a jammed latch was dangerous even when used with a buzzy.

Mosher maintained that it was ordinarily safe to use a buzzy. He pointed out that the car was already raised when he got there, and that he had no recourse but to allow the miners to finish. He acknowledged, however, that because of the location of the car in the incident in question, some possibility existed that a miner could be hurt even if using a buzzy, had the jack slipped. (Tr. 212-213). Superintendent Russell, on the other hand, testified to the general effect that use of the buzzy was an acceptable technique. Demonstrating with a jack, he endeavored to show that cars needed to be raised but a small distance to replace them on the track, and that if the jack slipped the car always fell to one side or the other, not toward the end where the jacking was done. He ultimately acknowledged, however, that it was safer to use a jack in good working order, than to use anything to hold the latch. (Tr. 217-219, 244-245.) On the whole, however, it is apparent that miners and management alike tended to believe use of a buzzy was acceptable and generally safe; otherwise the transcript would not be filled with unquestioning references to the use of buzzy on sticking latches. Use of a buzzy, that is to say, was not perceived as cheating on safety. In a mine where that state of mind prevailed it is doubtful that a suggestion that the jack was "not working properly" would be seen as a safety complaint. This is especially true where the suggestion came from a miner who - seemingly alone among mine personnel - believed it was safe to use his finger directly on the latch.

Complainant contends that ASARCO's stated reason's for the discharge must be discounted because the surrounding circumstances suggest that those reasons were a mere pretext for a retaliatory dismissal based on his making of a safety complaint. In support of this contention, complainant relies on Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), rev'd on other grounds, 709 F. 2d 86 (D.C. Cir. 1983). That case recognized that operators who are motivated to retaliate against miners for engaging in protected activity seldom leave a trail of direct evidence. Thus, the real motive for an adverse action may be proved by reasonable inferences drawn from such circumstances such as these: the operator's knowledge of protected activity; its hostility to the protected activity; a coincidence in time between the protected activity and the adverse action; and disparate treatment of the complaining miner and others whose alleged non-protected conduct was similar. Complainant insists that the evidence here mandates an inquiry into the areas outlined in Chacon. His brief then offers an extended analysis of evidence claimed favorable to the desired inferences.

The difficulty with complainant's position is manifest. The Chacon approach is of value only when some evidence, direct or circumstantial, establishes that protected activity took place. If such evidence is lacking, any Chacon analysis ends there. For the reasons previously discussed, I found that no credible evidence demonstrates that the miner conveyed to ASARCO any information, by word or conduct, which was or should have been understood as a safety complaint.

Some passing mention must also be made of complainant's assertion that he was the victim of an inexplicable animosity on the part of Mosher, who allegedly disliked him from the first day he reported to work under Mosher's supervision. Mosher denied any such attitude, and denied that he greeted complainant with obscenities on his first day on the crew. If Zeisel is believed, however, it adds no strength to his case. The complainant has a remedy under the Act only to the extent that his discharge was motivated by a complaint about safety. If Mosher indeed harbored an unjustified dislike of Ziesel, that fact may have furnished a discharge motive quite remote from any alleged safety complaint.

Similarily, if we are to accept complainant's view that mine superintendent Russell was somehow biased against him because he purchased a house from a unit manager for ASARCO, that fact, too, would at best furnish a separate motive for discharge.

To summarize, I find that the evidence shows that the complaining miner registered no safety-related complaint with the mine operator. I further find that his discharge was based solely upon a management perception that he tended to be an unsafe and otherwise unsatisfactory worker. I consequently conclude that the miner did not engage in protected activity under the Mine Safety and Health Act of 1977 and is therefore without a remedy under the Act.

ORDER

In accordance with the foregoing, this discrimination proceeding is ORDERED dismissed with prejudice.

John A. Carlson
Administrative Law Judge

Distribution:

Ronald E. Gregson, Esq.
910 16th Street, Suite 1125
Denver, Colorado 80202 (Certified Mail)

Earl K. Madsen, Esq., Bradley, Campbell & Carney
1717 Washington Avenue
Golden, Colorado 80401

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 30 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 82-305 A.C. No. 36-05018-03501
v.	:	
	:	Cumberland Mine
U. S. STEEL MINING CO., INC., Respondent	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., the "Act," for four violations of regulatory standards. The general issues before me are whether U.S. Steel Mining Company, Inc. (U.S. Steel), has violated the regulations as alleged and if so whether those violations are "significant and substantial" within the meaning of the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). If violations are found, it will also be necessary to determine the appropriate penalty to be assessed.

Citation No. 1146090 charges a violation of the standard at 30 C.F.R. § 75.503 and specifically alleges as follows: "[T]he S/S scoop battery tractor serial No. 486-1128 approval 2G operating in the 121 main west section was not maintained in permissible condition in that the battery covers were not secured."

The standard at 30 C.F.R. § 75.03 reads as follows: "[T]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

The Secretary argues that in order for the scoop tractor, which is admittedly electric face equipment, to be "permissible" within the meaning of the cited standard, it must comport with the construction and design requirements set forth in the standard at 30 C.F.R. § 18.44(c). Even assuming, arguendo, that those construction and design requirements are a prerequisite to permissibility, I do not find a violation herein. § 18.44(c) requires only that "battery-box covers shall be provided with a means for securing them in an enclosed position." Admittedly the battery box covers in this case were equipped with tabs and holes which clearly provided a means for securing those covers in a closed position. In addition to the tabs and holes, the covers were interlocking and were provided with lips that fit over the edge of the battery box.

Since the battery box covers in this case fully comported with the requirements of § 18.44(c), I cannot find that a violation has occurred. Citation No. 1146090 is accordingly vacated. If the Secretary indeed deems that battery box covers should be locked and secured at certain times for certain specified safety reasons, rulemaking procedures should be employed to provide an appropriate regulatory standard. The Administrative Law Judge cannot be used as a substitute for such rulemaking.

Citation 1146093 charges a violation of the standard at 30 C.F.R. § 75.606 and specifically alleges as follows: "The continuous miner trailing cable was under the left front tire of a parked Torkar shuttle car serial No. 4275 in the east main section [and] therefore was not adequately protected from damage by mobile equipment." The cited standard requires that "trailing cables be adequately protected to prevent damage by mobile equipment."

It is not disputed that the conditions cited by MSHA Inspector Clarence Moats in fact existed. The trailing cable for the continuous miner was in fact found under the left front tire of the cited shuttle car. Moreover there is no dispute that trailing cables can be damaged if run over by heavy mining equipment. The cable in this case had not been blocked or moved out of the roadway to protect it from being run over. In fact the cable had been lying in the roadway three feet from the left rib. Under

the circumstances, it is clear that the violation has been proven as charged. The evidence also shows however that the ground beneath the cable was soft, that the cable was not in fact damaged, and that there was no power in the cable at the time it was cited. Moreover it is undisputed that even if there had been internal damage to the cable, the circuit breaker would most likely have cut off power before injuries would occur.

A violation is "significant and substantial" if, "based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature." National Gypsum, supra. The evidence shows herein that the hazard contributed to by damaging trailing cables is electrical shock and electrocution. It is not disputed that these may lead to injuries which are reasonably serious. The evidence further shows that such electrical shock could occur if the cable is damaged in such a way that exposed wire would protrude outside the insulation and a miner picked it up with his hands. It is common for the cables to be moved by hand. Although the wire in this case was not found in such a condition, I find a reasonable likelihood that if the cited condition remained uncorrected, the wire would become exposed in the described manner and would result in an injury of a reasonably serious nature. Under the circumstances I conclude that the violation was "significant and substantial" and constituted a serious hazard. Secretary v. Mathies Coal Co., 6 FMSHRC _____ (January 6, 1984). I observe that the operator had three previous similar violations and another similar violation the same day. This pattern shows a careless disregard on the part of management in preventing violations of this nature. Accordingly, I also find the operator to have been negligent. The violation was abated in a timely manner.

Citation No. 1146094 was issued five minutes after the above citation for another violation of the same standard, i.e. 30 C.F.R. § 75.606. In this case, the shuttle car located in the belt entry of the east main section was parked on top of its own trailing cable. The unchallenged evidence shows that the trailing cable was lying beneath the left rear tire of the shuttle car approximately five feet from the rib. The cable had not been anchored to keep it out of the roadway and protect it from being run over. The remaining facts are the same as existed in connection with the previous citation, noted above. Under the circumstances, I find that the violation has been proven as charged. I further find that the violation was "significant and substantial" and serious for the reasons already set forth in regard to the prior citation. Because of the pattern of previous violations of

a similar nature, I find that the violation herein was the result of a careless disregard for compliance with this standard. The violation was abated in a timely manner.

Citation No. 990131 issued May 4, 1982, charges a violation of the standard at 30 C.F.R. § 70.100(a) alleging more particularly that the "average concentration of respirable dust based on results of five samples submitted by the operator in the working environment of designated occupation 044 for MMU012-0 was 2.4 milligrams per cubic meter exceeding the dust standard of 2.0 milligrams per cubic meter for this work unit."

The cited standard reads as follows: "Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations)." Respondent does not dispute the existence of the violation as charged but claims that the violation was not "significant and substantial" within the meaning of the National Gypsum decision.

The evidence shows that the respirable dust samples were taken from the longwall tailgate operators as required by MSHA. The sampling device is placed upon the miners in this occupation because it is expected that they will be the ones exposed to the highest concentrations of respirable dust. The Secretary argues that based upon the British studies in evidence (Ex. P-1), and the testimony of Thomas K. Hodous, M.D., a Board-certified expert in internal and pulmonary medicine (Ex.P-2), nearly 1% of the miners exposed over a 35 year working period to an average concentration of 2.4 milligrams per cubic meter of respirable dust will develop Category 2/1 simple pneumoconiosis or greater if they had begun working with normal Category 0/0 X-rays.[1]

It is not disputed that pneumoconiosis is a disease of a reasonably serious nature. The issue as presented is whether, based upon the particular facts surrounding this violation there

[1]The International Labor Organization classifies X-ray evidence of simple pneumoconiosis based on the profusion of dots appearing on the lung films. There are four major categories from 0 to 3, each further subdivided into three categores, 0 to 2. Category 0 would be a normal film and Category 3 would indicate a high profusion of dots suggestive of a severe disease process.

exists a reasonable likelihood that the hazard contributed to will result in pneumoconiosis or massive fibrosis. National Gypsum, supra. In Secretary v. United States Steel Mining Company, Inc., 5 FMSHRC _____, Docket No. WEVA 83-31 (January 30, 1984), I found on the particular facts of that case that such a reasonable likelihood existed. In that case, five respirable dust samples taken on three consecutive days in the cited bimonthly sampling cycle from the longwall tailgate operators showed an average exposure of 3.6 milligrams of respirable dust per cubic meter. Based on the same British studies cited in this case, Dr. Hodous projected that up to 2.4 per cent of miners starting with normal Category 0/0 X-rays exposed over a 35 year working period to that concentration of respirable dust would develop Category 2/1 or greater pneumoconiosis. The evidence in that case also showed that from the 197 samples taken from that occupation over a period of three and one half years, there was an average concentration of respirable dust of 3.12 milligrams per cubic meter. In addition, in that case the cited longwall unit had been consistently unable to meet the 2.0 milligram per cubic meter standard during its entire history of operation. It was considered to be technologically infeasible to operate that unit consistently within compliance of the standard. There was moreover insufficient evidence in that case to show whether the high risk tailgate operators were regularly wearing personal protective equipment which would have reduced their actual exposure to respirable dust.

The evidence in this case shows that the Cumberland Mine began its longwall operations in February 1980. During 1980, of the 118 valid samples taken from the cited occupation, the longwall tailgate operator, the average concentration of respirable dust was 1.828 milligrams per cubic meter. The mine operator was in violation of the cited standard only once during the year. Twenty-nine valid samples taken in 1981 showed an average respirable dust concentration of 1.605 milligrams per cubic meter. In 1982, there were forty valid samples taken with an average concentration of 2.02 milligrams per cubic meter. The mine operator was apparently out of compliance with the standard once that year. To the date of hearing in 1983, ten samples had been taken showing an average concentration of respirable dust of only 1.30 milligrams per cubic meter.

According to longwall miner Gregory King, called as the Secretary's witness, the high risk occupations at the longwall (those exposed to the highest concentrations of respirable dust, namely the headgate and tailgate operators) customarily wore personal respiratory protection (either Airstream helmets or Dustfoe 8.8 respirators) about 20% of the time and usually during periods

of heaviest dust concentration. In accordance with the stipulation of the parties, if properly worn, the respirators would correspondingly reduce the amount of dust inhaled by 20%, representing the time the miners were wearing such protection. It may reasonably be inferred from this evidence that the actual respirable dust inhaled by the tailgate operators, the cited occupation, was about 20% less than the reported concentrations.

The evidence in this case thus shows that the longwall tailgate operators at the Cumberland Mine have in the past only rarely been exposed to respirable dust concentrations above the 2.0 milligram per cubic meter standard. There is also a clear record at the mine of progressively decreasing concentrations of respirable dust as new dust suppression measures have been taken. No violations of the dust standard have been found since 1982 and the average concentration of respirable dust since then has been below the proscribed level. It may therefore reasonably be inferred that the longwall tailgate operators will continue to be exposed to dust concentrations below the proscribed level and that they will continue to use respirators at least part time. Within this framework, I find that the assumptions necessary to the risk determination made by Dr. Hodous and based upon the cited British studies cannot reasonably be inferred in this case.

Accordingly, on the facts of this particular case, I do not find that the cited violation is "significant and substantial" nor of high gravity. Inasmuch as the Respondent had been, prior to the issuance of the citation at bar, operating its longwall unit generally in compliance with the 2.0 milligrams per cubic meter standard and followed no independent testing procedures, I do not find it was negligent in exceeding the prescribed dust levels in this instance.

In determining the appropriate penalties to be assessed in this case, I am also considering the evidence that the operator has continued to cooperate with the Bureau of Mines in developing new dust control techniques at its Cumberland Mine, that it has furnished personal protective equipment to each of its mining crews, and has since the date of this violation, maintained relatively low respirable dust levels. I also note that the operator is large in size and has a moderate history of violations.

ORDER

The U.S. Steel Mining Company, Inc., is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 1146090 (vacated)	
Citation No. 1146093	$125
Citation No. 1146094	125
Citation No. 9901311	75

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., United States Steel Corporation 600 Grant Street, Pittsburgh, PA 15230 (Certified Mail)

Arthur E. Guty, Sr., Chairman, Safety Committee, Local 2300, United Mine Workers of America, 341 Derrick Avenue, Uniontown, PA 15401 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 30 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 82-13-M A.C. No. 04-00010-05028 A
v.	:	Crestmore Mine
ROBERT A. RIEDMAN, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Enos C. Reid, Esq., Reid, Babbage & Coil, Riverside, California, for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks a civil penalty against respondent, Robert A. Riedman, (Riedman), for violation of section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. 1/

Riedman, as mine production supervisor of the Crestmore Mine for the Riverside Cement Company, Riverside, California, is alleged to have "knowingly authorized, ordered, or carried out" the alleged violation of 30 C.F.R. § 57.15-5 cited in MSHA withdrawal order No. 375785 issued November 1, 1979 pursuant to section 107(a) of the Act. The cited regulation requires that safety belts and lines shall be worn when men work where there is danger of falling; and a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered. The

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

withdrawal order alleged as follows:

> A serious accident occurred at the Crestmore Mine when an employee entered the feed hopper at the dynapactor (crusher) to free a bridged material hangup. The bridged material broke through dropping the employee onto the pan feeder and loose material from above came down covering the employee. Safety belts, lines and a person in attendance on the line were not being used in this dangerous location.

Riedman denied the allegation. After notice to the parties, a hearing on the merits was held in Riverside, California.

FINDINGS OF FACT

1. On November 1, 1979, Riverside Cement Company was the corporate operator of the Crestmore Mine near Riverside, California. Robert A. Riedman was the mine production foreman.

2. Both Riverside Cement Company and Riedman are subject to the Federal Mine Safety and Health Act of 1977 (Transcript at 5 and 6).

3. The Crestmore Mine is an underground mine whose principal product is limestone for cement.

4. Riverside Cement Company paid a penalty assessment of $5,000 for the violation of C.F.R. § 57.15-5 alleged in withdrawal order No. 375785, issued November 1, 1979 (Exhs. P-3 and P-7).

5. The violation alleged in order No. 375785 was abated promptly and in good faith by the corporate operator (Exhs. P-6A and 6B).

6. On October 30, 1979, Richard Trombi, crusher operator, was injured while trying to free bridged material in the feed hopper at the dynapactor crusher. The crusher is a part of the underground mining process. Ore is hauled by trucks to where the crusher is located and dumped into a hopper. A pan feeder in the bottom of the hopper feeds the material into the dynapactor crusher (Tr. at 26-27 and Exh. P-5).

7. The hopper is a cone shaped bin, approximately 5 by 15 feet wide at the top, 20 feet deep, and narrowing to 5 by 11 feet at the bottom. Material unloaded in the hopper sometimes becomes lodged in the hopper and will not drop onto the pan feeder at the bottom (Exhs. P-5 and R-1).

8. On the day of the accident, Trombi and Cliff Palmer climbed into the hopper with two sticks of dynamite intending to set it off to dislodge some material that had become bridged in

the bin. The two miners were standing on the material to place the dynamite when the material broke away and caused Trombi to fall approximately three to five feet onto the pan feeder at the bottom. Also, material above Trombi fell on top of him.

9. Palmer had been holding onto a rope tied to the top of the hopper and used for entering and climbing out of the hopper. He was able to avoid dropping to the bottom of the hopper or being struck by the material (Tr. at 34 and Exhs. P-5 and R-1).

10. Trombi suffered back injuries, cuts to his nose and mouth, and abrasions over other parts of his body (Tr. at 35).

11. At the time the accident occurred, Riedman, the corporate operator's agent and mine production foreman, was standing on a catwalk along the side of the hopper. Riedman was supervising the work of Trombi and Palmer in the hopper (Tr. at 56-57 and Exh. R-1).

12. Riedman earns an annual salary of $34,000 (Tr. at 60).

ISSUES

1. On October 30, 1979, did the corporate operator fail to provide and require its employees to wear safety belts and lines when entering the hopper; or have a second person tend the safety line in violation of § 57.15-5 as alleged in the withdrawal order?

2. If so, did Riedman knowingly authorize, order, or carry out such violation within the meaning of section 110(c) of the Act?

DISCUSSION

The facts in this case are not in dispute. Richard Trombi and Cliff Palmer, employees of the corporate operator, under the direct supervision of respondent Robert A. Riedman, climbed into a hopper bin to blast loose rock that had become bridged across the bottom of the bin and prevented the remaining rock from being fed into the crusher.

In this case, rock had become bridged across the bottom of the bin and piled up along the side. Trombi and Palmer climbed into the bin and stood upon some of the rock located approximately half way down the side of the bin. They intended to use dynamite to blast loose the bridged rock. Trombi had just bent over to place the dynamite in the rock when the rock broke loose causing Trombi to fall to the bottom of the bin and other rock above to fall down on top of him. Palmer was holding on-to a rope that was tied to the top of the bin which was used to climb in and out of

the bin and was able to pull himself free from the falling rock. Neither miner was wearing a safety belt or was attached to a life line tended by a second person (Exhs. P-1 and R-1). Respondent Riedman was standing on a catwalk along side the bin at the time the accident occurred, supervising the work being done there by Trombi and Palmer (Tr. at 57).

I find that the above facts show a violation of mandatory safety standard 30 C.F.R. § 57.15-5 which provides as follows:

> Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

There can be no dispute that the hopper bin in this case should be considered a dangerous area. The actual occurrence of Trombi's fall and the resulting injuries best depict what the standard is designed to prevent.

The only defense presented by respondent Riedman for allowing these miners to enter the bin without safety belts or lines is that he thought it was safer. Riedman testified that the rock was located on the side of the hopper where the catwalk is located and the only place where the safety belt could be tied or tended. If the miners were wearing safety belts, when the rock fell, the miners would have been pulled into it and buried alive (Tr. at 56).

I reject this argument as being unrealistic. First, Palmer was able to escape by holding onto the rope that was tied to the top and used for climbing in and out of the bin. If the location of the catwalk was a problem, then other means to handle the task were required. No explanation can justify the action of management in this case.

The Commission in Secretary of Labor v. Kenny Richardson, 3 FMSHRC (1981), Richardson v. Secretary of Labor, 609 F. 2d 632 (1982), review denied, held section 110(c) of the Act to be constitutional and enunciated the critical elements which constitute a violation of this section. The corporate operator must first be found to have violated the Act. Further, if a person, such as supervisor, is in a position to protect an employee's safety and health and fails to act on the basis of information or knowledge or the reason to know of the existence of a violative act, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

As to the first element in the Richardson case, supra, the facts show in this case that the Secretary proposed the assessment of a $5,000.00 penalty against the corporate operator Riverside

Cement Company, for violation of § 57.15-5 as stated in order No. 375785. The corporate operator paid the penalty in full (Ex. P-7). Payment of a penalty, whether the full amount of the proposed assessment or a compromised amount, constitutes an admission by the corporate operator that the conditions alleged in the citations existed and were violations of the respective health and safety standards listed therein as a matter of law. Ranger Fuel Corporation, Docket Nos. WEVA 80-56-R, 80-57-R and 80-58-R, (February 10, 1981)(ALJ). Eastern Associated Coal Corp. v. Secretary, Docket No. WEVA 80-120-R, (May 20, 1980); The Valley Camp Coal Company, 1 IBMA 196, 204 (1972).

As to the second element described above, respondent Riedman's liability under section 110(c) of the Act for the action of Trombi and Palmer turns on whether he knowingly authorized, ordered, or carried out such violation. There can be no question that he did all three of the above for as the direct and immediate supervisor of these two employees, he was present on the catwalk along side the bin when Trombi and Palmer entered it without safety belts or lines. There can be no valid argument in defense of Riedman's actions in this case. It must be obvious from the precarious position of the two miners in the bin that an accident was possible endangering their health and safety.

PENALTY

The Secretary originally proposed a penalty of $500.00 in this case. At the hearing, he proposed that the penalty be raised to $700.00. I find that the facts in this case show beyond a doubt that Riedman was negligent in allowing Trombi and Palmer to enter the bin without safety belts or lines. The only evidence presented to explain the basis for such actions was Riedman's opinion that such equipment posed a greater danger than not using them. The argument is not accepted as reasonable. If the acts posed this kind of danger, other means were required to accomplish the task.

The gravity of the action on the part of Riedman is serious as the resultant injuries to Trombi were severe and the possibility of death was present.

Riedman was asked at the hearing by his counsel if the payment of a $700.00 penalty would cause a financial hardship? Riedman replied: "It won't help any". Riedman earned $34,000.00 annually at the time of his testimony in this case (Tr. at 58, 60).

I find that the original penalty of $500.00 is appropriate in this case.

CONCLUSIONS

1. The corporate operator, Riverside Cement Company, and Robert A. Riedman, mine production foreman, are subject to the Act and jurisdiction of the Administrative Law Judge in this case.

2. Riverside Cement Company is a corporation and on October 1, 1979, violated 30 C.F.R. § 57.15-5 as alleged in withdrawal order No. 375785 in failing to require safety belts and lines tended by a second person for miners entering bins, tanks, or other dangerous areas.

3. Respondent Robert A. Riedman violated section 110(c) of the Act in knowingly authorizing, ordering and carrying out the violation alleged in withdrawal order No. 375785.

ORDER

The respondent Robert A. Riedman is found to have violated section 110(c) of the Act and is ORDERED to pay a penalty of $500.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor
U.S. Department of Labor, 4015 Wilson Boulevard,
Arlington, Virginia 22203

Enos C. Reid, Esq., Reid, Babbage & Coil
P.O. Box 1300, Riverside, California 92502

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 30 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-31
v.	:	A.C. No. 46-01816-03504
	:	Gary No. 50 Mine
UNITED STATES STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for two violations of regulatory standards. At hearing, Petitioner requested to modify the pleadings by withdrawing Citation No. 2029554 from the case on the grounds that the citation had been vacated before the request for hearing had been filed. Under the circumstances, the Petitioner's request to withdraw the citation is granted. Commission Rule 11, 29 C.F.R. § 2700.11.

The remaining citation at issue, Citation No. 9914230, charges a violation of the mandatory standard at 30 C.F.R § 70.100(a). Since the Respondent concedes the existence of the violation as charged, the only issues before me are whether the violation was "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), and the appropriate penalty to be assessed. The citation alleges that "[b]ased on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 028-0 was 3.6 milligrams [per cubic meter] which exceeded the applicable limit [set forth in 30 C.F.R. § 70.100(a)] of 2.0 milligrams [per cubic meter]."

Under the National Gypsum test, "a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." The Secretary contends that there is a reasonable likelihood that exposure to high concentrations of respirable coal dust will result in pneumoconiosis, massive fibrosis, emphysema, stomach cancer, and chronic bronchitis. It is not disputed that these are illnesses of a reasonably serious nature.

Respirable dust samples taken on three consecutive days in the July/August 1981 bi-monthly sampling cycle from the longwall tailgate operator at the Gary No. 50 Mine show an average exposure of 3.6 milligrams of respirable dust per cubic meter. In addition the 197 samples taken from that same designated occupation over a period of 3-1/2 years (August 14, 1979 to March 7, 1983), show an average exposure of 3.12 milligrams of respirable dust per cubic meter. It is conceded that the cited longwall unit has been unable to consistently meet the 2 milligram per cubic meter standard set forth in the regulations and it is considered by both parties to be technologically infeasible to operate that unit consistently within compliance of the standard.[1]

According to Thomas K. Hodous, M.D., a board certified expert in internal and pulmonary medicine, evidence exists that demonstrates that continued exposure of coal miners to respirable coal dust increases the risk for at least five disease processes; namely stomach cancer, emphysema, chronic bronchitis, pneumoconiosis and massive fibrosis. While mortality studies have shown an increased incidence of stomach cancer in coal miners, Dr. Hodous

[1] In light of this evidence one must wonder why this longwall unit had not long ago been closed down by MSHA under available statutory procedures. See e.g. §§ 104(b), 104(d) and 104(e) of the Act. When asked at hearing why closure orders had not been effectuated (even after two years of noncompliance) the MSHA witness could only respond "That was what I didn't want you to ask." While MSHA urges in this case a finding that the dust violations are "significant and substantial" the only real significance of such a finding is its effect on triggering withdrawal order sequences under sections 104(d) and 104(e) of the Act. The finding is accordingly of little value unless MSHA is willing to enforce closure procedures--a willingness it has not so far shown.

acknowledged that the relationship between exposure to respirable dust and stomach cancer is yet unproven. In addition, while pathological evidence of "rather marked emphysema" among coal miners also exists, the relationship between dust exposure and this disease has similarly not been conclusively established. Dr. Hodous opined, however, that there is sufficient evidence to support the view that miners with individual susceptibilities have a higher risk of suffering stomach cancer and emphysema as a result of exposure to coal dust.

According to Dr. Hodous, chronic bronchitis can also result from dust exposure including exposure to non-respirable dust i.e. dust particles larger than 5 microns in size. According to the studies cited by Dr. Hodous, coal miners may suffer chronic bronchitis in a matter of 24 months. The disease leads to coughing and phlegm production and in some cases increased pulmonary infection. In severe cases, cough syncopy may develop wherein the cough is so severe that the individual may faint.

The fourth illness described by Dr. Hodous as resulting from exposure to respirable coal dust is coal workers pneumoconiosis. More specifically, pneumoconiosis is a lung disease caused by the deposition of respirable coal dust on the lung and the body's reaction to it. Exposure to respirable dust over a period of years results in the accumulation of coal particles into what are called macules surrounding the spots of coal in the terminal airways and the air sacs of the lung. Continuous exposure to coal dust may cause the condition to spread and involve most parts of the lung. The condition may worsen to progressive massive fibrosis involving the destruction of alveoli and distortion of the remaining lung tissues. While simple coal workers pneumoconiosis is usually asymptomatic, progessive massive fibrosis or complicated coal workers pneumoconiosis ordinarly causes shortness of breath and cough. It can also cause severe pulmonary impairment and early death. There is no known treatment which can reverse the disease process of these impairments. However, in the case of simple pneumoconiosis, removing the afflicted person from the offending exposure will prevent further progression. In the case of massive fibrosis, however, lung deterioration may continue without continued exposure to coal dust.

According to Dr. Hodous, several studies from British pneumoconiosis field research correlate the degree of exposure experienced by coal miners with the probability of contracting pneumoconiosis. The first is a study entitled "The Relation Between Pneumoconiosis and Dust Exposure in British Coal Mines" authored by Jacobsen, Rae, Walton and Rogan, (Exhibit G-6). The second is a follow-up study

entitled "Coal Worker's Simple Pneumoconiosis and Exposure to Coal Dust at Ten British Coal Mines" published in 1982, by the British Journal of Industrial Medicine (Exhibit G-8). From these studies a graph was developed depicting the probabilities of developing Category 2/1 or higher pneumoconiosis after exposure to various mean dust concentrations over an average working lifetime of 35 years. [2] The studies have shown that 15 percent of the miners who have contracted 2/1 pneumoconiosis can also be expected to develop progressive massive fibrosis over the subsequent 10 years. Based on these studies, Dr. Hodous calculated that among healthy miners exposed over a working lifetime to the dust levels evidenced in this case 1.7 percent to 2.4 percent will develop Category 2/1 or greater pneumoconiosis. As previously noted, a miner with 2/1 pneumoconiosis with continuing dust exposure has a greatly increased risk of developing progressive massive fibrosis, a disease that can result in severe pulmonary impairment and early death.

Respondent challenges the probability assessment in this case on the grounds that it is based upon unreliable data in the cited British studies. There is no evidentiary basis, however, for the challenged reliability. It is no more than a bald unsupported allegation. Moreover the expert testimony of Dr. Hodous affirmatively corroborates the reliability of the studies. Respondent also argues that Dr. Hodous' conclusions are based on invalid assumptions regarding future work experience of miners in the Gary No. 50 Mine. While the specific longwall mining unit cited in this case may not be in continuous operation and may not continuously expose the same miners to the same excessive levels of respirable dust evidenced in this case, I find that the evidence is sufficient from which probability estimates may reasonably be inferred for the limited purpose of determining whether or not the cited over-exposure is "significant and substantial."

Finally, Respondent argues that Dr. Hodous' projections do not take into consideration that 50 percent of the miners at the cited mine were wearing personal protective equipment. Even assuming, however, that this representation was correct and that the alleged protective equipment brought actual exposure levels to the prescribed limits, it is apparent that the remaining 50 percent of the miners

[2] The International Labor Organization classifies x-ray evidence of simple pneumoconiosis based on the profusion of dots appearing on the lung films. There are four major categories from 0 to 3 each further subdivided into three categories 0 to 2. Category 0 would be a normal film and Category 3 would show a high profusion of dots indicating a severe disease process.

were nevertheless unprotected. More particularly there is no evidence that the miners in the cited high risk occupation wore such protective equipment.

Accordingly I am satisfied that under the particular facts surrounding the violation cited in this case, including a long history of over-exposure to respirable dust and the expectation of future over-exposures in conjunction with the studies demonstrating a correlation between long term exposure to respirable dust and pneumoconiosis, I find that there does indeed exist a reasonable likelihood that the cited exposures in this case significantly and substantially contribute to the reasonably serious illness coal worker's pneumoconiosis. The uncontested testimony of Dr. Hodous that continuing coal dust exposure increases the risk of chronic bronchitis and, for susceptible individuals, of emphysema and stomach cancer also supports the inference that it is reasonably likely that the cited exposure significantly and substantially contributes to these reasonably serious illnesses. The violation herein is accordingly "significant and substantial." within the meaning of the National Gypsum decision. See also Secretary v. Consolidation Coal Co., 5 FMSHRC 378 (1983), (Judge Broderick) pet. for review granted April, 1983; and Secretary v. U.S. Steel Mining Co., 5 FMSHRC 46 (1983) (Judge Kennedy).

In determining the amount of penalty to be assessed in this case, I consider that the violation was serious as demonstrated by the above discussion. Based on the long history of excessive dust levels in this section of the Gary No. 50 Mine, and the inability of the Respondent to operate the cited longwall unit in continuous compliance with the respirable dust standard, I must find that the Respondent fully expected to operate in violation of that standard. At the same time, I recognize that the Respondent has been working with MSHA technical support staff and has been making extraordinary efforts at some expense to bring this and other longwall units into compliance with the regulation. The Respondent has also, in recognition of its inability to bring the longwall unit into compliance, furnished personal protective equipment for the mining crew. Under all the circumstances, I find that a penalty of $250 is appropriate.

ORDER

The U.S. Steel Mining Company, Inc., is hereby ordered to pay a civil penalty of $250 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Pittsburgh, PA 15230 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JAN 31 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 80-111-M
	:	A.C. No. 05-03431-05001
v.	:	
	:	Alcott Pit
	:	
	:	Docket No. WEST 81-295-M
SOUTHWAY CONSTRUCTION COMPANY, INC., Respondent	:	A.C. No. 05-03586-05001 BY2
	:	Sargents Pit

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
J. O. Lewis, Esq., Alamosa, Colorado, for Respondent.

Before: Judge Carlson

These two cases, consolidated for hearing, arose out of inspection of respondent's gravel pits and crushing operations. The cases were heard at Pueblo, Colorado, under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The Secretary seeks civil penalties for seven alleged violations of safety standards promulgated under the Act.

The parties waived the filing of post-hearing briefs.

ISSUES

The questions to be decided are:

(1) Whether respondent's operation constituted "mining" within the contemplation of the Act.

(2) Whether respondent's operation affected commerce within the contemplation of the Act.

(3) If respondent was covered by the Act, whether it committed the violations alleged, and if so what civil penalties are appropriate.

THE MINING ISSUE

All testimony in this case was provided by two federal inspectors.[1/] Counsel for Southway Construction Company, Inc. (Southway) called no witnesses, and was content to cross examine the inspectors. The undisputed evidence showed that respondent, at the times of inspections, was extracting river rock and gravel from natural deposits forming a bench along a stream bed. The river rock, in formation, was sufficiently loose to be removed directly by the buckets or scoops of front-end loaders. The product was screened on the site to separate small, gravel-size rock, which needed no further processing, from larger stones which required crushing to make aggregate.

Section 3(h)(1) defines a "coal or other mine" as "an area of land from which minerals are extracted in non-liquid form ...." This definition must be given a broad reading. Cyprus Industrial Minerals Corporation, 3 FMSHRC 1 (1981). Sand and gravel pit operations clearly fall within the definition. Marshall v. Wallock Concrete Products, Inc., (U.S. District Court for the District of New Mexico), 1 MSHC 2237 (1980); B & N Construction, Inc., 3 FMSHRC 427 (1981) (ALJ).

I therefore hold that the Southway operation was a "mine" within the meaning of the Act.

THE COMMERCE ISSUE

Southway denied that it was engaged in an enterprise affecting commerce, and put the government to its proofs upon that issue. The government undertook to supply those proofs by showing that Southway provided crushed rock or aggregate to the Colorado State Highway Commission for use in highway construction; that Southway used equipment manufactured outside the State of Colorado; and that Southway used the telephone, an instrument of interstate commerce, in the conduct of its business.

The Act covers all mines "the products of which enter commerce or the operations or products of which affect commerce." 80 U.S.C. § 803. This language gives the widest jurisdiction obtainable under the commerce clause of the Constitution. Brennan v. OSHRC, 492 F.2d 1027 (2d Cir. 1974).

1/ The transcript of the evidentiary hearing was of lamentable quality. Despite the frequent errors, the substance of the testimony was preserved and neither party sought corrections. Therefore no correcting orders are entered.

Inspector Leo Garcia inspected the Southway's Alcott pit on June 28, 1979. The aggregate produced at the site, he testified, was being trucked to the City of Delta, Colorado, for use in a street resurfacing project.

The evidence shows that Southway closed down its Alcott operation shortly after Garcia's inspection and moved to a location known as the Sargents pit. Inspector Porfy Tafoya inspected that location with another MSHA inspector on September 4, 1979. This site was also adjacent to a waterway. Tafoya testified that the foreman acknowledged that Southway was crushing aggregate for the Colorado Highway Department. He further testified that the Highway Department had representatives at the site and that he observed the aggregate being hauled away in Highway Department trucks. None of this evidence was challenged.

It has long been clear that even businesses which sell their product within a single state fall within the broadest application of the commerce power. This is so because of the cumulative impact of small producers upon interstate transactions. Wickard v. Filburn, 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542 (1974). Respondent's affect on commerce is doubly clear in this case because its aggregate product was used in the construction of public roads and highways which play an inevitable part in interstate transportation, B.L. Anderson, Inc., 3 FMSHRC 1019 (1981) (ALJ), aff'd. sub nom B.L. Anderson, Inc. v. FMSHRC, 668 F.2d 442 (1982); John Petersen, d/b/a Tide Creek Rock Products, 4 FMSHRC 2241, 2247 (1982) (ALJ).

Moreover, Inspector Tafoya testified that he ascertained that several of the pieces of heavy mobile equipment used in the pit were manufactured outside of Colorado. His knowledge was based upon up-to-date listings maintained by MSHA in connection with its licensing and approval of mining equipment. Familiarity with such information, he indicated, was essential to the performance of his duties. Under such circumstances the information is inherently credible, and not subject to exclusion under the hearsay rule as respondent contends. Use of equipment which has moved in interstate commerce affects commerce within the meaning of the Act. Avalotis Painting Company, 9 OSHA 1226 (1981); United States v. Dye Construction Company, 510 F.2d 78 (10th Cir. 1975).

The Secretary also attempted to show that Southway used a telephone in the conduct of its business, a further indication of commerce. That issue is not further examined here since other evidence plainly shows that the Southway enterprise "affected commerce."

THE VIOLATIONS

Docket No. WEST 80-111-M (The Alcott Pit)

Citation 327198

At the Alcott Pit, Inspector Garcia saw several oxygen cylinders on the floor of the pit. The cylinders, he testified, were upright and unsecured by straps or wires. Gauges showed the cylinders to be full. He cited this condition as a violation of the safety standard cited at 30 C.F.R. § 56.16-5 which provides:

> Compressed and liquid gas cylinders shall be secured in a safe manner.

The inspector indicated that the nearest employee, approximately 15 feet away, was operating a crusher. Immediately upon citation, Southway moved the cylinders up against a trailer, and secured them. The danger presented by unsecured cylinders, the inspector stated, was that if they were accidently tipped or turned over, the gauges could break, creating a possibility of ignition, or the cylinders themselves could "shoot out," propelled by the liberated gasses.

These facts, all undisputed, clearly establish a violation of the cited standard.

The inspector, in his citation, classified the violation as "significant and substantial." That statutory term was defined in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981), where the Commission held that it applied to those violations in which there exists "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Respecting this citation, the inspector testified that he did not now consider that the violation qualified as significant and substantial under the National Gypsum test. Counsel for the Secretary joined in that view and moved to amend the charge to eliminate the significant and substantial designation.

Although this judge has in the past had occasion to scrutinize such motions closely, the Secretary's reappraisals will be accepted in this case since the original penalty assessment amounts were quite small - an indication that the violations were relatively minor.

The civil penalty sought by the Secretary is $24.00. The parties stipulated to several of the factual elements which go toward determination of penalty for all violations in this proceeding. Southway's operation was small, and at the time of Garcia's inspection it had no history of violations. The evidence showed that all violative conditions were abated immediately. Respondent's good faith was not challenged.

As to this particular violation, workers exposure to the hazard of the unsecured oxygen bottles was minimal. Under all the circumstances only a light penalty is justified. The originally proposed penalty of $24.00 is light, however, and I deem that amount appropriate. A penalty of $24.00 is therefore assessed.

Docket No. WEST 81-295-M (The Sargents Pit)

Citation No. 326265

Inspector Tafoya testified that he observed that insulation on a splice on a 480 volt electrical cable furnishing power to a conveyor motor was inadequate, exposing the interior wires of the cable. The area of which he complained was very near the point at which the cable entered the motor case. Also, the bushing designed to protect the cable from wear and the effects of vibration where it entered the motor casing was not in the proper place. It therefore offered no protection to the cable. These conditions caused the inspector to charge a violation of 30 C.F.R. § 56.12-8, which, as pertinent here, provides:

> Power wires and cables shall be insulated adequately where they pass into and out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings.

The inspector maintained that the cable presented a hazard of electrical shock or electrocution to any of the four employees who might for any reason touch the cable or the motor housing. I hold that this uncontradicted testimony establishes the violation alleged. The cable was neither adequately insulated, nor was the fitting at the engine cover "proper".

The inspector maintained that this violation was significant and substantial as the original citation alleged. He feared that the combination of the defective splice and the misplaced bushing could lead to electrocution or severe shock. Four employees were potentially exposed to this hazard, and he singled out a worker doing clean-up in the immediate area of the belt. I agree with the inspector's assessment, and conclude that the violation carried with it the reasonable likelihood of injury of a reasonably serious nature. It was therefore properly classified as significant and substantial.

The Secretary seeks a penalty of but $40.00. Giving due consideration to the penalty criteria discussed earlier, together with the gravity of the violation, a $40.00 penalty is surely not excessive. The proposed amount will therefore be assessed.

Citations 326266 and 573521

These two citations represent virtually identical conditions on two separate conveyor systems at the pit. On each conveyor Inspector Tafoya observed take-up pulleys with exposed or unguarded pinch points. The exposed pinch points on both machines were situated about four or five feet above ground level. Neither danger point was protected by any natural obstruction which would tend to isolate employees from contact. The inspector acknowledged that no employees were working in proximity to the pulleys at the time of his visit, but observed that clean-up of conveyor spillage would necessarily be done in the immediate area from time-to-time. Unwary workers, he indicated, could have clothing caught up in the pinch point, with resulting personal injury. He cited these conditions as violations of 30 C.F.R. § 56.14-1, which provides:

> Gears; sprockets; chains; drive head, tail and take-up pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The facts establish violations. Here again the violations were originally charged as significant and substantial, but the Secretary moved at trial to delete that designation owing to the inspector's belief that the circumstances did not meet the National Gypsum test. The inspector's view was apparently based on the fairly remote possibility that workers would be near the danger area presented by the pulleys. While the validity of that view may be arguable, I am not disposed to quibble with it in a case of this magnitude. The violations will not be deemed significant and substantial.

The Secretary seeks a civil penalty of $40.00 for each violation. Since I see no useful distinction between the penalty-related facts affecting these violations and those affecting the oxygen bottle citation discussed earlier, consistency suggests the same result here. Consequently, a civil penalty of $24.00 will be assessed for each.

Citations 573520 and 573522

While at the site, Inspector Tafoya determined that two pieces of heavy mobile equipment were operating without audible reverse signal alarms. Both machines, a front-end loader and a Caterpillar bulldozer, were equipped with such automatic devices. On both machines, however, the alarms were out-of-order. The inspector also testified that operators of the machines had obstructed views to the rear, and that while he watched backing maneuvers, neither operator was provided with an observer to signal when the way was clear. Tafoya cited these conditions as violations of 30 C.F.R. § 56.9-87, which provides:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The inspector indicated that there was no employee foot traffic in the area of the cited equipment while he watched. There were, however, no impediments to the presence of workers, and there was thus a "potential" for endangerment. The evidence shows that the alleged violations occurred.

The Secretary seeks a penalty of $36.00 for each reverse alarm violation. Even if not significant and substantial, I consider these violations of greater gravity than those for which lesser penalties have been assessed herein. Large pieces of mobile equipment need functioning back-up alarms whenever there is any possibility of foot traffic on the pit floor. The $36.00 penalty amounts will be affirmed.

Citation 573523

The inspector described four electrical boxes located in Southway's generator trailer which controlled electrical current to a variety of equipment in the pit, including the conveyors and crushers. None of these boxes, he testified, was labeled to show which piece of equipment it controlled. This condition caused him to cite the respondent for violation of 30 C.F.R. § 56.12-18, which provides:

> Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

The inspector acknowledged that the foreman of the operation and the other three employees probably knew the purpose of each box. He nevertheless pointed out that in the event of an emergency persons other than employees might need to deenergize a particular circuit without delay or any need for study or experimentation.

The requirement of the standard is unconditional; the violation was proved.

The Secretary does not retreat from his original position that the violation was significant and substantial. Curiously, however, the proposed penalty at $22.00 was smaller than that for any other violation in this proceeding. While the condition of the control boxes was clearly violative of the standard, I find the likelihood of an accident, and hence any injury, quite remote under the facts of record. I must therefore hold that the Secretary failed to establish the significant and substantial element of the charge.

The $22.00 penalty proposed is appropriate and will be assessed.

CONCLUSIONS OF LAW

Consistent with the facts found true in the narrative portions of this decision, the following conclusions of law are made:

(1) Southway was engaged in "mining" under the Act and its mining operations and production affected commerce. It was thus subject to the Secretary's enforcement jurisdiction.

(2) Southway violated the safety standard published at 30 C.F.R. § 56-16.5 as alleged in citation 327198 in Docket No. WEST 80-111-M. The violation was not significant and substantial within the meaning of the Act. A civil penalty of $24.00 is appropriate.

(3) Southway violated the safety standard published at 30 C.F.R. § 56.12-8 as alleged in citation 326265 in Docket No. WEST 81-295-M. The violation was "significant and substantial" within the meaning of the Act. A civil penalty of $40.00 is appropriate for the violation.

(4) Southway violated the safety standard published at 30 C.F.R. § 56.14-1 as alleged in citations 326266 and 573521 in Docket No. WEST 81-295-M. The violations were not "significant and substantial" within the meaning of the Act. A civil penalty of $24.00 is appropriate for each violation.

(5) Southway violated the safety standard published at 30 C.F.R. § 56.9-87 as alleged in citations 573520 and 573522 in Docket No. WEST 81-295-M. The violations were not "significant and substantial" within the meaning of the Act. A civil penalty of $36.00 is appropriate for each violation.

(6) Southway violated the safety standard published at 30 C.F.R. § 56.12-18 as alleged in citation 573523 in Docket No. WEST 81-295-M. The violation was not "significant and substantial" within the meaning of the Act. A civil penalty of $22.00 is appropriate for the violation.

ORDER

Accordingly, all citations, as modified herein, are ORDERED affirmed, and the respondent Southway shall pay to the Secretary of Labor civil penalties totalling $206.00 within 30 days of the date of this order.

John A. Carlson
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building,
1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

J. O. Lewis, Esq., 703 3rd Street, P.O. Box 1033
Alamosa, Colorado 81101 (Certified Mail)

/ot