JANUARY 1992

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JANUARY 1992

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

Secretary of Labor, MSHA v. Grefco, Inc., Docket No. CENT 91-176-M. (Judge Morris, Settlement Decision of November 18, 1991 - not published)

Kerr-McGee Coal Corporation v. Secretary of Labor, MSHA, Docket No. WEST 91-84-R, etc. (Judge Lasher, December 9, 1991)

Secretary of Labor, MSHA v. United Rock Products Corporation, Docket No. WEST 91-425-M. (Chief Judge Merlin, Default decision of December 18, 1991)

There were no cases filed where review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 10, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 88-144-R WEVA 88-212
SOUTHERN OHIO COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), and presents two issues: (1) whether a notice to provide safeguards issued pursuant to 30 C.F.R. § 75.1403 is invalid if it addresses conditions that exist in a significant number of mines; and (2) whether the validity of a notice to provide safeguards is materially affected by the fact that it is patterned after 30 C.F.R. § 75.1403-9(a), a published safeguard criterion. [1] Our decision in this matter is one of

---

[1] 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

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

30 C.F.R. § 75.1403-1 sets forth general provisions regarding "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-1(a) provides:

> Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

The procedures by which an authorized representative of the Secretary

several on this date with respect to the Secretary's issuance of safeguards. [2]

In this case, Commission Administrative Law Judge Roy J. Maurer found that the Secretary failed to prove that the safeguard in question was issued because of any conditions "peculiar" to the mine of Southern Ohio Coal Company ("SOCCO"), as opposed to other mines that also have track haulage. 11 FMSHRC 1992, 1997 (October 1989)(ALJ). Consequently, he concluded that the safeguard was invalid because it was not issued on a "mine-by-mine" basis. Accordingly, the judge vacated an order of withdrawal issued to SOCCO alleging a violation of the safeguard. For the reasons that follow, we vacate the judge's decision and remand this case for further proceedings.

I.

Factual Background and Procedural History

On January 28, 1988, Charles Thomas, an inspector of the Department of Labor's Federal Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the Martinka No. 1 Mine, an underground coal mine operated by SOCCO. Inspector Thomas observed that no shelter holes were provided along a section of the supply track of the E-4 section. [3] He

---

may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b).

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

Section 75.1403-9 is entitled "Criteria-shelter holes," and section 75.1403-9(a) provides:

> Shelter holes should be provided on track haulage roads at intervals of not more than 105 feet unless otherwise approved by the Coal Mine Safety District Manager(s).

[2] Our other safeguard decisions issued today are: BethEnergy Mines, Inc., 14 FMSHRC ___, Nos. PENN 89-277-R, etc.; Mettiki Coal Corp., 14 FMSHRC ___, Nos. YORK 89-10-R, etc.; and Rochester & Pittsburgh Coal Co., 14 FMSHRC __, Nos. PENN 88-309-R, etc.

[3] A shelter hole is an area where a miner can seek protection from haulage equipment, locomotives, mine cars and other vehicles traveling through a passageway.

issued an order pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. 814(d)(2), alleging a violation of a notice to provide safeguard that had been issued under 30 C.F.R. § 75.1403-9(a) (n. 1 supra).

Order No. 2895348 states:

> A shelter hole is not provided along the E4 section supply track for a distance of 170 feet when measured. The area is between No. 1 block and No. 3 block. Overcast walls are in the crosscuts left and right of the track. Notice to provide Safe[g]uard was issued No. 1JF 5/23/75....

Gov. Exh. 3. In issuing the order, Inspector Thomas also entered special findings that SOCCO's alleged violation was of a significant and substantial nature and was caused by its unwarrantable failure to comply. SOCCO contested the order, the Secretary proposed civil penalties, and the matter proceeded to an evidentiary hearing before Judge Maurer.

The notice to provide safeguard issued at the Martinka No. 1 Mine by MSHA Inspector Joe Fraim on May 23, 1975, states:

> Shelter holes are not provided at 105 foot intervals on the 1 Left section supply track for a distance of 400 feet. Shelter holes shall be provided on all track haulage roads in this mine....

Tr. 29, 31, 53-54; Gov. Exh. 2. Inspector Thomas testified that he had no knowledge of the reasons, other than the reasons stated on the face of the safeguard itself, for the issuance of the safeguard. Tr. 54.

Inspector Thomas testified that, if coal cars derailed in the cited area and a miner was then unable to escape to a shelter hole, he could be crushed against the wall or suffer broken bones, lacerations, amputations, and possibly death. Tr. 42-43. Thomas believed that the violation was aggravated by the fact that the cited area was wet and presented a slipping hazard to a person running through the area to a shelter hole, and that visibility in the area was impeded by various factors. Tr. 28, 34, 72.

John Metz, the general mine supervisor of the Martinka Mine and Paul Zanussi, the mine's accident prevention officer, agreed with Thomas that a shelter hole was not provided every 105 feet in the cited area, but maintained that certain extenuating circumstances justified the absence of the shelter holes. Tr. 76, 83. Messrs. Metz and Zanussi testified that a small shelter hole (manhole) had been made in the overcast wall in the cited area, which previously had been accepted by MSHA as an alternate type of shelter hole. Tr. 62, 79-80, 84-85. When MSHA changed its policy and no longer accepted such alternate shelter holes, SOCCO determined that it had to "shoot" approximately 30 new shelter holes in solid ribs of coal. Tr. 86-87. Metz testified that SOCCO had not yet shot a shelter hole in the cited area because it was first shooting holes in priority areas that received the most traffic. He stated that the cited area received only

minimal foot and rail traffic because the area was new at the time of the inspection and there was not yet a need for anyone to be working in that location. Metz also stated that it had been his experience that tracks such as those in the cited area, which were used for mantrips or for carrying rock dust and other supplies to working sections, were used less frequently than tracks that hauled coal.

Inspector Thomas testified that it was his understanding that the subject safeguard notice requires shelter holes every 105 feet on every track haulage road regardless of the frequency of rail or foot traffic through the area or whether the mine uses a conveyor belt system to remove coal. Tr. 61-62. He further testified that the hazard at the Martinka No. 1 Mine was no greater than the hazard at other track haulage mines that were subject to similar safeguards. Tr. 60. Of the 21 mines using track haulage that Thomas had inspected, each mine had a similar safeguard notice requiring shelter holes every 105 feet along track haulage roads. Tr. 50. A similar safeguard had been issued at SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines, and at the American Electric Power System's Windsor Coal Mine. Tr. 102, 111. Inspector Thomas testified that he could not recall any underground coal mine using track haulage that did not have a similar safeguard notice. Tr. 49.

Preliminarily, the judge determined that the Secretary bears the burden of proving the validity of the underlying safeguard. The judge then examined the evidence to determine whether the Secretary had successfully met that burden. The judge placed particular emphasis on Inspector Thomas's testimony that each of the 21 track haulage coal mines that Thomas had inspected had a safeguard notice similar to the subject safeguard including the Windsor Coal Mine and SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines. 11 FMSHRC at 1996. The judge also relied on Inspector Thomas's testimony that he could not recall a single instance in which a safeguard similar to the subject safeguard had not been issued in an underground coal mine utilizing track haulage. Id.

Based upon his review of the evidence, the judge found that the Secretary had failed to establish the validity of the underlying safeguard notice:

> I conclude in this case, the Secretary has failed to demonstrate that Safeguard No. 1JF was issued on a "mine-by-mine" basis and more particularly, has failed to demonstrate that it was issued at the Martinka No. 1 Mine because of any peculiar circumstances or physical configuration of that mine. The safeguard had nothing whatsoever to do with conditions peculiar to that mine as opposed to other mines that also have track haulage.

11 FMSHRC at 1997 (emphasis added).

After finding that the safeguard was invalid, the judge determined that Order No. 2895348 was improperly issued because it was based upon the

invalid safeguard. Accordingly, he vacated the order without reaching the issues of whether the safeguard had been violated or whether the inspector's special findings were valid. The Commission granted the Secretary's petition for discretionary review. Oral argument in this matter was heard on February 21, 1991, along with argument in the other safeguard cases.

II.

Disposition of Issues

A. The Secretary's authority to issue safeguards addressing conditions that exist in a significant number of mines

1. The Secretary's general safeguard authority

The Secretary's general authority to issue safeguards is derived from section 314(b) of the Mine Act, 30 U.S.C. § 874(b). That provision is contained in a section of the statute that includes interim mandatory safety standards for hoisting and mantrips in underground coal mines. Section 314 is one of several provisions among the interim safety standards of Title III of the Mine Act that were carried over from the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("1969 Coal Act").

Unlike other provisions of Title III of the Mine Act, section 314 contains few specific mandatory standards. The specific mandatory standards in section 314 concern hoists, brakes on rail equipment and automatic couplers.

The legislative history of section 314(b) is scant. When introduced in the House and the Senate, the bills that became the 1969 Coal Act both contained the provision now found at section 314(b). The House Report states simply that this provision "authorizes the inspector to require other safeguards as necessary to reduce the hazards of transporting men and materials." H. Rep. No. 563, 91st Cong., 1st Sess. 55 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 1085 ("Legis. Hist."). The Senate Conference Report provides:

> Subsection (b) authorizes the inspector to require other safeguards for transporting men and materials, such as those in the present advisory code. It is expected, however, that efforts will be made to improve upon these also.

Legis. Hist. at 1619.[4]

---

[4] The reference to the "present advisory code" is to the Federal Mine Safety Code for Bituminous Coal and Lignite Mines (Part I - Underground Mines), published by the Bureau of Mines, U.S. Department of the Interior,

On March 28, 1970, the Secretary of the Interior promulgated regulations at 30 C.F.R. § 75.1403 to implement section 314(b).[5] As originally promulgated, section 75.1403-1 set forth the Secretary's general interpretation of authority under section 314(b). The regulation stated, in pertinent part:

> (a) The sections in the § 75.1403 series ... describe safeguards that are required to minimize commonly recognized hazards with respect to the transportation of men and materials. Authorized representatives of the Secretary shall be guided by these sections in requiring the provision of safeguards under § 75.1403.
>
> (b) An authorized representative of the Secretary shall in writing advise the operator of a specific safeguard to be provided pursuant to § 75.1403 and shall fix a time within which the safeguard shall be provided. If the safeguard is not provided within the time fixed, a notice [citation] shall be issued to the operator pursuant to § 104 of the Act.

35 Fed. Reg. 5221, 5250 (March 28, 1970) (emphasis added).

These regulations established specific safeguards designed to minimize "commonly recognized" transportation hazards. The regulations required the Secretary's inspectors to advise an operator in writing if a specific safeguard must be complied with at a particular mine. The regulations also provided that enforcement action would be taken against the operator if the requirements of the safeguard were not met within the time fixed by the inspector.

Later that year, the Secretary amended these regulations to designate the specific regulatory "safeguards" in sections 75.1403-2 through -11 as the "criteria" by which inspectors were to be guided in requiring safeguards; to authorize inspectors to require safeguards for hazardous conditions not covered by a specific criterion; and to make clear that safeguards were to be issued on a "mine-by-mine" basis. 30 C.F.R. § 75.1403-1; 35 Fed. Reg. 17923 (November 20, 1970). Section 75.1403-1 also

---

on October 8, 1953. This code was advisory only and contained extensive provisions directed to improving safety in the transportation of men and materials. See Coal Mine Health and Safety: Hearings on S. 335 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Part 3, 91st Cong. 1st Sess. 1359-1404 (1969) ("Coal Act Hearings").

[5] The 1969 Coal Act was enforced by the Secretary of the Interior while the Mine Act is enforced by the Secretary of Labor. We use the term "Secretary" herein to refer to either official, as appropriate.

stated that, in addition to issuing safeguards based on the published criteria, "[o]ther safeguards may be required." Section 314(b) was not changed in the Mine Act and, in all pertinent respects, the implementing regulations at 30 C.F.R. 75.1403 remain the same.

The Secretary argues in her brief that the only limitation placed on the Secretary in issuing safeguards is that they address hazards relating to the transportation of miners and material. S. Br. at 5. Further limits on the Secretary's powers to issue safeguards, however, are drawn in the statutory language and in the implementing regulations. A safeguard may be issued to minimize transportation hazards only in underground coal mines. An inspector's decision to issue a notice to provide safeguards must be based on his consideration of the specific conditions at the particular mine. The requirement that the inspector identify a specific transportation hazard at a mine before issuing a safeguard flows from the language of section 314(b), authorizing the issuance of a safeguard that is "adequate, in the judgment of an authorized representative of the Secretary," to minimize a transportation hazard. (Emphasis added.) Section 75.1403-1(a) further clarifies that consideration of the specific conditions giving rise to a hazard requires inspectors to issue safeguards on a mine-by-mine basis. Further, safeguards may be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required as of a specified date. Section 75.1403-1(b). MSHA's current Program Policy Manual ("Manual") states that the criteria of sections 75.1403-2 through -11 are not mandatory standards:

> It must be remembered that these criteria are not mandatory. If an authorized representative of the Secretary determines that a transportation hazard exists and the hazard is not covered by a mandatory regulation, the authorized representative must issue a safeguard notice, allowing time to comply before a 104(a) citation can be issued....

Manual, Volume 5, Part 75, pp. 125-26.[6] An inspector's use of the safeguard provision is not limited by the statute, the regulations, or the Manual to hazards that are "unique" or "peculiar" to a mine.

---

[6] The title page of the Manual states that the "MSHA Program Policy Manual is a compilation of the Agency's policies on the implementation and enforcement of the Federal Mine Safety and Health Act of 1977 and Title 30 Code of Federal Regulations and supporting programs." The United States Court of Appeals for the D.C. Circuit has stated that, while the Manual may not be binding on MSHA, "we consider the MSHA Manual to be an accurate guide to current MSHA policies and practices." Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989). (The Commission has indicated that, as an adjudicative body, it is not necessarily bound by statements in the Manual, although in appropriate circumstances, it may choose to defer to and apply such pronouncements. See, e.g., King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981).)

A safeguard, however, must address a transportation hazard that is actually present in the mine in question. An MSHA inspector possesses authority to decide whether a safeguard should be issued at a mine without consulting with representatives of the operator. In order to issue a notice to provide safeguards, an inspector must determine that there exists at a mine an actual transportation hazard that is not covered by a mandatory standard; that a safeguard is necessary to correct the hazardous condition; and the corrective measures that the safeguard should require.

The Commission has held that the language of section 314(b) of the Act is broad and "manifests a legislative purpose to guard against all hazards attendant upon haulage and transport[ation] in coal mining." Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985). The Commission also has observed that, while other mandatory safety and health standards are adopted through the notice-and-comment rulemaking procedures of section 101 of the Act, 30 U.S.C. § 811, section 314(b) extends authority to the Secretary to create on a mine-by-mine basis what are, in effect, mandatory standards, without the formalities of rulemaking. Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985)("SOCCO I"). The Commission has recognized that "this unusually broad grant of regulatory authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards." Id.

2. Validity of safeguards addressing conditions existing at a significant number of mines

Whether a notice to provide safeguards issued under section 75.1403 is invalid if it addresses conditions that exist in a significant number of mines is a question of first impression for the Commission.[7] The key question in this case is whether, even if issued on a mine-by-mine basis, a safeguard is invalid if it deals with a hazardous condition that is commonly encountered in coal mines. In other words, if an inspector evaluates the specific conditions at a particular mine, determines that a discrete transportation hazard exists at that mine, and issues a safeguard notice requiring the elimination of the hazard, is that safeguard rendered invalid if similar safeguards have been issued at a significant number of other mines?

a. Statutory considerations

SOCCO contends that Congress's grant of authority to the Secretary in section 314(b), when considered in conjunction with sections 101 and 301(a) of the Mine Act, 30 U.S.C. §§ 811 and 861(a)(infra), reflects an understanding that safeguards will not be of general applicability. SOCCO maintains that "Congress chose to grant authority to issue safeguards not with the intent that it was creating an exception to the requirements of section 101 [and 301(a)], but on the basis that such safeguards would be individualistic and peculiar to a given mine." SOCCO Br. 9.

---

[7] This issue was raised in Southern Ohio Coal Co., 10 FMSHRC 963 (August 1988)("SOCCO II"), but was not then resolved by the Commission.

Section 101 of the Mine Act sets forth the procedures the Secretary must follow to "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. § 811(a). Section 301(a) of the Mine Act states that the interim mandatory safety and health standard of Title III shall be applicable to all underground coal mines "until superseded in whole or in part by improved mandatory safety standards" promulgated by the Secretary under section 101 of the Mine Act. 30 U.S.C. § 861(a). SOCCO reads these two provisions to require the Secretary to promulgate safety standards for commonly occurring transportation hazards. It argues that Congress did not intend to exempt hazards pertaining to the transportation of men and materials from the rulemaking requirements of section 101.

It is important to understand the genesis of the rulemaking provisions referred to by SOCCO. The predecessor to the 1969 Coal Act, the Federal Coal Mine Safety Act Amendments of 1952, 30 U.S.C. § 451 et seq. (repealed), did not authorize the Secretary of the Interior to promulgate improved safety standards. The 1969 Coal Act, like the Mine Act, contained interim safety standards for underground coal mines and empowered the Secretary to promulgate improved safety standards. The rulemaking provisions were included, in large measure, to afford the Secretary flexibility to improve upon the interim standards as experience and technology developed. As stated in the legislative history, the rulemaking provisions of the Coal Act "give the Secretary the flexibility needed to devise improved standards as technology changes, as new safety programs develop, and to provide protection against hazards not covered by [the interim standards]." S. Rep. No. 411, 91st Cong., 1st Sess. 86 reprinted in Legis. Hist. at 212. [8] Moreover, section 301(b) of the Mine Act, 30 U.S.C. § 861(b), contains language from the Coal Act that compels the Secretary "to develop and promulgate new and improved standards promptly that will provide increased protection to the miners."

Although Congress empowered and directed the Secretary to provide increased protection for miners through the promulgation of improved safety standards, Congress did not provide any benchmark against which to judge whether improved standards are required. Rather, Congress left that determination to the Secretary. The rulemaking provisions of sections 101 and 301 of the Mine Act do not circumscribe the authority to issue safeguards granted to the Secretary in section 314(b). Thus, we conclude that, in general, it is within the Secretary's sound exercise of discretion to issue mandatory standards or to issue safeguards for commonly encountered transportation hazards.

---

[8] The Secretary of the Interior, in a letter to Senator Javits supporting the 1969 Coal Act, stated that he wanted "to emphasize the need for the Congress to enact, not only the very detailed interim health and safety standards in the bill, but also provide ... the necessary flexibility in this Department to change, upgrade and modify these standards as experience and technology develop." Coal Act Hearings, Part 5, at 1585 (letter of Russell Train, Acting Secretary of the Interior, June 16, 1969).

As concluded above, section 314(b) enables an MSHA inspector to issue a safeguard to ensure the safety of miners when the inspector observes a transportation hazard that is not addressed by an existing mandatory standard. We discern nothing in the Mine Act or its legislative history expressly requiring that the hazard be unique to the mine at issue and nothing prohibiting the use of similar safeguards to address similar unsafe conditions that may exist at a number of mines.

SOCCO's argument that the Secretary actually engages in rulemaking when she issues safeguards for commonly encountered hazards fails to acknowledge the unique authority given to the Secretary in section 314(b). In our judgment, SOCCO's argument addresses the legislative wisdom of the broad authority conferred upon the Secretary by Congress in section 314(b). We agree that the Secretary might have issued mandatory standards to cover the hazard involved in this case but, on the basis of the current record, we are not prepared to say that her failure to do so was an abuse of discretion. The Secretary has set forth a reasoned basis for using safeguards to address transportation hazards at underground coal mines. The Secretary cites the flexibility that safeguards provide to maximize transportation safety at mines and the authority conferred by section 314 of the Act to issue safeguards "as necessary" to reduce transportation hazards. In general, we find this rationale well founded in the statute.

Additionally, courts rarely compel an agency to institute rulemaking proceedings, even where an interested person has filed a petition for rulemaking. See, e.g., Arkansas Power & Light Co. v. ICC, 725 F.2d 716, 723 (D.C. Cir. 1984)("[C]ourt will compel an agency to institute rulemaking proceedings only in extremely rare instances"); Bethlehem Steel Corp v. EPA, 782 F.2d 645, 655 (7th Cir. 1986)("When an agency has discretion as to whether or not to undertake rulemaking, the courts cannot tell it how to exercise that discretion.") The United States Court of Appeals for the District of Columbia Circuit has acknowledged the "broad discretionary powers possessed by administrative agencies to promulgate (or not promulgate) rules, and the narrow scope of review to which the exercise of that discretion is subjected...." WWHT, Inc. v. FCC, 656 F.2d 807, 818 (1981).

b. Precedent

SOCCO relies on the D.C. Circuit's decision in Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (1976), and on the Commission's decision in Carbon County Coal Corp., 7 FMSHRC 1367 (September 1985) in challenging the validity of generally applicable safeguards. We believe that these cases, which dealt with ventilation plans, are distinguishable and do not support the operator's position. In Zeigler, the court determined that, because section 303 of the 1969 Coal Act set forth mine ventilation standards, the ventilation plans required by section 303(o) were conceived for a narrow purpose: to provide requirements relating to the particular circumstances of

a given mine. 536 F.2d at 407.[9] The Court indicated that if the Secretary were to attempt to compel such plans to include requirements of a general nature that should have been formulated as mandatory standards under section 101, the operator might be able to show that the Secretary had abused the ventilation plan authority conferred by section 303(o). Id. The D.C. Circuit, in UMWA v. Dole, 870 F.2d 662, 672 (D.C. Cir. 1989), repeated its warning, originally made in Zeigler, that "the Secretary should utilize mandatory standards for requirements of universal application." The Dole court, however, also reiterated its earlier pronouncements in Zeigler regarding "the considerable authority of the Secretary to determine what 'should more properly have been formulated as a mandatory standard under the provisions of § 101.'" 870 F.2d at 671.

We agree with the Secretary that ventilation plans were conceived for a narrower purpose than safeguards. Comprehensive interim standards were established by Congress for ventilation. Section 314 of the Mine Act does not set forth extensive standards for hoisting and mantrips, but subsection (b) empowers inspectors to issue "other safeguards" as necessary to eliminate hazards associated with transportation. In addition, Congress gave MSHA inspectors comparatively more authority in issuing safeguards for transportation hazards than in imposing ventilation requirements in mine plans. Further, although roof control plans must provide the same level of protection as that provided by the plan criteria, even if a particular criterion is not included in the plan, Dole, 870 F.2d at 670, there is no similar requirement that the level of protection of safeguard criteria be provided at any mine. Section 75.1403-1(b) makes clear that the safeguard criteria are not binding on any operator unless, and until, that operator is given notice, in a written safeguard from an authorized representative of the Secretary, that one or more of the criteria are applicable to its mine. MSHA's Manual reiterates that "these criteria are not mandatory." Manual, Volume 5, at 125-26. Thus, the Court's logic in Zeigler with respect to the mine-particularity of ventilation plans is not transferable to safeguards.

SOCCO maintains that in order to construe sections 101 and 314 harmoniously, we must view section 101 as a limitation on the authority conferred by section 314 of the Mine Act. In Zeigler, however, the Court held that section 101 of the 1969 Coal Act was violated only if the Secretary exceeded the scope of her authority under section 303(o) of that statute. 536 F.2d at 406-07. In the present case, section 101 of the Mine Act is violated only if a safeguard exceeds the scope of the authority conferred by Congress in section 314(b). As discussed above, we believe that issuing a safeguard for a hazardous condition that is not limited to one mine or a small number of mines is within the scope of the Secretary's

---

[9] Section 303(o) of the Coal Act was carried over as section 303(o) of the Mine Act, 30 U.S.C. § 863(o), and provides in pertinent part that a "ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form...."

authority, provided the inspector issues the safeguard based on his evaluation of the specific conditions at a particular mine and on his determination that such conditions create a transportation hazard in need of correction.

The Commission's Carbon County decision is consistent with our holding today. In Carbon County, the Commission found that a ventilation plan provision that MSHA sought to incorporate into an operator's plan "was the result of a rote application of [an MSHA] District ... guideline and was not based upon the particular conditions" at the mine. 7 FMSHRC at 1373.[10] The Commission held that MSHA could prevail and have the subject provision included in the mine plan if it established that "particular conditions at the mine warrant the inclusion of the [subject] provision in the ventilation plan." 7 FMSHRC at 1375. Thus, it was the rote application of the subject provision of the ventilation plan to the mine in question, pursuant to MSHA District policies, that caused the Commission to invalidate the provision. MSHA had failed to evaluate whether the subject provision or the operator's alternative would best promote safety at the mine in question. Similarly, a safeguard cannot be blindly imposed but must be based on the inspector's determination that a specific hazard exists at a particular mine.

In sum, we conclude that the mine-by-mine requirement with respect to issuance of safeguards does not mean that a safeguard must be based on a hazard "unique" or "peculiar" to any given mine or small number of mines. Rather, a safeguard may properly be issued for a commonly encountered hazard, so long as such safeguard addresses a specific transportation hazard actually determined by an inspector to be present and in need of correction at the mine in question. Therefore, in the present proceeding, the fact that the safeguard was based on a common hazard encountered in a number of other mines does not, by itself, invalidate the safeguard.

B. Safeguards based upon promulgated criteria

The Secretary also argues that, because the safeguard in this case was based upon section 75.1403-9(a), one of the promulgated criteria, the safeguard is valid even though the hazard may be found at a significant number of mines. Thus, the Secretary asserts that, even if the Commission holds that a safeguard may not be issued for a commonly encountered hazard, a safeguard issued for such a hazard is valid if it is based upon one of the promulgated criteria. She bases her argument on the D.C. Circuit's decision in Dole. In another case decided this date, BethEnergy Mines, Inc., 14 FMSHRC ___, Docket Nos. PENN 89-277-R, etc., we have concluded that the validity of a safeguard is not affected by the fact that it is based on a promulgated criterion in section 75.1403 and that the principles with respect to roof control criteria set forth in Dole are not relevant to cases involving safeguards. Slip op. at 7-8. For the reasons given in BethEnergy,

---

[10] The Dole decision interpreted Carbon County "to make the narrow point that mine operators are entitled to have alternative procedures evaluated by the district manager to determine if they achieve the safety objective set out in MSHA regulations and policy." 870 F.2d at 672.

we hold that a safeguard must be based on the specific conditions at a mine, regardless of whether the safeguard is patterned after a promulgated criterion, and that an otherwise invalid safeguard is not made valid simply because it is based on a promulgated criterion.

C. Burden of proof

The judge held that the Secretary bears the burden of establishing the validity of the underlying safeguard. 11 FMSHRC at 1995. The Secretary argues that the judge's allocation of this burden was erroneous. We agree with the judge.

The Mine Act does not specifically state who has the burden of demonstrating the validity of a safeguard. An operator may challenge a safeguard's validity in a contest or civil penalty proceeding arising from the issuance of a citation or order based on that safeguard. The Secretary is required to prove that the safeguard provided the operator with sufficient notice of the "nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." SOCCO I, 7 FMSHRC at 512.

This Commission, as the administrative adjudicatory body under the Mine Act, possesses considerable discretion in allocating the burden of proof, so long as the allocation is rational and consistent with the policies of the Mine Act. See generally Donovan v. Stafford Const. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(approving Commission's burden of proof allocations in discrimination cases arising under the Act). One important factor in allocating the burden of proof is which party possesses knowledge of the conditions giving rise to the safeguard. We believe that the Secretary would be in the best position to produce such evidence. While the mine operator may have more extensive knowledge of the conditions in its mine, the Secretary would be far more knowledgeable as to why her authorized representative issued the safeguard.

Another important factor to consider is whether a challenge is in the nature of an affirmative defense to the charge of a violation. In general, the Commission, with Court approval, has required the operator to bear the burden of proof as to affirmative defenses. See, e.g., Stafford Const., 732 F.2d at 959, approving in relevant part, Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). However, an allegation by an operator that an inspector did not base a safeguard on the specific conditions actually present in its mine is not an affirmative defense. Rather, proof of specific mine conditions is part of the Secretary's prima facie case as to the validity of the safeguard. We hold that it would be appropriate and consistent with the purposes of the Mine Act to require the Secretary to prove that the inspector issued the safeguard based on an evaluation of the specific conditions at the mine and the determination that such conditions created a transportation hazard in need of correction. Placing this burden on the Secretary is consistent with the Commission's holding in SOCCO I, requiring the Secretary to prove that the safeguard adequately identified the nature

of the hazard and the conduct required of the operator to remedy the hazard.

This allocation of the burden of proof does not require the Secretary to prove a negative. For example, she is not required to produce evidence demonstrating that a safeguard was not issued by rote application of an MSHA guideline rather than on a mine-by-mine basis. The Secretary is required to demonstrate only that the inspector evaluated the specific conditions at the particular mine and determined that a safeguard was warranted in order to address a transportation hazard. In rebuttal, the operator would be free to offer evidence that the safeguard was not based on conditions present at its mine or that the safeguard was routinely applied without consideration of the conditions at its mine.

We note that testimony concerning issuance of a safeguard may not be available or necessary in all cases. The safeguard in the present matter was issued in 1975. Nevertheless, in the absence of testimony, the Secretary may still be able to demonstrate that the safeguard was validly issued. The language of the safeguard itself may prove that the safeguard was issued to address specific conditions found at the mine, and that the safeguard comports with the requirements of SOCCO I.

D. Validity of the safeguard in issue

Judge Maurer concluded that the Secretary failed to demonstrate that the underlying safeguard in this case was issued on a "mine-by-mine" basis because he found that the safeguard "had nothing whatsoever to do with conditions peculiar to [the Martinka No. 1 Mine] as opposed to other mines that also have track haulage." 11 FMSHRC at 1997 (emphasis added). As discussed above, we reject the mine-peculiar view of the nature of the Secretary's safeguard authority. Thus, the safeguard in question is valid if it was based on the specific conditions at SOCCO's mine and on a determination by the inspector that those conditions created a transportation hazard in need of correction, notwithstanding the fact that similar safeguards may have been issued at other mines.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand this proceeding to the judge to evaluate the validity of the safeguard consistently with the principles discussed in this decision.

The judge should first determine whether the safeguard was issued based on specific conditions at the Martinka No. 1 Mine that the inspector found constituted a transportation hazard in need of correction. If the judge concludes that the safeguard was validly issued, he should then determine whether the safeguard was violated and whether the order of withdrawal was properly issued. Taking into consideration the principles set forth in the Commission's decision in SOCCO I, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of

the operator to remedy such hazard." 7 FMSHRC at 512. If the judge determines that there was a violation, he should then consider whether the violation was of a significant and substantial nature and was caused by SOCCO's unwarrantable failure to comply with the safeguard, and assess an appropriate civil penalty.

Notwithstanding the foregoing legal determinations, we find it appropriate to conclude this decision by questioning, from the standpoint of policy, whether the proliferation of safeguards is the most effective method of addressing the more commonly encountered hazards in underground coal mine transportation. Transportation hazards are a major cause of injuries and fatalities in underground coal mines, but have rarely been the subject of

rulemaking. We note that in the Department of Labor's most recent Semiannual Regulatory Agenda, the Secretary has recognized the need for specific mandatory safety standards to protect miners from the hazards associated with the hoisting and transportation of persons and materials. 56 Fed. Reg. 53584 (October 21, 1991). There, the Secretary states that "[t]ransporting persons and material has been a leading cause of fatal accidents in underground coal mines" and that she "has very few mandatory standards addressing haulage hazards." Id. Because the use of individual safeguards, issued on a mine-by-mine basis, may not adequately protect all affected miners from haulage related hazards, we strongly suggest that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

David A. Laing, Esq.
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215

Carl C. Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Roy Maurer
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 10, 1992

BETHENERGY MINES, INC.	:	
	:	
v.	:	Docket Nos. PENN 89-277-R
	:	PENN 89-278-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), presents the following issues: (1) whether the validity of a notice to provide safeguards issued pursuant to 30 C.F.R. § 75.1403 is affected by the fact that it is patterned after 30 C.F.R. § 75.1403-5(g), a published safeguard criterion;[1]

---

[1] 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

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

30 C.F.R. § 75.1403-1 sets forth general provisions regarding "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-1(a) provides:

> Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b).

(2) whether the Secretary of Labor should be collaterally estopped from litigating an issue regarding the issuance of certain relevant citations; (3) whether BethEnergy Mines, Inc. ("BethEnergy") failed to comply with the subject notice to provide safeguards; (4) whether BethEnergy's alleged violations of the notice to provide safeguards were of a significant and substantial nature; and (5) whether two citations alleging BethEnergy's violations of the notice to provide safeguards were duplicative.

Commission Administrative Law Judge William Fauver determined that although the subject notice to provide safeguards may have addressed hazards commonly encountered at other mines, it was not rendered invalid because it was based on a published safeguard criterion. 12 FMSHRC 761, 768-69 (April 1990)(ALJ). Interpreting the safeguard broadly, the judge found that BethEnergy had violated the safeguard and that the violations were of a significant and substantial nature. 12 FMSHRC at 769-70. The judge also concluded that collateral estoppel should not be applied against the Secretary. 12 FMSHRC at 770. Finally, the judge determined that the two citations issued against BethEnergy for its alleged violations were not duplicative. Id.

For the reasons explained below, we affirm the judge's determination that collateral estoppel should not be applied against the Secretary in this case. We apply herein the general principles concerning the Secretary's power to issue safeguards announced in our companion decision issued this date in Southern Ohio Coal Co., 14 FMSHRC ___, Nos. WEVA 88-144-R, etc.

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. § 75.1403-5 is entitled "Criteria-Belt conveyors" and section 75.1403-5(g) provides:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

("SOCCO").[2] We vacate the remainder of the judge's decision, and remand this case for further proceedings.

I.

Factual Background and Procedural History

On June 13, 1984, Francis Wier, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a notice to provide safeguard to BethEnergy at its Mine No. 60, an underground coal mine located in Pennsylvania. The notice states:

> A clear travelway of at least 24 inches wide was not provided on both sides of the belt conveyor in the longwall section MMU 031. Starting at the tipple and extending inby for approximately 400 ft. For the first 200 ft. the clearance changed from the left side back to right and management had the area fenced of[f] and a crossunder had been provided. The second area was approximately 300 ft. inby the tipple was on the left sid[e] and clearance was between 23 inches and 15 inches for approximately 10-15 feet in two different locations.
>
> This is a notice to provide safeguard that requires at least 24 inches of a clear travelway be provided on both sides of all belt conveyors installed after March 30, 1970 at this mine.

Joint Exh. 3.

More than five years later, on September 7, 1989, MSHA Inspector John Mull conducted a regular inspection at the Livingston portal at the Eighty-Four Complex, an underground coal mine that includes the area formerly known as Mine No. 60. As he walked along the No. 3 and No. 4 belt conveyors, he observed that there was not a continuous 24-inch clearance on both sides of the belts because rib material, concrete blocks, and cribs obstructed the "tight" (i.e., narrow) travelway beside the belts. Tr. 44-45, 58. Based upon his observations, Inspector Mull issued two citations, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), each alleging a violation of the safeguard notice issued by Inspector Wier. Tr. 47.

Citation No. 3088080, issued for the alleged violative condition located beside the No. 4 belt, states:

> At least 24 inches of a clear travelway was

---

[2] The present decision is one of four issued this date dealing with safeguard issues. In addition to SOCCO, supra, the other decisions are Mettiki Coal Corp., 14 FMSHRC ___, Nos. YORK 89-10-R, etc.; and Rochester & Pittsburgh Coal Co., 14 FMSHRC ___, Nos. PENN 88-309-R, etc.

> not provided on both sides of the no. 4 belt ... as the side not normally walked was obstruct[ed] with material from the ribs and other material at numerous locations.

Citation No. 3088162, issued for the alleged violative condition existing beside the No. 3 belt, states:

> At least 24 inches of a clear travelway was not provided on both sides of the entire no. 3 belt, as the side not normally walked was obstruct[ed] with rib material, crib, block and other material at numerous locations.

Inspector Mull designated both alleged violations to be of a significant and substantial nature because he believed that the obstructions presented tripping and slipping hazards that could cause a miner to suffer strains, sprains, and bruises. Furthermore, he found that if persons tripped on the obstructions, they could fall against the belt and catch their arms in the roller, which could be permanently disabling or fatal. BethEnergy contested both citations, and the matter proceeded to a hearing before Judge Fauver.

At the hearing, Roger Uhazie, the subdistrict manager for MSHA, testified that there are 47 active mines covered by the MSHA Monroeville Sub-District Office. Tr. 33-34. Mr. Uhazie testified that all of the large mines in the subdistrict have a similar safeguard requiring 24 inches of clearance on both sides of belt conveyors. Tr. 37. Five mines that have not been issued a similar safeguard do not have belt conveyors or are small mines. Tr. 34, 37.

In his decision, the judge focused on the validity of the underlying safeguard. Preliminarily, he acknowledged that he had previously interpreted Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), to stand for the proposition that safeguards addressing commonly encountered hazards in mines were invalid because they were not mine-specific and should have been the subject of a mandatory standard. 12 FMSHRC at 766.

The judge then explained that in United Mine Workers of America v. Dole, 870 F.2d 662 (D.C. Cir. 1989), the United States Court of Appeals for the District of Columbia Circuit clarified its earlier holding in Zeigler. The judge stated:

> As so clarified, the Zeigler decision is 'a warning that the Secretary should utilize mandatory standards [by formal rulemaking] for requirements of universal application,' but it does not preclude the Secretary from 'requiring that generally-applicable plan approval criteria or their equivalents be incorporated into mine plans.' The Court's reasoning for the latter conclusion has particular significance here.

12 FMSHRC at 767, citing Dole, 870 F.2d at 672. The judge interpreted the Court's reasoning to mean that the Secretary would not circumvent formal rulemaking procedures by requiring incorporation of generally applicable roof control provisions in plans if those provisions were based upon criteria that had been promulgated in accordance with notice-and-comment rulemaking procedures. 12 FMSHRC at 767-68.

The judge then concluded that the roof control plan criteria reviewed in Dole and the safeguard criteria at sections 75.1403-2 through -11 were similar in that both were promulgated in accordance with section 101 of the Act, 30 U.S.C. § 811, and that neither was enforceable until it was incorporated into an actual plan or safeguard. The judge summarized:

> I hold that if an inspector's safeguard notice is based on a published criterion (in 30 C.F.R. §§ 75.1403-2 through 75.1403-11), using the same or substantially the same language as the criterion, then (1) the safeguard is valid even if the hazard is of a general rather than a mine-specific nature, and (2) the safeguard is not subject to the strict construction rule announced by the Commission in Southern Ohio Coal Co., [7 FMSHRC 509 (April 1985)], but should be interpreted in the same manner as any other promulgated safety standard.

12 FMSHRC at 769.

Based upon the foregoing, the judge found the safeguard in question to be valid because it was patterned upon section 75.1403-5(g), a published criterion, and he proceeded to interpret the safeguard broadly. 12 FMSHRC at 770. Finding that the language of the safeguard gave reasonable notice that the walkway beside the conveyor belt should be clear, the judge affirmed the citations describing obstructions in the walkway. Id. The judge also concluded that collateral estoppel should not be applied against the Secretary in this matter. Id.

The Commission granted BethEnergy's petition for discretionary review. Oral argument in this matter was heard on February 21, 1991, along with argument in the other safeguard cases.

II.

Disposition of Issues

A. Validity of underlying safeguard

1. The Secretary's general safeguard authority

The central issue in this case is the validity of the underlying safeguard. In its companion decision issued this date in SOCCO, supra, the Commission addressed the extent of the Secretary's power to issue safeguards. We reviewed the text and legislative history of section 314(b)

of the Mine Act, 30 U.S.C. § 874(b) (see n.1 supra), which confers upon the Secretary the general authority to issue safeguards. We reaffirmed the Commission's view, first expressed in Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985)("SOCCO I"), that section 314(b) is an unusually broad grant of regulatory authority to the Secretary that permits her to issue on a mine-by-mine basis what are, in effect, mandatory standards dealing with transportation hazards.

The Commission rejected the proposition that a notice to provide safeguard is invalid if it addresses a hazard that exists in a significant number of mines. We noted the considerable authority of the Secretary to determine what should properly be formulated as mandatory standards, and we held that the rulemaking provisions of the Mine Act, sections 101 and 301, 30 U.S.C. § 861, do not circumscribe the Secretary's authority to issue safeguards under section 314(b). Rather, we held that a safeguard may properly be issued to deal with commonly encountered transportation hazards, provided it is based on a determination by the inspector of a specific transportation hazard existing at a particular mine. We made clear, however, that a safeguard may not properly be issued by rote application of general MSHA policies, irrespective of the specific conditions at a given mine. We also discussed the Court's opinion in Zeigler Coal Co. v. Kleppe, 536 F.2d 378 (D.C. Cir. 1976), and the Commission's opinion in Carbon County Coal Corp., 7 FMSHRC 1367 (September 1985), both of which dealt with the mine ventilation plan adoption and approval process, and concluded that these cases are distinguishable. Finally, we allocated to the Secretary the burden of proving that a safeguard was issued on the basis of the specific conditions at a particular mine. Notwithstanding the legal conclusions reached in SOCCO, we also questioned, from the standpoint of policy, whether the proliferation of safeguards is the most effective method of addressing the more commonly encountered hazards in underground coal mine transportation, and we strongly suggested that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating such hazards. SOCCO, 14 FMSHRC at ____, slip op. at 15-16.

2. Validity of safeguard based on published safeguard criterion

The Secretary primarily argues that a safeguard addressing a commonly encountered hazard is nonetheless valid. The Secretary argues alternatively that, if a safeguard cannot validly be issued for a commonly encountered hazard, a safeguard issued for such a hazard is nonetheless valid if it is based upon one of the promulgated safeguard criteria set forth in 30 C.F.R. §§ 75.1403-2 through 75.1403-11. The Secretary relies upon Dole, 870 F.2d 662, to support this position.

In ruling that a safeguard dealing with a commonly encountered hazard may properly be issued if it is based on a published safeguard criterion, the judge also relied heavily on Dole. In Dole, the United Mine Workers of America ("UMWA") brought an action asserting that the level of protection afforded by the Secretary's new roof plan regulations, which include roof control plan criteria, had been reduced. In its determination of whether

the new regulations (30 C.F.R. §§ 75.204(a) & (b), & 75.213 (1990)) afforded the same level of protection to miners as the predecessor regulations (30 C.F.R. §§ 75.200-7(a), 75.200-12, 75.204, 75.204-1 and 75.200-14 (1987)), the Court examined whether the predecessor regulations constituted "mandatory standards," since only such mandatory standards are included within the scope of the "no-less protection rule." 870 F.2d at 667; 55 Fed. Reg. 4592 (February 8, 1990). The "no-less protection rule," embodied in the Act's grant of rulemaking power to the Secretary (30 U.S.C. § 811(a)), authorizes the Secretary to replace existing mandatory standards only if the new standards provide at least the same level of protection as the old standards. See 870 F.2d at 664.

The Court concluded that the predecessor regulations constituted mandatory standards and, therefore, were subject to the "no-less protection rule." 870 F.2d at 672. The Court explained that the predecessor regulations required that a certain level of protection be met by all plans, even if some individual criteria were not adopted in a specific plan. 870 F.2d at 670.

The Court rejected the argument of intervenor American Mining Congress ("AMC") that roof control plans were intended to contain only mine-specific provisions and that generally applicable provisions were invalid and not subject to the "no-less protection rule." 870 F.2d at 669. The Court found that Congress intended roof control plans to afford comprehensive protection against roof falls and, therefore, that they could properly contain provisions that might be appropriate at many mines as well as provisions that might be inappropriate at other mines. 870 F.2d at 670. The Court indicated that the AMC's argument was based upon an apparent misconstruction of Zeigler and Carbon County, supra. The Court interpreted Zeigler and Carbon County to stand only for the proposition that "the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by so doing she circumvented procedural requirements for establishing mandatory standards laid down in the Mine Act." 870 F.2d at 671-72.

The Court further explained that the Secretary is not precluded from requiring general plan provisions that would achieve an "overall level of miner protection on all pertinent aspects of roof control," but that the Secretary "should utilize mandatory standards for requirements of universal application." 870 F.2d at 672. The Court acknowledged that the Secretary possesses considerable authority to determine what hazards should be dealt with through the promulgation of mandatory standards under section 101 of the Mine Act, 30 U.S.C. § 811. 870 F.2d at 671.

We believe that conclusions with regard to criteria that are drawn from the roof control plan process are not applicable to cases involving safeguards. A roof control plan must provide the same level of protection as that afforded by the plan criteria, even if a certain roof plan criterion is not included in a particular plan. 30 C.F.R. § 75.200-6 (1987); Dole, 870 F.2d at 670. There is no similar requirement with respect to the safeguard criteria. Section 75.1403-1(b) makes clear that the safeguard criteria are not binding on any particular operator unless, and until, that

operator is given notice, in a written safeguard from an authorized representative of the Secretary, that one or more of the criteria are applicable to its mine. 30 C.F.R. § 75.1403-1(b). MSHA's Program Policy Manual (the "Manual") reiterates "that these criteria are not mandatory." Manual, Volume V, Part 75, p. 125.[3]

As we concluded in SOCCO, a safeguard is valid only if it is based on a determination by the inspector that a transportation hazard exists at a particular mine. The fact that a safeguard is based on a published criterion does not, by itself, establish its validity. In this regard, the judge erred when he concluded that the safeguard criteria "may be used as safeguards even though they are applied at many mines and are not mine-specific" because they were promulgated in accordance with section 101 of the Act. 12 FMSHRC at 769. The judge reached this conclusion by interpreting Dole to mean that the published roof control criteria constituted mandatory standards because they were promulgated in accordance with notice-and-comment rulemaking procedures. Id. quoting, 870 F.2d at 670 & 671. We disagree with the judge's interpretation of Dole. The Court reached the conclusion that the published criteria constituted mandatory standards not because individual criteria were promulgated but, instead, because overall they mandated a particular level of protection. The Court stated that roof control plans can be approved by MSHA "only if they either conformed to the criteria or 'provide[d] no less than the same measure of protection to the miners' as the criteria.... MSHA was not only empowered but required to withhold approval of the plan until the mine operator incorporated the criterion. Thus the criteria ... themselves constituted a mandatory standard laying down a required level of protection for miners that had to be met by all plans." 870 F.2d at 670 (emphasis in original) (citations omitted). The roof control plan criteria in Dole cannot appropriately be compared to safeguard criteria because, as noted above, there is no similar requirement that all mines provide the level of protection that would result from imposition of the safeguard criteria. Hence, we reject the view that a safeguard is valid merely because it is based on a published safeguard criterion and, as explained above, we do not read Dole to compel by analogy the contrary result.

---

[3] The title page of the Manual states that the "MSHA Program Policy Manual is a compilation of the Agency's policies on the implementation and enforcement of the Federal Mine Safety and Health Act of 1977 and Title 30 Code of Federal Regulations and supporting programs." The D.C. Circuit has stated that while the Manual may not be binding on MSHA, "we consider the MSHA Manual to be an accurate guide to current MSHA policies and practices." Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989). (The Commission has indicated that, as an adjudicative body, it is not necessarily bound by statements in the Manual, although in appropriate circumstances, it may choose to defer to and apply such pronouncements. See, e.g., King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981).).

3. Judicial construction of safeguard based on a published criterion

We also reject the judge's determination that a safeguard notice based on a promulgated safeguard criterion need not be strictly construed by the Commission, but may be interpreted more broadly in a manner similar to the proper construction of any other mandatory standard. As we discussed in SOCCO I (7 FMSHRC at 512), and reaffirm today, a safeguard must be interpreted narrowly in order to balance the Secretary's unique authority to require a safeguard and the operator's right to fair notice of the conduct required of it by the safeguard. The fact that a safeguard is based on a published criterion does not alter this fundamental consideration. A criterion does not provide clear notice until it is embodied in a safeguard issued to the operator. The focus of judicial inquiry is on whether the safeguard is based on specific conditions at a mine and, as to those specific conditions, whether it affords the operator fair notice of what is required or prohibited by the safeguard.

In sum, we hold that the fact that a notice to provide safeguard is based upon a promulgated safeguard criterion is not, in itself, determinative of the validity of the safeguard. As explained in SOCCO, the validity of a safeguard depends on whether it was based on the inspector's evaluation of specific conditions at the mine in question and a determination that those conditions created a specific transportation hazard in need of the remedy prescribed. Because the judge in this case failed to consider the manner in which the safeguard was issued, we vacate the judge's determination that the safeguard was valid. We remand for further consideration in light of the present decision, our companion decision issued today in SOCCO, and the principles of construction announced in SOCCO I, 7 FMSHRC at 512.

Since we vacate the judge's determination that the underlying safeguard was valid, we need not reach at this juncture the issue of whether BethEnergy violated the safeguard, whether the alleged violations were properly designated significant and substantial, and whether the citations issued were duplicative. The judge may reach those issues again on remand, as appropriate.

The single issue remaining is whether the judge erred in concluding that collateral estoppel should not be applied against the Secretary in this proceeding.

B. Collateral Estoppel

BethEnergy contends that the Secretary should be collaterally estopped from relitigating the issue of whether she possesses the authority to issue and enforce a safeguard on an MSHA District-wide basis, without consideration of the specific conditions at a given mine, because she previously litigated and lost the same issue against BethEnergy in BethEnergy Mines, Inc., 11 FMSHRC 942 (May 1989)(ALJ) (BethEnergy I"). The judge determined that the Secretary should not be collaterally estopped in this proceeding because the safeguard in question in BethEnergy I was based

upon a different criterion than the criterion invoked here and, further, that BethEnergy I was decided "without the benefit of the [Dole] decision." 12 FMSHRC 761, 770 (April 1990).

The Secretary counters that the judge correctly rejected BethEnergy's collateral estoppel argument because there are significant differences in the safeguard issues in BethEnergy I and the present case. The Secretary considers the most significant difference to be that this case involves the validity of a safeguard based upon a published criterion, while in BethEnergy I the safeguard was greatly modified from the language of a published criterion. Finally, the Secretary argues that BethEnergy I involved a different mine and that the safeguard addressed a different hazard.

Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit may preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Bradley v. Belva Coal Co., 4 FMSHRC 982, 990 (June 1982). Collateral estoppel does not apply in instances in which there has been a change in controlling facts or applicable legal principles between the two cases. See, e.g., Montana v. United States, 440 U.S. 147, 158-59 (1979); United States v. Stauffer Chemical Co., 464 U.S. 165, 169 (1984). A change in controlling facts may, in effect, create a new issue in the second suit that was not litigated or adjudicated in the prior suit. 1B J. Moore, Moore's Federal Practice ¶0.448 (2d ed. 1984). Identity of issue is a fundamental element that must be satisfied before collateral estoppel may be applied. Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 594 (7th Cir. 1979).

As discussed above, the fact that a safeguard is based upon a published criterion does not necessarily affect its validity or the manner in which it is to be judicially construed. Accordingly, we reject the Secretary's contention that the issues in the two proceedings differ significantly merely because the safeguard in the present proceeding is founded on a published criterion. Likewise, we reject the judge's apparent determination that there was a change in legal principles between BethEnergy I and the present case because BethEnergy I was decided without the benefit of Dole. Dole was in fact decided before BethEnergy I.

Nonetheless, we agree with the Secretary that the judge correctly rejected BethEnergy's collateral estoppel argument. We conclude that collateral estoppel should not be applied against the Secretary in this case, in part, because BethEnergy did not prove identity of issue in view of the different controlling facts in BethEnergy I and the present case.

In BethEnergy I, the judge found that the evidence was undisputed that the same safeguard had been issued at all mines with track haulage in MSHA District 3, that these safeguards were uniformly based on a sample furnished by MSHA's District 3 Office, and that the standardized modification language was applied to all track haulage mines in District 3, regardless of the conditions in any particular mine. See 11 FMSHRC at 943. Here, the evidence was presented that the same safeguard requiring 24 inches of

clearance on both sides of conveyor belts had not been issued to all mines in the relevant MSHA subdistrict with belt conveyors. Small mines in the subdistrict did not receive the safeguards. Tr. 37. BethEnergy has not shown that there was no change in controlling facts between BethEnergy I and this case, and therefore, has not proven identity of issue.

More importantly, however, we reject BethEnergy's collateral estoppel argument because we find it to be irrelevant to the disposition of the issues before the Commission in this case. As noted, BethEnergy seeks to apply collateral estoppel to prevent the Secretary from litigating the issue of "whether the Secretary has the authority to issue and enforce a safeguard pursuant to 30 C.F.R. § 75.1403 on a District-wide basis without consideration of the specific conditions at the mine." BE Br. at 24. The Secretary is not attempting to litigate that issue. In fact, it appears that the Secretary agrees that a safeguard may be issued only after a representative of the Secretary considers the specific conditions at a mine. See, e.g., Oral Arg. Tr. at 26. Thus, because the Secretary does not dispute the issue that BethEnergy seeks to estop her from litigating, collateral estoppel would have no effect on the resolution of the issues before the Commission.

III.

Conclusion

For the reasons set forth above, we affirm, in result, the judge's decision that collateral estoppel should not be applied against the Secretary in this case, vacate the remainder of the judge's decision, and remand this case for further consideration.

With respect to the issue of whether the underlying safeguard is valid, the judge should set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at BethEnergy's Mine No. 60 and on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO I, the judge should

determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If the judge finds the safeguard to have been validly issued, he should resolve the question of whether BethEnergy violated the safeguard. The remaining issues are to be reconsidered as appropriate to the judge's other determinations.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

PENN 89-277-R
PENN 89-278-R

R. Henry Moore, Esq.
Buchanan Ingersoll
600 Grant Street, 58th Floor
Pittsburgh, PA 15219

Carl C. Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 10, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. YORK 89-10-R YORK 89-26
METTIKI COAL CORPORATION	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), presents the following issues: (1) whether a notice to provide safeguard issued pursuant to 30 C.F.R. § 75.1403 is valid if it addresses conditions that exist at a significant number of mines; (2) whether the validity of a notice to provide safeguard is affected by the fact that it is patterned after 30 C.F.R. § 75.1403-10(e), a published safeguard criterion; and (3) whether the Secretary of Labor should be collaterally estopped from litigating the issues in this case.[1] Our decision

---

[1] 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

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

30 C.F.R. § 75.1403-1 sets forth general provisions regarding "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-1(a) provides:

> Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

The procedures by which an authorized representative of the Secretary may

in this matter is one of several issued on this date with respect to the authority of the Secretary of Labor to issue safeguards.[2]

Commission Administrative Law Judge William Fauver concluded that the Secretary was collaterally estopped from litigating the issues pertaining to validity of a safeguard raised in this case, because the Secretary litigated and lost on the same issues against a different mine operator in BethEnergy Mines, Inc., 11 FMSHRC 942 (May 1989)(ALJ)("BethEnergy I"). The judge, relying on BethEnergy I, also held, on the merits, that the citation charging a violation of the safeguard and the underlying safeguard were invalid. 12 FMSHRC 92 (January 1990)(ALJ). For the reasons that follow, we reverse the judge's decision in part, vacate it in part and remand this case for further proceedings.

I.

Factual Background and Procedural History

On November 1, 1988, MSHA Inspector Charles Wotring inspected the Mettiki Mine in Garrett County, Maryland. He observed an empty and unattended Eimco diesel-powered, self-propelled personnel carrier parked in a crosscut off of the main E-2 track about 20 feet from the base of a slight incline. The personnel carrier was equipped with two brake systems: service brakes used during normal operation and a parking brake designed to prevent the carrier from moving when parked. The parking brake was engaged, but the personnel carrier was not secured by stopblocks, derails or chain-type car holds.

---

issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b).

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a [citation] shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. § 75.1403-10 is entitled "Criteria-Haulage; general" and section 75.1403-10(e) provides:

> Positive-acting stopblocks or derails should be used where necessary to protect persons from danger of runaway haulage equipment.

[2] The other safeguard decisions issued today are: Southern Ohio Coal Company, 14 FMSHRC ____, Nos. WEVA 88-144-R, etc.; BethEnergy Mines, Inc., 14 FMSHRC ____, Nos. PENN 89-277-R, etc.; and Rochester & Pittsburgh Coal Co., 14 FMSHRC ____, Nos. PENN 88-309-R, etc.

Inspector Wotring issued the citation to Mettiki because he concluded that securing the carrier with only the parking brake was insufficient to comply with the notice to provide safeguard that had been in effect at the mine since June 1980. Wotring believed that the safeguard, as subsequently modified, required track-mounted haulage equipment to be secured with a stopblock, equipped with derails, or chained to the rail to prevent runaway movement. The citation stated in part:

> The White Knight No. 2 personnel carrier was parked on the E-2 main line track incline, unattended and unsecured to prevent runaway. No chain or other means was provided to prevent runaway of this equipment.

Gov. Exh. 22. The inspector designated the alleged violation as being of a significant and substantial nature. Wotring also found Mettiki's negligence to be moderate.

The underlying notice to provide safeguard had been issued by MSHA Inspector Michael Evanoff on June 1, 1980, at the Gobbler Knob Mine (now part of the Mettiki Mine) and provided:

> Positive acting stopblocks or derails are not being used near the bottom of the slope track haulage to protect persons from danger of runaway haulage equipment. Trackmen regularly extend the track haulage at this area which lies on an approximate 17 degree grade. This is a notice to provide safeguards requiring in this mine that positive acting stopblocks or derails shall be used where necessary to protect persons from danger of runaway haulage equipment.

Gov. Exh. 23.

The safeguard was modified on several occasions, most recently on May 11, 1988, to read as follows:

> Safeguard 0629279 issued 6-1-80 is hereby modified in the requirements to read: Positive acting stopblocks, derails or chain type car holds shall be used to secure or prevent runaway of track mounted haulage equipment. Other devices not specifically designed for such purpose are not acceptable, such as skid retarders, post or crib blocks crossed over rails of any design in front/rear of haulage equipment, wooden chocks under wheels or jill pokes of any design.

Gov. Exh. 24.

The notice to provide safeguard was patterned after 30 C.F.R. § 75.1403-10(e), which states:

> Positive-acting stopblocks or derails should be used

where necessary to protect persons from danger of runaway haulage equipment.

This notice to provide safeguard, as modified, was essentially the same as a safeguard that was invalidated by Commission Administrative Law Judge Gary Melick in BethEnergy I, supra. In that case, the judge found that "all of these safeguards regarding the use of positive acting stopblocks or derails in [MSHA's] District 3 were uniformly modified to include language prohibiting the use of certain types of stopblocks," and that "this standardized language was applied to all track haulage mines in District 3, regardless of the conditions in any particular mine." 11 FMSHRC at 943. Judge Melick concluded that "[s]ince it is undisputed that the original safeguard in this case, as well as the subsequent modifications, were issued on a district-wide basis without regard to the specific conditions at [the mine] they were not properly issued." 11 FMSHRC at 948. The Secretary did not appeal the judge's decision in BethEnergy I and it became a final decision of the Commission by operation of the statute. Section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1).

In his decision in the present case, Judge Fauver vacated the safeguard and the citation. The judge noted that in BethEnergy I, Judge Melick determined that MSHA had issued safeguards requiring the use of positive acting stopblocks or derails to all track haulage mines in MSHA District 3, regardless of the conditions at any particular mine. Judge Fauver held that, inasmuch as this case involves the same MSHA District and the same standardized safeguard, the Secretary was collaterally estopped from relitigating Judge Melick's findings in this case. 12 FMSHRC at 95. Judge Fauver, relying on BethEnergy I, also held, on the merits, that the underlying safeguard was invalid. Id. The Commission granted the Secretary's petition for discretionary review. Oral argument in this matter was heard on February 21, 1991, along with argument in the other safeguard cases.

II.

Disposition of Issues

A. The Secretary's safeguard authority

The central issue in this case is the validity of the underlying safeguard. In its companion decision issued this date, Southern Ohio Coal Co., 14 FMSHRC ____, Nos. WEVA 88-144-R, etc. ("SOCCO"), the Commission addressed the extent of the Secretary's authority to issue safeguards under section 314(b) of the Mine Act. 30 U.S.C. § 874(b) (See n.1 supra). We reviewed the text and legislative history of that section and reaffirmed the Commission's view, first expressed in Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985)("SOCCO I"), that section 314(b) is an unusually broad grant to the Secretary of regulatory authority permitting her to issue, on a mine-by-mine basis, what are, in effect, mandatory standards dealing with transportation hazards.

The Commission rejected the proposition that a notice to provide safeguard is invalid if it addresses a hazard that exists in a significant number of mines. We noted the considerable authority of the Secretary to

determine what should properly be formulated as mandatory standards, and we held that the rulemaking provisions of the Mine Act, sections 101 and 301, do not circumscribe the Secretary's authority to issue safeguards under section 314(b). Rather, we held that a safeguard may properly be issued to deal with commonly encountered transportation hazards, provided it is based on a determination by the inspector of a specific transportation hazard existing at a particular mine. We made clear, however, that a safeguard may not properly be issued by rote application of general MSHA policies, irrespective of the specific conditions at a given mine. We also discussed the Court's opinion in Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), and the Commission's opinion in Carbon County Coal Corp., 7 FMSHRC 1367 (September 1985), both of which dealt with the mine ventilation plan adoption and approval process, and concluded that these cases are distinguishable. Finally, we allocated to the Secretary the burden of proving that a safeguard was issued on the basis of the specific conditions at a particular mine. Notwithstanding the legal conclusions reached in SOCCO, we also questioned, from the standpoint of policy, whether the proliferation of safeguards is the most effective method of addressing the more commonly encountered hazards in underground coal mine transportation, and we strongly suggested that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating such hazards. SOCCO, 14 FMSHRC at ____, slip op. at 15-16.

In BethEnergy Mines, Inc., 14 FMSHRC ___, Nos. PENN 89-277-R, etc. ("BethEnergy"), also issued this date, we concluded that the validity of a safeguard is not affected by the fact that it is based on a promulgated criterion in section 75.1403, and that the principles with respect to roof control plan criteria set forth in the D.C. Circuit's decision in UMWA v. Dole, 870 F.2d 662 (D.C. Cir. 1989) are not relevant to cases involving safeguards. BethEnergy, slip op. at 7-8. For the reasons set forth in BethEnergy, we hold that a safeguard must be based on the specific conditions at a mine, regardless of whether the safeguard is patterned after a promulgated criterion, and that an otherwise invalid safeguard is not made valid simply because it is based on a promulgated criterion.

B. Validity of the safeguard at issue

Judge Fauver adopted Judge Melick's reasoning in BethEnergy I and held that the safeguard was invalid. In BethEnergy I, Judge Melick, having determined that all of the mines with track haulage in MSHA District 3 had been issued the same safeguard, regardless of the conditions in any particular mine, invalidated the safeguard on that basis.

In SOCCO, we rejected the "mine-peculiar" view of the Secretary's safeguard authority. In BethEnergy, we held that a safeguard must be based on the specific conditions at a mine, regardless of whether the safeguard is patterned after a promulgated criterion. Thus, consistent with these decisions, the safeguard in question in this case is valid, notwithstanding the fact that similar safeguards were issued for similar hazards at a number of other mines in MSHA District 3, if it was actually based on the specific conditions at Mettiki's mine and on a determination by the inspector that those conditions created a transportation hazard in need of correction.

The judge's analysis is not consistent with the foregoing framework. Accordingly, we vacate his determination with regard to the validity of the safeguard and remand this proceeding to the judge for reevaluation of the safeguard's validity within the framework discussed in SOCCO, BethEnergy and this decision.

C. Collateral Estoppel

Mettiki also contends that the Secretary should be collaterally estopped from denying that standardized safeguards similar to the safeguard at issue in this case had been issued to all track haulage mines in MSHA District 3, regardless of the conditions in any particular mine, because she previously litigated that issue unsuccessfully in BethEnergy I. Judge Fauver, citing Parkland Hosiery Co. v. Shore, 439 U.S. 322 (1979), and Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), determined that, because the Secretary had litigated and lost that issue against a different operator, she was estopped from relitigating it in this case. 12 FMSHRC at 95.

Relying on United States v. Mendoza, 464 U.S. 154 (1984), the Secretary argues that the judge erred because collateral estoppel cannot be applied against the federal government in cases involving nonmutual parties. She contends that since Mettiki was not a party to the earlier litigation, the Secretary cannot be collaterally estopped from litigating the validity of the safeguard at issue in this case.

In Mendoza, the Supreme Court held that the federal government is not bound by an adverse decision of a United States District Court "in a [subsequent] case involving a litigant who was not a party to the earlier litigation." 464 U.S. at 162. The Court stated that the federal government is "more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues." 464 U.S. at 160. The Court concluded that the application of nonmutual estoppel against the federal government would force the government "to appeal every adverse decision in order to avoid foreclosing further review." 464 U.S. at 161.

We conclude that collateral estoppel should not be applied against the Secretary in this case because Mettiki was not a party in BethEnergy I. The Secretary should not be bound in the present proceeding by Judge Melick's decision in an earlier case involving a different mine operator. The cases cited by the judge to support his determination that collateral estoppel should be applied are inapposite. In both Parklane Hosiery and Blonder-Tongue, the Court authorized the use of collateral estoppel to bar relitigation of issues that had been previously litigated in a prior case even though the party seeking estoppel was not a party in the previous litigation. Those cases, however, did not involve the federal government. The Court in Mendoza disapproved the use of nonmutual collateral estoppel against the federal government. 464 U.S. at 160-63. Mettiki has not directed our attention to any precedent or compelling reason justifying a departure from Mendoza. We hold, therefore, that the judge erred in ruling that the Secretary was collaterally estopped from litigating the validity of the safeguard in this case.

III.

Conclusion

For the reasons set forth above, we reverse the judge's decision that collateral estoppel should be applied against the Secretary in this case, vacate the judge's decision that the safeguard is invalid, and remand this case for further consideration.

The judge should set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at the Mettiki Mine and on the inspector's determination that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO I, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If the judge finds the safeguard to have been validly issued, he should resolve the question of whether Mettiki violated the safeguard. If the judge determines that there was a violation, he should then consider whether the violation was of a significant and substantial nature and assess an appropriate civil penalty.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Susan E. Chetlin, Esq.
Mettiki Coal Corporation
2525 Harrodsburg Road, Suite 300
Lexington, Kentucky 40504

Carl C. Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge William Fauver
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 10, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 88-309-R
	:	PENN 88-310-R
ROCHESTER AND PITTSBURGH COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), presents the issue of whether a notice to provide safeguard issued pursuant to 30 C.F.R. § 75.1403 is invalid if it addresses conditions that exist in a significant number of mines. [1] Our decision in this matter is one of several issued on this date

---

[1] 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

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

The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b).

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a [citation] shall be issued to the operator pursuant to section 104 of the Act.

concerning the authority of the Secretary of Labor to issue safeguards. [2]

Commission Administrative Law Judge Avram Weisberger concluded that the Secretary failed to prove that the safeguard was "mine specific" to the Greenwich Collieries No. 2 Mine of Rochester and Pittsburgh Coal Company ("R&P"). 11 FMSHRC 2007, 2010 (October 1989)(ALJ). Consequently, he found the safeguard to be invalid because it was not promulgated pursuant to the rulemaking procedures of the Act. Accordingly, the judge vacated the citations issued to R&P alleging violations of the safeguard. For the reasons that follow, we vacate the judge's decision and remand this case to the judge for further proceedings.

I.

Factual Background and Procedural History

On August 24, 1988, Nevin Davis, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a spot inspection at the Greenwich Collieries No. 2 Mine and observed a miner exiting an elevator at the top of the South Portal with a portable dolly made of metal pipe. The dolly was approximately 2 feet high and tapered towards its rectangular base, which was approximately 1 foot by 2 feet. The dolly had two wheels and was designed to be pushed by hand. Davis issued a citation to R&P alleging a violation of an underlying Notice to Provide Safeguard (No. 2885431). The citation states:

> An employee of this Company was observed by this writer exiting the South Portal elevator at the surface area with a metal type portable dolly carrying device. A notice to provide Safeguard No. 2885431 was issued at this mine on 05/18/88 under District Memorandum No. 207 - dated May 8, 1978 under Part/Section 75.1403 and prohibits person or persons being transported in elevators with equipment, supplies, or other materials except small hand tools, surveying instruments, or technical devices.

The inspector designated the alleged violation as being of a significant and substantial nature.

On September 6, 1988, Davis was again at the No. 2 mine and observed a miner exiting the top of the same South Portal elevator with a dolly, which he thought was the same one that he had observed on August 24, 1988. He issued another citation, again alleging a violation of Notice to Provide Safeguard No. 2885431. The citation states:

> An employee of this Company (Lamp No. 109) was observed and later questioned by this writer exiting

---

[2] Our other safeguard decisions issued today are: Southern Ohio Coal Company, 14 FMSHRC ____, Nos. WEVA 88-144-R, etc.; BethEnergy Mines, Inc., 14 FMSHRC ____, Nos. PENN 89-277-R, etc.; and Mettiki Coal Corp., 14 FMSHRC ____, Nos. YORK 89-10-R, etc.

> the South Portal elevator at the surface area with a metal type portable dolly carrying device. A notice to provide Safeguard No. 2885431 was issued at this mine on 05/18/88 under District Memorandum No. 207 - dated May 8, 1978 under Part/Section 75.1403 and prohibits person or persons being transported in elevators with equipment, supplies, or other materials, except small hand tools, surveying instruments, or technical devices.

The inspector also designated this violation as significant and substantial.

Notice to Provide Safeguard No. 2885431 had been issued by Inspector Davis on May 18, 1988, as a result of his observations at the No. 2 Mine on May 16, 1988. On that date, Davis saw two miners unloading four or five metal pipes about 2 inches in diameter and between 2 to 4 feet in length from an elevator. There were also two unidentified "cylindrical" objects about 1/2 foot high on the floor of the elevator. Based on these observations and relying on "District Memorandum No. 207," Davis issued the Notice to Provide Safeguard, which states:

> Two (2) employees of this Company w[ere] observed by this writer on 05/16/88 at approximately 1500 hours exiting this mine[']s underground workings by way of the South Portal[']s elevator. These same two employees then proceeded to unload metal pipe arrangements and large cylindrical type objects (2) from this elevator. This notice to provide safeguard is issued for this mine per District Memorandum No. 207 dated May 8, 1978 and requires that no persons shall be transported on any cages or elevators with equipment, supplies, or other materials. This does not prohibit the carrying of small hand tools, surveying instruments, or technical devices.

District Memorandum No. 207, from Donald W. Huntley, MSHA District Manager for Coal Mine Safety and Health, states:

> In accordance with the procedure for expansion of provisions under section 75.1403, 30 C.F.R. 75, ... the following list of provisions should be enforced:
>
> > No person shall ride on a cage or elevator with equipment, supplies, or other materials.

This does not prohibit the carrying of small hand tools, surveying instruments, or technical devices. [3]

In his decision, the judge stated that a safeguard must be issued on a "mine-specific" basis, dealing with hazards "unique" or "peculiar" to a given mine, and that a safeguard purporting to address "generally applicable" conditions must instead be promulgated pursuant to the rulemaking provisions of the Act. 11 FMSHRC at 2010-11. The judge found that the Secretary had failed to establish that the safeguard in issue was "mine-specific" to the No. 2 mine. 11 FMSHRC at 2011. The judge concluded that the safeguard was invalid "as it was not promulgated pursuant to the rule-making procedures" of the Mine Act and dismissed the citations as being predicated upon an invalidly issued safeguard. Id. The Commission granted the Secretary's petition for discretionary review. Oral argument in this matter was heard on February 21, 1991, along with argument in the other safeguard cases.

II.
Disposition of Issues

The sole issue in this case is the validity of the underlying safeguard. In its companion decision issued this date, Southern Ohio Coal Co., 14 FMSHRC ____, Nos. WEVA 88-144-R, etc. ("SOCCO"), the Commission addressed the extent of the Secretary's authority to issue safeguards under section 314(b) of the Mine Act, 30 U.S.C. § 874(b) (see n.1 supra). We reviewed the text and legislative history of that section and reaffirmed the Commission's view, first expressed in Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985)("SOCCO I"), that section 314(b) is an unusually broad grant to the Secretary of regulatory authority permitting her to issue, on a mine-by-mine basis, what are, in effect, mandatory standards dealing with transportation hazards.

The Commission rejected the proposition that a notice to provide safeguards is invalid if it addresses a hazard that exists in a significant number of mines. We noted the considerable authority of the Secretary to determine what should properly be formulated as mandatory standards, and we held that the rulemaking provisions of the Mine Act, sections 101 and 301, do not circumscribe the Secretary's authority to issue safeguards under section 314(b). Rather, we held that a safeguard may properly be issued to deal with commonly encountered transportation hazards, provided it is based on a determination by the inspector of a specific transportation hazard existing at a particular mine. We made clear, however, that a safeguard may not properly be issued by rote application of general MSHA policies, irrespective of the

---

[3] The Secretary does not contend that the safeguard at issue in this proceeding was based on any published safeguard criterion set forth at 30 C.F.R. §§ 75.1403-2 through -11. We note, however, that 30 C.F.R. § 75.1403-7(k), dealing with mantrips, provides that "[s]upplies or tools, except small hand tools or instruments, should not be transported with men."

specific conditions at a given mine. We discussed the Court's opinion in Zeigler Coal Co. v. Kleppe, 536 F.2d 378 (D.C. Cir. 1976), and the Commission's opinion in Carbon County Coal Corp., 7 FMSHRC 1367 (September 1985), both of which dealt with the mine ventilation plan adoption and approval process, and concluded that these cases are distinguishable. Finally, we allocated to the Secretary the burden of proving that a safeguard was issued on the basis of the specific conditions at a particular mine. Against the backdrop of these general principles, we now review the judge's determinations in the present case. Notwithstanding the legal conclusions reached in SOCCO, we also questioned, from the standpoint of policy, whether the proliferation of safeguards is the most effective method of addressing the more commonly encountered hazards in underground coal mine transportation, and we strongly suggested that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating such hazards. SOCCO, 14 FMSHRC at ____, slip op. at 15-16.

The judge concluded that the Secretary failed to establish that the safeguard was "mine-specific to the subject mine." 11 FMSHRC at 2011. The judge determined that Inspector Davis issued the safeguard as a result of District Memorandum No. 207 and that both the terms of this memorandum as well as the safeguard itself "relate to conditions that are applicable to all elevators and are not unique to the elevators at Mine No. 2." 11 FMSHRC at 2010-11. The judge concluded that there is no evidence that the condition described in the safeguard "is unique to Mine No. 2, or is occasioned by equipment peculiar to Mine No. 2." 11 FMSHRC at 2011.

In SOCCO, we rejected the "mine-peculiar" view of the Secretary's safeguard authority. Consistent with that holding, the safeguard in question in this case is valid, notwithstanding the fact that similar safeguards were issued at a number of other mines, if it was actually based on the specific conditions at the Greenwich Collieries No. 2 Mine and on a determination by the inspector that those conditions created a transportation hazard in need of correction. The judge also relied heavily on Zeigler and Carbon County, supra. For the reasons explained in SOCCO, those decisions do not compel the "mine-peculiar" approach in the safeguard context. In light of these conclusions, we vacate the judge's decision and remand this proceeding to him for reevaluation of the validity of the safeguard according to the framework discussed in SOCCO and in this decision.

The judge should set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at Mine No. 2 and on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO I, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If the judge finds the safeguard to have been validly issued, he should resolve the question of whether R&P violated the safeguard. If the judge determines there were violations, he should then consider whether the violations were of a significant and substantial nature and should assess appropriate civil penalties.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand for further proceedings consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Joseph A. Yuhas, Esq.
Rochester & Pittsburgh Coal Company
P.O. Box 367
Ebensburg, PA 15931

Carl Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 10, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 88-152
GREEN RIVER COAL COMPANY, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

The issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), is whether Green River Coal Company, Inc. ("Green River") failed to comply with a notice to provide safeguard issued pursuant to 30 C.F.R. § 75.1430 and based upon the criterion set forth in 30 C.F.R. § 75.1403-5(g).[1] The Secretary alleges that conditions found by her inspector

---

[1] 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

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

The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b).

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific criteria by

subsequent to the issuance of a safeguard notice and described in a citation alleging a violation of section 75.1403-5(g) were prohibited by the safeguard notice. Commission Administrative Law Judge George A. Koutras found that the conditions for which the citation was issued were not encompassed by the safeguard notice, and he vacated the citation. 11 FMSHRC 685 (April 1989)(ALJ). For the reasons set forth below, we affirm.

On January 21, 1987, Jerrold Pyles, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a notice to provide safeguard to Green River Coal Company, Inc. ("Green River") at Green River's No. 9 Mine, an underground coal mine located near Madisonville, Kentucky. The notice states:

> A clear travelway at least 24" wide was not provided on both sides of the "7B" belt between xcuts No's 88 & 89. There was less than 24" on one side of belt between roof support (timbers) and rib nor between belt and roof support. This is a notice to provide safeguard.

Exh. P-9. In order to remedy the condition, Green River created a clear 24-inch travelway between the roof support timbers and the rib by shearing off part of the rib with a pick and an electric jack hammer.

On March 21, 1988, Inspector Pyles, accompanied by the safety manager for Green River, Grover Fischbeck, conducted an inspection of the mine, during which they observed that damage from a roof fall existed in the area of the 5-D belt, cross-cut number 6. The area had been partially cleaned by removing fallen rock from the conveyor belt. However, some fallen rock remained, approximately 2 feet in height and extending for a length of 10 to 12 feet on either side of the conveyor belt. The rock was slippery in places as a result of water leaking from the roof.

Pyles testified that to conduct a thorough inspection of the 5-D conveyor belt, a belt examiner would have to walk on the slippery rock, which would expose the examiner to hazards associated with falling. Fischbeck confirmed that Pyles issued the citation because of the obstructions in the travelway caused by the fallen rock, which would prevent the belt examiner from walking along the entire length of the belt.

---

which authorized representatives are guided in requiring safeguards. Section 75.1403-5 is entitled "Criteria -- Belt Conveyors" and section 75.1403-5(g) states:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

Pyles issued a citation alleging a violation of section 75.1403-5(g) based upon the safeguard notice he had issued on January 21, 1987. The citation states:

> A clear travelway of at least 24 inches was not provided on the 5 D belt xcut No. 6, in that rock had fallen down against belt, due to a roof fall, and had the travelway partially blocked to where a man or person would have to walked [sic] over the top of it. Area was wet and slippery on top of the gray shale....

Exh. P-8. The Secretary proposed a civil penalty of $800 for the violation, which Green River contested.

Following an evidentiary hearing, the judge vacated the citation. Citing the Commission's decision in Southern Ohio Coal Co., 7 FMSHRC 509 (April 1985)("SOCCO I") and the decision of Commission Administrative Law Judge John A. Carlson in Mid-Continent Resources, Inc., 7 FMSHRC 1457 (September 1985)(ALJ), he concluded that the safeguard notice issued by Pyles on January 21, 1987, did not encompass the cited conditions. 11 FMSHRC at 702-03.[2] The judge agreed with Judge Carlson's reasoning in Mid-Continent and compared the conditions leading to the issuance of the citation with those leading to the issuance of the safeguard notice. He found that the conditions giving rise to the safeguard, which had come about as a result of installing roof support timbers too close to a conveyor belt and which required that the rib be sheared to provide the necessary

---

[2] In SOCCO I, a case involving an alleged violation of a notice to provide safeguard, the Commission held that, in determining whether an operator has violated a safeguard notice, the notice must be strictly construed and must give the operator clear notice of the hazard and of the conduct required to remain in compliance. 7 FMSHRC at 512.

In Mid-Continent, an inspector issued a safeguard notice pursuant to section 75.1403-5(g) because coal sloughage obstructed part of a 24-inch travelway along a conveyor belt. Subsequently, the inspector found another travelway obstructed by coal sloughage, a shallow trench, and roof support timbers. Judge Carlson found that the citation was valid with respect to the coal sloughage, but invalid with respect to the trench and timbers. He held that specification of coal sloughage in the safeguard notice "was broad enough to embrace the casual presence or accumulation of coal or similar solid objects in the travelway." 7 FMSHRC at 1461. He further held, however, that the safeguard notice was not broad enough to include the dissimilar obstructions of the trench, which differed in nature from the sloughage, or the standing roof support timbers, which were installed as part of the roof control system and which required abatement action far different from the removal of coal sloughage. The judge therefore concluded that the trench and the roof support timbers "differed enough from the class of objects akin to coal sloughage to remain outside the reasonable scope of [the] ... notice of safeguard." 7 FMSHRC at 1462.

clearance, were different from the rock fall condition on which Pyles based the citation.

On review, the Secretary contends that the judge misapplied the Commission's holding in SOCCO I. She argues that the citation must be upheld if both the safeguard notice and the citation cover physical obstructions to a 24-inch travelway. The Secretary refers to the Commission's statement in SOCCO I, where the safeguard notice had been issued to address an obstruction caused by cement blocks and rocks, that further instances of physical obstructions, whether rocks, cement blocks, construction materials, mine equipment, or debris, would fall within the scope of the safeguard. 7 FMSHRC at 513. She argues that, because the safeguard notice and citation in this case cover "physical obstructions," roof support timbers and fallen rock, the citation was validly issued and should have been upheld, and a civil penalty assessed against Green River.

We disagree. In SOCCO I, the Commission explained that strict construction of safeguards is premised upon the unique process by which safeguards are issued. Inspectors are authorized by section 75.1403 to write what are, in effect, mandatory safety standards on a mine-by-mine basis in order to reduce hazards posed by the transportation of men and materials in a particular mine. If the operator fails to comply with a safeguard as issued, he is susceptible to the issuance of a citation and the subsequent assessment of a civil penalty. 30 C.F.R. § 75.1403-1(b).

The Commission concluded that the special nature of the safeguard provision, that is, its unusually broad grant of regulatory authority, requires a rule of interpretation more restrained than that accorded standards promulgated for nationwide application to all mines. The Commission held that "a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." SOCCO I, 7 FMSHRC at 512. The Commission further stated that its approach toward interpretation of the safeguard provisions "strikes an appropriate balance between the Secretary's authority to require ... safeguards and the operator's right to notice of the conduct required of him" and that "the safety of miners is best advanced by an interpretative approach that ensures that the hazard of concern to the inspector is fully understood by the operator, thereby enabling the operator to secure prompt and complete abatement." Id.

In SOCCO I, the safeguard notice was issued because fallen rock and cement blocks obstructed the travelway, and the citation that alleged a violation of the safeguard was issued because an accumulation of water, which presented a slipping and stumbling hazard, was present in the travelway. The Commission found that the accumulation of water was neither specifically identified in the safeguard notice nor contemplated by the inspector when he issued the safeguard notice. SOCCO I, 7 FMSHRC at 513. In concluding that the conditions for which the citation was issued did not violate the notice to provide safeguard, the Commission considered the physical characteristics of the impediments to travel, as well as factors such as the type of hazards posed by the conditions, the manner by which the conditions were created, and the manner in which the conditions could be

remedied. Id.[3]

Following the analytical guidelines adopted by the Commission in SOCCO I, Judge Koutras correctly concluded that the safeguard notice in this case did not cover the cited obstruction. In so doing, the judge properly rejected the inspector's opinion that, regardless of the conditions that caused a belt travelway to be restricted, a violation of the safeguard occurred whenever a clear travelway of at least 24 inches was not provided in accordance with the safeguard notice. 11 FMSHRC at 700-03. The judge focused upon the characteristics of the obstacles causing the obstruction, the type of hazard posed by the obstacles, the manner in which the obstacles were created, and the manner in which the resulting conditions could be remedied. The judge found that, while no evidence was presented with respect to the hazards associated with a travelway restricted by the installation of roof support timbers close to a conveyor belt, the evidence, nonetheless, established a slipping and falling hazard with respect to the fallen rock. 11 FMSHRC at 702. The judge noted that the obstructions described in the safeguard notice and citation arose in dissimilar manners. The safeguard specifically addressed a lack of clearance caused by the installation of roof timbers too close to a conveyor belt, while the cited obstruction was caused by rock that had fallen against the belt. 11 FMSHRC at 702-03. The judge also noted that the safeguard obstruction was abated in a manner requiring the use of a jack hammer to shear off a rib to provide greater clearance. 11 FMSHRC at 703. The cited obstruction was abated by removing the fallen rock. Tr. 12, 17. Given these differences between the impediment caused by the intentional placement of roof support timbers and the impediment caused when rock had accidentally fallen against the conveyor belt, he held that the safeguard notice did not encompass the conditions in the citation. 11 FMSHRC at 703.

The inspector believed that whenever a clear travelway was not provided for whatever reason, he should issue a citation, even though an obstruction caused by fallen rock was not specifically addressed in the safeguard notice. Tr. 63-64. A safeguard, however, must identify with specificity the nature of the hazard against which it is directed and the conduct required of the operator to remedy the hazard. Obstructions in travelways caused by the deliberate placement of roof supports differ fundamentally in nature, cause, and remedy from those that occur due to roof falls. We find, therefore, that the prohibition against obstructions in travelways caused by the placement of roof support timbers did not provide sufficient notice to Green River that obstructions caused by roof falls likewise were prohibited.

We reject the Secretary's argument that the concerns expressed by the Commission in SOCCO I regarding the necessity for narrow construction of a

---

[3] This same wide range of distinguishing factors was considered by the judge in Mid-Continent when he concluded that the safeguard notice issued because coal sloughage obstructed an escapeway did not encompass obstructions caused by a trench and roof support timbers. 7 FMSHRC at 1461. See n.2, supra.

notice to provide safeguard are valid only when the safeguard is not based on a specific published criterion of sections 75.1403-2 through 75.1403-11. See Sec. Br. at 10. The Secretary argues that a safeguard notice that is based on a published criterion should be construed like a mandatory standard and should apply to all factual circumstances reasonably encompassed by the language of the criterion. The Secretary cites UMWA v. Dole, 870 F.2d 662 (D.C. Cir. 1989) as supporting her argument.

We have addressed a number of issues concerning the authority of the Secretary of Labor to issue safeguards in decisions issued this date in the following cases: Southern Ohio Coal Co., 14 FMSHRC, ____, Nos. WEVA 88-144-R, etc.; BethEnergy Mines, Inc., 14 FMSHRC ___, Nos. PENN 89-277-R, etc.; Mettiki Coal Corp., 14 FMSHRC ___, Nos. YORK 89-10-R, etc.; and Rochester and Pittsburgh Coal Co., 14 FMSHRC ___, Nos. PENN 88-309-R, etc. In BethEnergy, supra, we held that the fact that a safeguard is founded on a published criterion does not affect either its validity or the manner in which it is to be construed. The validity of a safeguard depends on whether the safeguard is based on the inspector's evaluation of specific conditions at the mine in question and on the inspector's determination that those conditions created a specific transportation hazard in need of the remedy prescribed. We determined that the principles with respect to roof control plan criteria set forth in Dole are not relevant to cases involving safeguards. We reaffirmed our holding in SOCCO I that a safeguard must afford the operator fair notice of what is required or prohibited by the safeguard. The fact that a safeguard is based on a published criterion does not alter the fundamental consideration that a safeguard must be interpreted more narrowly than a promulgated standard in order to balance the Secretary's authority to require a safeguard and the operator's right to fair notice of the conduct required by the safeguard. Slip op. at 8-9.

We conclude, therefore, that the judge properly construed the safeguard notice and correctly found that it is not broad enough to encompass the conditions described in the citation. Accordingly, we affirm the vacation of the citation.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Carl Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

B.R. Paxton, Esq.
Paxton & Kusch
213 E. Broad Street
P.O. Box 655
Central City, Kentucky 42330

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 13, 1992

AMOS HICKS	:	
	:	
v.	:	Docket No. VA 89-72-D
	:	
COBRA MINING, INC.	:	
JERRY K. LESTER, and	:	
CARTER MESSER	:	
	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This matter, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), is before the Commission for a second time. The present proceeding stems from a pro se petition for discretionary review filed by Amos Hicks on September 9, 1991, seeking review of part of an August 7, 1991, decision issued by Commission Administrative Law Judge Avram Weisberger. 13 FMSHRC 1262. Mr. Hicks takes issue with the amount of the damages awarded him in connection with his discriminatory discharge.

In a March 22, 1990, decision Judge Weisberger determined that Hicks had set forth a prima facie case of discrimination, but that the Respondents had established an affirmative defense to Hicks' case. 12 FMSHRC 563. Hicks petitioned for discretionary review of the decision, which was granted. On April 1, 1991, the Commission vacated the judge's decision and directed that the Respondents' affirmative defense be re-evaluated in light of applicable precedent. 13 FMSHRC 523. On June 4, 1991, the judge determined that Cobra Mining, Inc. ("Cobra"), Jerry Lester and Carl Messer had discriminatorily discharged Hicks in violation of section 105(c) of the Mine Act. 30 U.S.C. § 815(c). 13 FMSHRC 921. The factual background of Hicks' complaint of discrimination is set forth fully in our April 1, 1991, decision and need not be restated here.

The issue before us at this juncture is whether certain consequential damages found by the judge to have been caused by the discriminatory discharge were correctly calculated. The damages at issue are in connection with Hicks' loss of his pickup truck, which was repossessed and sold shortly after Hicks was discriminatorily discharged in May of 1989. Before the judge, Cobra and the individual Respondents argued that Hicks' loss of his truck could not be deemed compensable damages under the Mine Act. Citing the legislative history

of the Act,[1] the judge rejected Respondents' arguments and held, "it is respondent's obligation to put Complainant in the position he would be in if there had not been a discriminatory discharge in violation of the Act." 13 FMSHRC at 1263.

The Respondents have not controverted on review the judge's threshold finding that such damages are compensable under the statute. Indeed, Cobra and Messrs. Lester and Messer have filed no pleadings or responses on review. Accordingly, the sole issue before us is whether the judge correctly determined the amount of compensation owed to Hicks for the loss of his truck. For the reasons that follow, we vacate that portion of the judge's decision and remand the matter for further proceedings as indicated below.

Prior to the issuance of his remedial decision, the judge directed the parties to file statements regarding the amount of damages due Hicks. On June 21, 1991, the Secretary of Labor, on Hicks' behalf, filed a request for back pay, costs and consequential damages totalling $17,107.17.[2] Of the total damages sought, the Secretary designated $9,861.07 as consequential damages associated with Hicks' loss of his 1988 Dodge Ram pickup truck, which, shortly after Hicks' discharge, was repossessed and sold by the bank through which he had financed its purchase. The amount sought was arrived at by adding the monthly payments Hicks had already made on the truck ($4,818.80) and the amount Hicks still owed to the bank after the loan balance was adjusted to

---

[1] The legislative history of section 105(c) of the Act provides in relevant part:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct, including, but not limited to, reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. Rep. No. 181, 95 Cong., 1st Sess., at 37 (1977), reprinted in 95 Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

[2] Hicks was represented by the Secretary in the original proceeding, in which no discriminatory discharge was found. 12 FMSHRC 563 (March 1991). The Secretary did not file a petition for discretionary review of that decision on Hicks' behalf, leaving Hicks to file his ultimately successful petition pro se. The Secretary re-entered the proceeding on remand and, in addition to filing for the above-referenced damages, sought and obtained a civil penalty of $1500.00 against Respondents for violation of section 105(c) of the Act. Upon the judge's reduction of the amount of consequential damages sought by the Secretary on Hicks' behalf, the Secretary once again did not file a petition for discretionary review, and Hicks filed his present petition pro se.

reflect the repossession and sale of the vehicle ($5,042.27).

The unrebutted evidence submitted by Hicks indicates that he purchased a new 1988 Dodge Ram pickup truck in February 1988, and financed the purchase through a loan totalling $20,652.00. Hicks made 14 monthly payments of $344.20 each on the loan through April 1989. After his discharge by Cobra in May 1989, Hicks made no further payments on the truck. At that time he had paid $4,818.80 on the loan. The bank repossessed the truck in July of 1989, and thereafter sold it for $7,400.00. In September of 1989, the bank advised Hicks that the proceeds of the sale and various offsetting charges associated with the repossession left him with a liability to the bank of $5,042.27.

In his decision, the judge ordered payment of what he considered Hicks' "lost equity" in the truck, i.e., the total of the monthly payments Hicks had made prior to the repossession of the truck ($4,818.80). As for the $5,042.27 still owing to the bank and sought as damages by the Secretary, the judge held that this sum "constitutes complainant's obligation under the loan, and does not appear to be related to his having lost his employment." 13 FMSHRC at 1263.[3]

The measure of recognizable consequential damages is generally calculated on the basis of the "fair market value" for property lost as a result of the illegal act. See, e.g., Kenneth Wiggins v. Eastern Assoc. Coal Corp., 7 FMSHRC 1766, 1773 (November 1985). We conclude that neither the calculation of consequential damages proposed by the Secretary nor the actual determination of those damages made by the judge is appropriate.

The appropriate award to Hicks is an amount reflecting what he actually lost -- the fair market value of the truck at the time it was repossessed, less whatever net credits he received from the forced sale of the vehicle. Such an approach would most closely reflect what Hicks might have realized had he voluntarily sold the vehicle at the time it was repossessed. The best means of determining Hicks' damages, therefore, is to first establish the fair market value the truck at the time of repossession, in light of such factors as its condition, equipment options and the depreciation it underwent during the 14 months that Hicks owned and operated it. Objective valuation of the truck can be derived from independent appraisal manuals, published for that purpose.

Accordingly, this matter is remanded to the judge for additional

---

[3] The judge relied upon a decision in Noland v. Luck Quarries, Inc., 2 FMSHRC 954 (April 1980), in which Commission Chief Administrative Law Judge Paul Merlin, in order to make the complainant "whole," ordered the respondent to compensate the complainant for the lost equity in a truck that complainant was forced to sell after his discriminatory discharge. It does not appear, however, that the figure was arrived at simply by computing the amount already paid on the truck loan, which would, in most cases, include sums attributable to interest. Rather, it was arrived at by mutual agreement of the parties after the judge ordered them to negotiate an amount in light of such factors as "cost, ... down payment, refinancing, repairs and sales price." 2 FMSHRC at 961-63.

consideration. The judge is directed to reopen the record to receive evidence on the value of the truck at the time of repossession. Once that amount is determined, it should be increased by $142.44, an amount equal to the costs of the repossession charged to Hicks by the bank. In turn, that total amount should be reduced by $7,400.00, the amount credited to Hicks' loan balance from the proceeds of the bank's forced sale of the truck. The remainder, if any, should then be added, with interest, to the damages already awarded for back pay, interest, and costs in the judge's August 7, 1991 order.

For the foregoing reasons, we vacate the judge's decision with respect to the amount of damages awarded for the loss of Hicks' truck and remand the matter for further proceedings consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Mr. Amos R. Hicks
Rt. 2, Box 27 D
Paynesville, West Virginia 24873

Kurt J. Pomrenke, Esq.
White, Elliott & Bundy
P.O. Box 8400
Bristol, Virginia 24203

Glen M. Loos, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 14, 1992

IN RE: CONTESTS OF RESPIRABLE DUST :
SAMPLE ALTERATION CITATIONS : MASTER DOCKET NO. 91-1
:
:

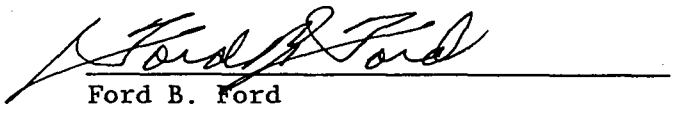
ORDER

On November 13, 1991, the Commission granted petitions filed by the Secretary of Labor and the contestants represented by the law firm of Jackson & Kelly, for interlocutory review of orders entered by Commission Administrative Law Judge James A. Broderick in these proceedings. Petitioners have filed their briefs and response briefs. On January 3, 1992, contestants represented by the law firms of Robertson, Cecil, King & Pruitt and Street, Street, Street, Scott & Bowman filed motions to join in the response brief filed by Jackson & Kelly. These contestants did not join in Jackson & Kelly's petition for interlocutory review and have not previously sought to participate in this interlocutory proceeding.

These contestants did not attempt to explain in their motions why they waited until all briefs were filed to seek to participate in this interlocutory review proceeding. They have been aware of this appeal since it was filed and could reasonably have sought to participate on a more timely basis. Parties who wish to participate in appeals to this Commission must do so promptly after review has been granted. See generally Mid-Continent Resources, Inc., 12 FMSHRC 2399, 2404-05 (December 1989).

Accordingly, the above-referenced motions to join in the response brief filed by Jackson & Kelly are denied.

For the Commission:



Ford B. Ford
Chairman

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 15, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 91-176-M
GREFCO, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act"). On November 18, 1991, Commission Administrative Law Judge John J. Morris entered a decision approving settlement in this case, in which he noted that Grefco, Inc. ("Grefco") had moved to withdraw its contest and to pay in full the civil penalty of $192 proposed by the Secretary of Labor. For the reasons explained below, we vacate the judge's decision approving settlement and remand for further proceedings.

The record reflects that by letter dated November 1, 1991, Michael Conley, counsel for Grefco, informed the Commission and counsel for the Secretary that Grefco would no longer be contesting the proposed penalty in Grefco, Inc., Docket No. CENT 91-190-M. Counsel for the Secretary subsequently forwarded Mr. Conley's November 1 letter to Judge Morris, along with a cover letter explaining that Grefco was withdrawing its contest of the proposed penalties in the present proceeding, Docket No. CENT 91-176-M. On November 18, 1991, the judge entered a decision approving settlement, noting that Grefco had moved to withdraw its contest in the subject case.

On January 2, 1992, the Commission received a letter from Conley dated December 30, 1991, in which he explains that although Grefco does not contest the proposed penalties in the unrelated case, Grefco, Inc. Docket No. CENT 91-190-M, Grefco continues to contest the proposed civil penalties in the subject case. Conley explains that the judge's decision approving settlement was mistakenly entered due to the misdirection of Conley's November 1 letter by the Secretary's counsel, and requests that this matter be returned to Judge Morris.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a

petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. § 823(d); 29 C.F.R. § 2700.70(a). Grefco did not file a timely petition for discretionary review within the 30-day period, nor did the Commission direct review on its own motion within that period. 30 U.S.C. 823(d)(2)(B). Thus, under the Mine Act, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem Grefco's December 30 letter to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See J.R. Thompson, Inc., 12 FMSHRC 1194, 1195-96 (June 1990).

Relief from a final judgment on the basis of mistake, inadvertence, surprise or excusable neglect is available to a movant under Fed. R. Civ. P. 60(b)(1) & (6). See, e.g., Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). The record in this case suggests that the decision approving settlement may have been entered in error. We conclude that this matter should be remanded to the judge in order to afford Grefco the opportunity to present its position to the judge, who shall determine whether final relief from the decision approving settlement is warranted.

For the foregoing reasons, we vacate the judge's order approving settlement and remand this matter to the judge for appropriate proceedings.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 23, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 90-95-M
EXPLOSIVES TECHNOLOGIES INTERNATIONAL, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). The issue is whether Commission Administrative Law Judge James Broderick erred in finding that Explosives Technologies International, Inc. ("ETI") violated two mandatory surface metal/non-metal safety and health standards: 30 C.F.R. § 56.5050(b) requiring the use of feasible administrative or engineering controls to reduce employees' exposure to excessive noise [1] and 30 C.F.R.

---

[1] 30 C.F.R. § 56.5050 states:

> (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard SI.4-1971, "General Purpose Sound Level Meters,"
>
> * * * * * * * * *
>
> PERMISSIBLE NOISE EXPOSURES
>
Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97

§ 56.7002 requiring that equipment defects affecting safety be corrected before the equipment is used.[2] 13 FMSHRC 161 (January 1991)(ALJ). The Commission granted ETI's petition for discretionary review. For the reasons that follow, we affirm the judge's conclusion that ETI violated section 56.5050(b)(1), but reverse his conclusion that it violated section 56.7002.

ETI is an independent contractor at a crushed granite surface mine located in Johnston County, Oklahoma. ETI performs drilling and explosives work at the mine.

I. Factual Background and Procedural History

On November 21, 1989, Norman LaValle, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection at the mine. The inspection included a noise survey of drill operators employed by ETI, including the operator of an Atlas hydraulic drill. In conducting the noise survey, LaValle used a dosimeter to measure the noise

---

Duration per day, hours of exposure	Sound level dBA, slow response
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noise shall not exceed 140 dB, peak sound pressure level.

* * * * *

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

(Emphasis added.)

[2] 30 C.F.R. § 56.7002 states:

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

reaching the drill operator. [3] After three hours had elapsed, LaValle found that the driller had been exposed to noise levels 2.94 times the exposure limit, equivalent to 98 dBA for an 8-hour period. [4] LaValle also found that feasible engineering or administrative controls were not being used to control the noise. LaValle ordered the drill operator to stop drilling and issued Citation No. 3283281 for a violation of section 56.5050(b).

On January 10, 1990, LaValle inspected ETI's Robbins RRT-35 DTH Drill. The drill was out of service for repair of the transmission clutches. LaValle found cracks in the boom support structure of the drill, which he thought could cause its failure. The cracks were packed with oil and grease, suggesting to LaValle that they had existed for some time. LaValle issued Citation No. 3271867 alleging a violation of section 56.7002 by ETI. MSHA proposed civil penalties of $20 for each violation.

Before the administrative law judge, the Secretary maintained that section 56.5050(b) had been violated because ETI had not used feasible engineering or administrative controls to reduce the noise from the Atlas drill. ETI conceded that the drill operator had been exposed to excessive noise, but argued that pneumatic drills with feasible engineering controls expose miners to higher noise levels than those emitted by its hydraulic drill

---

[3] A dosimeter is an electronic device that measures noise exposure. The dosimeter is attached to the miner and the microphone is placed as close to the miner's ear as possible. The dosimeter reads unity (100%) if the noise level is at the maximum level permitted under the standard.

[4] The regulations do not define the terms "dBA" or "decibel". The term "decibel" is defined in A Dictionary of Mining, Mineral, and Related Terms 305, U.S. Department of the Interior (1968), as:

> The unit for measuring sound intensity.... When sound or noise is created it gives off energy which is measured in decibels.

In Marshall v. West Point Pepperell, Inc., 588 F.2d 979, 982 n.5 (5th Cir. 1979), the court explained the term "decibel" as follows:

> Decibels, the basic unit of measurement of sound levels, are recorded on sound level meters according to several scales. On the A scale [dBA], the meter is more sensitive to higher pitched tones than those of a lower pitch, just as the human ear is. The "slow" response is another setting of the instrument by which it averages out high level noises of brief duration (such as hammering), rather than responding to the individual impact noises. See U.S. Dept. of Labor, Guidelines to the Department of Labor's Occupational and Noise Standards, p.3 (1971).

without engineering controls. In ETI's view, its choice of the Atlas drill constituted its feasible engineering control.

The Secretary also maintained that section 56.7002 was violated, arguing that the fact the drill was down for transmission repairs was irrelevant, since the cited defect was unrelated to the transmission and existed prior to the drill's removal from service. ETI argued that the Robbins drill did not violate section 56.7002 because the drill was down for repairs and the inspector incorrectly assumed that ETI would not have discovered the problem and repaired it before it was used.

Judge Broderick sustained the alleged violations. 13 FMSHRC at 163. He found that ETI's Atlas drill operator was exposed to noise levels in excess of those set forth as permissible in section 56.5050, and that feasible administrative and engineering controls existed that could have been used to reduce the noise level of the drill. Id. The judge also found that there were cracks in the metal of the Robbins drill boom support structure and, although the drill was not being operated at the time the condition was discovered, the cracks had existed for some time. Id. The judge found that neither violation was serious and that both resulted from ETI's ordinary negligence and were abated within the time set for termination. He assessed a civil penalty of $50 for each violation. Id.

On review, ETI asserts that the judge erred in finding violations of sections 56.5050(b) and 56.7002. ETI again argues that its choice of a quieter hydraulic drill constitutes its feasible control, and that its use of the drill without additional feasible engineering controls does not violate the standard. It submits that MSHA's interpretation and application of the standard is arbitrary. ETI argues that the cracked drill boom should not have been cited because the drill was being repaired when the deficiency was found. Finally, ETI argues that the judge erroneously assessed $50 penalties for the alleged violations.

II. Disposition of Issues

A. Violation of section 56.5050.

Section 56.5050(a) establishes permissible noise exposure levels based on a time-weighted average. Section 56.5050(b) requires that feasible administrative or engineering controls be used when noise exposure exceeds the permissible level. If these measures fail to reduce noise exposure sufficiently, personal protective equipment must be used to reduce noise levels to within permissible limits.

In Callanan Industries, Inc., 5 FMSHRC 1900 (November 1983), the Commission held that the Secretary establishes a prima facie case of violation by providing: [5]

[5] 30 C.F.R. § 56.5-50, the noise standard involved in Callanan Industries, is identical to section 56.5050.

> (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source;
> (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control;
> (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of the elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits.

5 FMSHRC at 1909.

With respect to element one of the Callanan Industries test, the judge found, and ETI does not dispute, that the drill operator was exposed to noise levels in excess of the limits specified in the standard. 13 FMSHRC at 163. Nor does ETI dispute the judge's finding that there were feasible administrative and engineering controls that could have been used to reduce the noise level to which the employee was exposed. 13 FMSHRC at 163. Inspector LaValle testified that such controls included sound deadening devices or sound deflecting devices, mufflers, and cabs. Tr. 20, 28-29, 39. MSHA District Health Specialist Steve Viles testified that a barrier shield could also serve as a feasible engineering control. Tr. 95-96. MSHA engineer Richard Goff also testified that a barrier or a partial barrier made from belting material or safety glass as well as a cab or partial cab could reduce the noise. Tr. 49-50, 60-62, 64, 66, 69. See also Tr. 38, 73; S. Exh. 10; ETI Exhs. 5, 6.

The judge did not address elements three, four, or five of the Callanan Industries test, although the Secretary presented unrebutted testimony relevant to those elements. In addressing the reduction in the noise level that would be obtained through implementation of engineering controls, Goff testified that, by putting a partial barrier on the control panel of the Atlas drill, "you should be able to get about a 10 dBA reduction." Tr. 50. Goff said that a partial cab at the control station would result in noise reduction of about 5 to 15 dBA. Tr. 69. Goff testified that the cost to construct a barrier made from belting material was approximately $100, that it could usually be put on in about three to four hours, and that there would be a reduction of about 10 dBA on smaller drills. Tr. 61-62. Goff further stated that more effective barriers constructed from safety glass cost approximately $1,000, including materials and labor. Tr. 66. He estimated that this barrier control would provide a 10 to 15 dBA reduction. Tr. 62. Goff testified that retrofitting an Atlas drill with a cab would cost approximately $50,000 to $70,000. Tr. 63-64. The cited drill was valued at $300,000. Tr. 82; ETI Exh. 2.

In Callanan Industries, 5 FMSHRC at 1911-12, the Commission concluded that a 5 dBA reduction at a cost of approximately $2,672 to a drill valued

under $2,500 was sufficient for purposes of establishing that the costs of the controls were not out of proportion to the expected benefits. [6] In A.H. Smith, 6 FMSHRC 199 (February 1984), the Commission found that noise control costs ranging between $600 and $1400 for a diesel shovel were not unreasonable. Accordingly, in view of the evidence discussed above, we conclude that the Secretary established the prima facie case outlined in Callanan Industries.

ETI nonetheless contends that MSHA is arbitrarily applying the standard because pneumatic drills that generate a significantly higher noise level with feasible engineering controls in place are permitted to operate. ETI argues that, logically, it should be able to rely on personal protection equipment because its drill is quieter than a pneumatic drill with engineering controls.

We conclude that ETI is not being treated arbitrarily under the standard because all mine operators are required to use feasible engineering controls to reduce the noise on all equipment that exceeds the levels permitted. If such controls fail to reduce the exposure to within permissible levels, personal protection equipment must then be provided and used to reduce the sound emitted to permissible levels. A mine operator, as well as its employees, benefits from using a quieter drill because it enables the standard's exposure limit to be attained more easily. Additionally, feasible engineering controls on quieter drills may reduce the noise sufficiently to obviate the need for protective equipment. In any event, the fact that pneumatic drills with engineering controls may expose miners to higher noise levels than ETI's hydraulic drill without engineering controls is irrelevant to the issue of whether ETI violated the standard. We conclude that substantial evidence supports the judge's finding that ETI violated section 56.5050(b).

B. Violation of Section 56.7002.

Section 56.7002 requires that "[e]quipment defects affecting safety be corrected before the equipment is used." ETI does not dispute the existence of the cracks in the support structure of the boom of the Robbins drill but argues that it did not violate the standard because the drill was out of service for repairs when the citation was issued. [7]

In Mountain Parkway Stone, Inc., 12 FMSHRC 960 (May 1990), the Commission construed the identical safety standard for underground metal-nonmetal mines (30 C.F.R. § 57.9002). The Commission held that a violation of

---

[6] In MSHA's Program Policy Manual, it is suggested that a 3 dBA reduction is significant. Volume IV, Part 56/57 at 40 (08/30/90 Release IV-5). "[R]educing the noise only three dBA's will reduce the sound power to one half of its previous level." Mining Enforcement and Safety Administration, U.S. Department of the Interior, Programmed Instruction Workbook No. 11, Noise Control, at 27 (1976). (Emphasis in the original).

[7] Because ETI did not dispute whether the cracks in the boom support affected safety, we do not address this matter.

the standard can occur even if the equipment is not in actual use at the time the citation is issued. 12 FMSHRC at 962-63. In that case, a boom truck with numerous defects was parked at the mine in turn-key condition and had not been removed from service. [8] There was no evidence that anyone was engaged in repairing the truck or that any employee had been assigned to repair it. 12 FMSHRC at 963. Moreover, the MSHA inspector testified that he believed the tire tracks around the truck were fresh and that the truck was used whenever there was a need to load. 12 FMSHRC at 961. The inspector further testified that a mechanic employed by Mountain Parkway informed him that the truck had been used during the night shift immediately before the inspection. Id.

The circumstances in this case are distinguishable from those in Mountain Parkway. Here, it is undisputed that the Robbins drill was out of service and undergoing repair. See 13 FMSHRC at 162. Moreover, the record does not establish that the drill had been used in a defective condition.

In affirming the citation, the judge apparently relied on LaValle's testimony in finding that the cracks on the drill boom support structure had existed "for some time." 13 FMSHRC at 163. See Tr. 32, 33-34. LaValle's testimony concerning the age of the cracks, however, was speculative, because, by his own admission, he had no knowledge of structural engineering. In addition, the standard requires that safety defects be corrected "before the equipment is used," and it is, therefore, incumbent upon the Secretary to prove such use or availability for use. The Secretary failed to prove that the drill had been used in the defective condition and failed to present any evidence addressing its past use. The lack of evidence on this important element of the safety standard is significant in the present case because the drill was being repaired at the time the citation was issued and was therefore not then available for use. We conclude that substantial evidence does not support a finding that ETI violated section 56.7002 and, accordingly, we vacate the citation.

C. Assessment of Civil Penalty

Finally, we address whether the judge's assessment of a $50 civil penalty for the violation of section 56.5050(b) was appropriate. Under the Mine Act, review is limited to questions raised in the Petition for Discretionary Review. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii). This issue was raised for the first time in ETI's brief. In any event, the judge did not err.

When a judge's penalty assessment is put in issue on review, the Commission must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. Pyro Mining Co., 6 FMSHRC 2089, 2091 (September 1984). The judge found that the violation of section 56.5050(b) was not serious, resulted from ETI's ordinary

---

[8] Among the defects cited by the inspector in Mountain Parkway were: lack of stabilizing jacks on the truck to prevent it from overturning; leaks in the boom's hydraulic system; missing doors, seat belts, and front and rear lights; and a rag used as a cap on the gas tank. 12 FMSHRC at 961.

negligence, and was abated within the time set for termination. 13 FMSHRC at 163.

We find that the $50 civil penalty is supported by the record and is consistent with the statutory penalty criteria. ETI does not question any of the judge's penalty criteria findings, including his finding of ordinary negligence by the operator. ETI only suggests that the judge raised the civil penalty to $50, using the recently increased MSHA minimum penalty as a benchmark. There is no indication in this record that the judge's action was so motivated. Accordingly, ETI has presented no persuasive reasons why we should overturn the penalty assessment of the judge. Shamrock Coal Co., 1 FMSHRC 469 (June 1979).

III. Conclusion

The judge's decision is affirmed in part and reversed in part. We affirm the judge's finding that ETI violated section 56.5050(b) and his assessment of a civil penalty of $50. We reverse the judge's finding that ETI violated section 56.7002, vacate his assessment of civil penalty, and dismiss the Secretary's petition for civil penalty.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Eva L. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Mr. Volker E. Schmidt, President
Explosives Technologies, Inc.
P.O. Box J
Greenwood, Missouri 64034

Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 1992

CHARLES T. SMITH	:	
	:	
v.	:	Docket No. KENT 90-30-D
	:	
KEM COAL COMPANY	:	
	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), is before the Commission by way of a petition for discretionary review filed on March 1, 1991, by Kem Coal Company ("Kem Coal"). In its petition, Kem Coal seeks review of Commission Administrative Law Judge William Fauver's decision on the merits issued October 31, 1990 (12 FMSHRC 2130), and of his final disposition on stipulated damages, costs and attorney fees issued January 31, 1991. 13 FMSHRC 166. Kem Coal asserts that substantial evidence does not support the judge's conclusion that Charles T. Smith established a prima facie case of discrimination under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and that, even assuming such a prima facie case was established, the judge failed to address Kem Coal's affirmative defense, which alleged that the operator would have discharged Smith in any event for activity not protected under the Mine Act. For the reasons that follow, we vacate the judge's decision and remand the matter for further proceedings consistent with this decision.

I. Factual and Procedural Background

Kem Coal operates a coal processing facility, known as the No. 25 Preparation Plant, located in London, Kentucky. 12 FMSHRC 2130. The plant utilizes three shifts per day (morning and afternoon production shifts and a night maintenance shift) and employs between 15 and 18 miners. Tr. 40, 58.

The facility operates as follows: coal coming onto the property is fed onto a conveyor system that deposits the coal into two round storage bins called stacking tubes or stackers. The stackers are 20 to 25 feet high and have windows or chutes at both the top and the bottom. When coal builds up in a stacker to the level of the lower windows, it is supposed to spill out of the stacker and form a cone-shaped pile below. In turn this pile is supposed to fall through a hopper to a feeder system that carries the coal by conveyor to the facility's washing plant. When coal from the stacker spills away from the hopper area and the accumulation of material is

insufficient to maintain the automatic feeding system, a bulldozer is used to push coal into the feeder to maintain the flow of material to the washing plant. 12 FMSHRC at 2130-31.

Occasionally, the lower windows of a stacker become clogged with coal and mud, causing the stacker to fill up with material which is then discharged haphazardly from the upper windows of the stacker. The usual corrective procedure is either to use a high pressure water hose to unclog the windows or to lower a worker into the stacker on ropes to free up the obstruction. 12 FMSHRC at 2131.

Complainant Charles T. Smith began working at Kem Coal's preparation plant in October of 1988. He started as an oiler on the maintenance shift, but in April or May of 1989, he was transferred to the afternoon shift as a dozer operator. 12 FMSHRC at 2131-32. Tr. 42. His duties included pushing coal into the feeders, as described above, and consolidating and compacting refuse at a refuse pile located near the stackers. Tr. 59.

On June 20, 1989, Smith was operating the dozer and pushing coal at the No. 2 stacker when the lower windows of the stacker became clogged and coal began falling from the upper windows onto the dozer. He radioed the plant's control room and asked that his foreman, Henry Halcomb, be notified of the problem. According to Smith, Timmy Miller, who was operating the CB radio in the control room, subsequently relayed a message from Halcomb to Smith to "go ahead and run it." Thereafter, a chunk of coal hit one of the dozer windows and broke it. Smith again radioed the control room and told Miller the windows of the dozer were getting "knocked out of it and we don't have enough coal to push." Miller again relayed the message to "go ahead and run it." 12 FMSHRC at 2131.

At that point, a chunk of coal hit a wire in the dozer's electrical system and its lights went out. Smith informed the control room and was told by Miller that Halcomb had said if Smith did not want to run the machine he could park it and go home, and Halcomb would have a mechanic fix it. Smith pulled the dozer back from the stacker, repaired the lights, and proceeded to push coal into the feeder. Id.

Later in June, Smith confronted Halcomb and complained to him that Halcomb had put his life in danger by making him push coal while material from the upper windows was falling on the dozer. According to Smith, Halcomb replied that it was Smith's job to push coal. 12 FMSHRC at 2132.

On July 14, 1989, the incline feed belt that carries coal to the washing plant broke and the entire afternoon crew was assigned to replace it. The work was performed under the direction of Roger Cox, the plant superintendent. At some point during the shift, Smith asked Cox when he (Smith) would be given a dinner break. Cox replied that, once the belt had been replaced, Cox would have someone relieve Smith. Cox apparently went home after the belt replacement and no one relieved Smith. About an hour and a half before the shift was over, Smith asked Halcomb whether he could take a dinner break and was told it was too close to quitting time and he would not get to eat. 12 FMSHRC at 2132.

On July 15, 1989, Smith arrived at the mine with the intention of complaining to Cox about what he regarded as general harassment by Halcomb, but Cox was not at the mine. Smith went to the training room and found Halcomb and other members of the afternoon shift. Smith told Halcomb that he was going to complain to Cox about Halcomb's harassment and first cited his missed dinner break on the night before. Halcomb replied that, since Cox had supervised the belt replacement, Smith's argument was with Cox. 12 FMSHRC at 2132-33. As the argument progressed, the other members of the crew left the training room, leaving Smith and Halcomb alone. 12 FMSHRC at 2133.

Smith raised the June 20, 1989, incident at the coal stacker, when Smith felt his life had been put in danger, and threatened to report the matter to the Mine Safety Health Administration (MSHA). Halcomb denied that he had put Smith's life in danger and claimed that Smith's characterization of Halcomb's message as relayed by Miller was "hearsay" and that he had not said what Smith alleged. Smith then directed a vulgar epithet at Halcomb.[1] At that point Halcomb, in effect, suspended Smith by telling him to "go to the house." Id.

Both Smith and Halcomb called Cox at home that afternoon but he was not in. Tr. 44. Later that evening, Cox returned Halcomb's call and Halcomb related his version of the afternoon's events. 12 FMSHRC 2133, Tr. 44. On Monday morning, July 17, 1989, Smith went to the mine and met alone with Cox. Smith complained to Cox about Halcomb's harassment and specifically mentioned the stacker incident and the missed dinner break. Cox asked Smith if he had sworn at Halcomb, and Smith told Cox that he had. Cox then told Smith that he was fired. 12 FMSHRC at 2133-34.

The judge found (1) that since Superintendent Cox was also an ordained minister, Halcomb "was aware of or could reasonably expect [Cox's] sensitivity to profane language and his philosophy of supporting his supervisors"; (2) that Halcomb "shaped his factual account to Cox concerning the argument with [Smith] to injure [Smith] in Cox's eyes" by inaccurately indicating to Cox that Smith used "God damn" in his epithet and that the epithet was expressed in front of other members of the crew; (3) that Halcomb did not tell Cox that Smith had apologized immediately after using the epithet; and (4) that Halcomb did not tell Cox that Smith had said he was going to take his safety complaints about Halcomb to MSHA. 12 FMSHRC at 2133.

---

[1] The precise wording of the epithet was in sharp dispute between the parties and, as will be discussed below, was a significant issue in the judge's ultimate determination in favor of Smith. Smith testified, and the judge found, that Smith called Halcomb a "lying son of a bitch." Tr. 24. Halcomb testified that Smith called him a "God damn son of a bitching liar." Tr. 88. Cox testified that Smith had admitted using the latter phrase when Cox questioned him about the incident. Tr. 71. Smith also testified, and the judge found, that he apologized to Halcomb immediately after swearing at him, whereas Halcomb testified that Smith offered no apology. Tr. 24, 89. Cox testified that neither Halcomb nor Smith indicated to him that Smith had apologized. Tr. 63.

The judge determined that Smith's safety complaints constituted protected activity. The judge specifically cited the June 20, 1989, incident at the coal stacker when Smith radioed his safety complaints to Halcomb through the control room operator; the confrontation in late June when Smith complained in person to Halcomb about the stacker incident; and the confrontation on July 15, 1989, when Smith reiterated his complaints to Halcomb and threatened to take his complaints to MSHA. 12 FMSHRC at 2135.

The judge found that Halcomb took adverse action against Smith in retaliation for his protected activity by suspending Smith without pay on July 15, 1989, and by "giving a distorted factual account" of the July 15, 1989, argument to Cox "with the intention or expectation of influencing the superintendent to discharge [Smith]." 12 FMSHRC at 2136.

As a basis for the latter conclusion, the judge found that "Halcomb knew, or could reasonably expect that the superintendent, who was a practicing pastor, would be offended by the religious epithet he substituted for Complainant's actual language, and that the superintendent would consider cursing a foreman in front of his crew a dischargeable offense." 12 FMSHRC 2136.

The judge went on to conclude that the "distorted factual account" resulted in Smith's discharge because Cox fired Smith for insubordination and "cussing" at Halcomb; Cox was unaware that "God damn" was not used in the epithet or that the epithet was expressed when Smith and Halcomb were alone; and because, according to Cox, if Smith and Halcomb had been alone "'it could have probably been resolved', that is, without discharging [Smith]." 12 FMSHRC at 2136-37. Lastly, the judge held that even though Cox had been deceived by Halcomb, it did not alter the fact that management, through Halcomb, had taken discriminatory action against Smith that resulted in his discharge. Accordingly, the judge found Kem Coal in violation of section 105(c).

The judge ordered the parties to confer in an effort to stipulate damages, including back pay and litigation costs. By a subsequent decision issued January 31, 1991, the judge awarded Smith $21,864.18 in back pay and other damages plus any additional back pay accruing until his reinstatement or his rejection of reinstatement, and attorney fees of $4,522.50.

II. Disposition of Issues

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act bears the burden of production and proof to establish that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary o.b.o. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary o.b.o. Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. Failing

that, the operator may nevertheless affirmatively defend against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test).

Substantial evidence supports the judge's conclusion that Smith engaged in protected activity when he complained about coal falling on his bulldozer on June 20, 1989, and when he complained again to Halcomb in their confrontations later in June and during their argument on July 15, 1989. Furthermore, it is undisputed that adverse action was taken against Smith by reason of his suspension without pay on July 15, 1989, and his ultimate discharge on July 17, 1989. The Pasula/Robinette test also requires the Commission and its judges to determine whether the adverse action complained of was motivated in any part by the complainant's protected activity.

The judge found that Halcomb was motivated to discriminate against Smith by Smith's safety complaints and his threat to take those complaints to MSHA. 12 FMSHRC 2136. The judge went on to find that Halcomb's discriminatory conduct included giving "a distorted factual account" of the July 15, 1989, argument to Cox "with the intention or expectation of influencing the superintendent to discharge [Smith]." Id. The critical elements of what the judge deemed Halcomb's "distorted account" to Cox were: (1) that, knowing Cox to be a practicing pastor, Halcomb told him that Smith had used a religious epithet; (2) that Halcomb failed to tell Cox that Smith immediately apologized; (3) that Halcomb told Cox that Smith swore at him in front of the crew; and (4) that Halcomb failed to inform Cox that Smith had threatened to take his complaint to MSHA.

In his decision the judge concludes that Cox, as a practicing pastor, would have been offended if the epithet Smith used was religious in nature and if it was said in front of other members of the crew. 12 FMSHRC 2136. "Halcomb was aware of, or could reasonably expect, the superintendent/minister's sensitivity to profane language and his philosophy of supporting his supervisors." 12 FMSHRC at 1233. Aside from Cox's statement that he doesn't "use that kind of language" and that Smith had "no right to call a man those kind of names," (Tr. 71) Cox's testimony and other record evidence do not suggest any special susceptibility to Halcomb's alleged intrigue owing to the superintendent's status as a "practicing pastor." While Cox's demeanor on the witness stand might have indicated a hypersensitivity to what might otherwise be considered garden variety discourse in the mining environment, the judge does not indicate that in his decision.

The judge's conclusions with respect to the motivations and conduct of Halcomb appear to be based upon certain credibility determinations and a series of inferences drawn from the evidence. It is clear that the judge believed the testimony of Smith and disbelieved the testimony of Halcomb and Miller with respect to the coal stacker incident, and that he believed Smith and disbelieved Halcomb on all disputed points thereafter. Kem Coal concedes that it is within the discretion of the trial judge to make such credibility determinations, and the Commission has held that a judge's

credibility resolutions cannot be overturned lightly. Robinette, supra, 3 FMSHRC at 813; Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986). As for the inferences drawn by the judge, we have held that such inferences "are permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." Secretary v. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1134 (May 1984).

The confounding factor on review, however, and one vigorously argued by Kem Coal, is that the judge implicitly believed the testimony of Cox even though in some aspects it supports Halcomb's testimony while contradicting Smith's testimony. In other words, while the issues on review do not concern the credibility determinations made by the judge in evaluating the testimony of Smith versus Halcomb, they do concern the testimony of Smith when viewed against certain contradictory statements of Cox. It is neither appropriate nor possible for an appellate body to resolve such conflicts. Accordingly, we remand the matter to the judge for further credibility findings and for analysis and explanation of the bases for his ultimate conclusions regarding the nexus between Smith's protected activity and his discharge by Kem Coal. In particular, we direct the judge to set forth the evidentiary bases for the first three elements of Halcomb's "distorted account," set forth above.[2]

First, with respect to the allegedly blasphemous component of the epithet directed at Halcomb by Smith, the judge concluded that Halcomb deceived Cox in that regard. Cox testified, however, that he specifically asked Smith whether he had called Halcomb "those names," and that he used the initials, "G.D. lying S.O.B.," in asking the question. Tr. 71-72. According to Cox, Smith admitted using those words. Id. As indicated above, however, (n.1), Smith denied using "G.D." Second, as to whether Smith immediately apologized to Halcomb for swearing at him, while the judge credited the testimony of Smith that an apology was made, the judge does not reconcile Smith's testimony that he had told Cox of the apology (Tr. 36) with Cox's testimony that he was not told by either Halcomb or Smith that Smith had immediately apologized. Tr. 63. Third, there are unresolved ambiguities in the record as to how Cox arrived at the mistaken belief that Smith swore at Halcomb in the presence of other members of Halcomb's crew. The judge needs to explain the basis for his conclusion that "[t]he account that Halcomb gave Cox ... [that] Complainant cursed him in front of the crew ... was inaccurate" (12 FMSHRC at 2133).

Both Smith and Halcomb testified before the judge that they were alone when the swearing took place. Tr. 34, 120. Smith's testimony makes clear that he told Cox that his (Smith's) brother was not present (Tr. 28), but it does not indicate any conversation with Cox regarding the presence of

---

[2] There appears to be no question as to the fourth element listed above, Halcomb's failure to inform Cox that Smith had threatened to take his complaint to MSHA. Cox testified that he was not told that Smith had made such a statement (Tr. 48) and Halcomb admitted that he "[didn't] think" he relayed that information to Cox. Tr. 96.

others. Nor does Halcomb's testimony indicate that he discussed the presence of witnesses with Cox.

The only testimony from Cox as to the source of his belief that the crew members were present during the swearing is as follows:

> Q. (By Mr. Endicott, counsel for Complainant) You went under the opinion that this argument that transpired between [Smith] and [Halcomb], when the words were spoken, there were other people present at the time?
>
> A. (By Mr. Cox) Yes, sir.
>
> Q. Is that what [Halcomb] told you?
>
> A. Later on, other people came to me and rehearsed to me the seriousness of the situation, yes.
>
> Q. What other people would that be?
>
> A. One boy by the name of Bryan Collins. Bryan had -- the argument had gotten kind of out of hand and Bryan said he just got up and left, he knew it was getting bad. And -- well, he's the only one that knew of it, first hand, I think. I don't think anybody else was present.
>
> Q. But he got up and left at that, didn't he, Bryan did?
>
> A. Yes, after the words. Yes.
>
> Q. After or before, are you sure?
>
> A. I think he heard -- actually heard the words spoken from what he told me now.

Tr. 63-64.

Just before the above testimony, Cox stated that prior to discharging Smith, he had not spoken to anyone but Halcomb and his (Cox's) own supervisors. Tr. 63. Cox's testimony is ambiguous as to how he came to believe that Smith had "called [Halcomb] these names in front of [Halcomb's] people." Tr. 63. Cox's misapprehension of the facts as to who was present when the swearing took place admits of several possible explanations, e.g., Cox's recollection at trial was hazy; Cox's testimony on the issue was purposely evasive; Cox, having been told by both Smith and Halcomb that others were present when the argument began, mistakenly assumed that some crew members were still present when the swearing took place; or, as the

judge concluded, Cox was deceived by Halcomb into thinking there were witnesses to the swearing. While we do not second-guess the judge as to the most plausible explanation for Cox's mistaken belief regarding the presence of witnesses to the swearing incident, it is necessary for purposes of "meaningful review" to know the reasons or bases for the judge's conclusion on this critical issue. Secretary v. Anaconda Company, 3 FMSHRC 299, 300 (February 1981).

Reconciling the ambiguities surrounding this issue is important because of Cox's frank admission elsewhere in the record that while the swearing was "still insubordinate ... if it had been a personal thing, just between [Smith] and [Halcomb], it could have probably been resolved, yes." Tr. 65. Resolving these ambiguities is a necessary prerequisite to an evaluation of Kem Coal's claims that it rebutted Smith's prima facie case or, in the alternative, that it affirmatively defended against the prima facie case by establishing that it would have discharged Smith, in any event, for his unprotected activity alone, i.e., his insubordinate swearing at Halcomb. We note that the judge did not expressly address the affirmative defense issue in his decision.

We find that the judge's failure to reconcile critical differences in the testimony of Smith and Cox and the lack of a clear connection between the evidence in the record and certain inferences drawn by the judge as to Halcomb's conduct preclude our meaningful review of the judge's conclusion that Smith was discriminated against in violation of the Act. Accordingly, we direct the judge to resolve the factual issues we have raised and then to determine anew, by applying the Pasula/Robinette test, whether Smith has established a prima facie case of discrimination. If the judge so finds, he should then determine whether Kem Coal has rebutted that case, or has affirmatively defended against it by demonstrating that it would have discharged Smith, in any event, for his unprotected activity alone.

Accordingly, we vacate the judge's decision and remand the matter for further consideration in light of the questions raised in this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Timothy Joe Walker, Esq.
Reece, Lang and Breeding, P.S.C.
P.O. Drawer 5087
London, Kentucky 40745

Michael S. Endicott, Esq.
Ed Spencer's Law Offices
P.O. Box 1176
Paintsville, Kentucky 41240

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 1992

WAYNE C. TURNER	:	
	:	
v.	:	Docket No. VA 90-51-D
	:	
NEW WORLD MINING, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). On March 28, 1991, Commission Administrative Law Judge Avram Weisberger entered a decision finding that respondent New World Mining, Inc. ("New World") had not discriminated against complainant Wayne Turner ("Turner") in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 13 FMSHRC 503 (March 1991)(ALJ). The Commission did not receive from Turner a timely petition for discretionary review of the judge's decision. Turner's counsel has filed papers that are, in essence, a request to reopen this case. For the reasons that follow, we grant the request to reopen so that the Commission may consider whether to direct review of the judge's decision.

The record reflects that on May 1, 1991, the Commission's Office of Administrative Law Judges received a letter with an attachment from Turner's counsel dated April 29, 1991, addressed to Judge Weisberger. The letter identifies the attachment as a "brief" to be filed in this case. The Commission's Docket Office personnel treated these papers as the filing of a brief with the judge and not as a petition for discretionary review. No direction for review was issued by the Commission and, by operation of the statute, the judge's decision became a final order of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

On August 5, 1991, a letter dated August 2, 1991, with attachments, from Turner's counsel was received by the Commission's Docket Office. Turner's counsel stated that he was forwarding a "Petition for Review" in response to a conversation with Commission Docket Office personnel, in which he learned that the Commission had not received Turner's petition for discretionary review of the judge's decision. Attached to the letter was a document entitled "Petition for Appeal," which had not been attached to the April 29 letter.

On August 29, 1991, the Commission entered an order that afforded Turner and New World the opportunity to address whether Turner's petition for discretionary review was timely filed and whether this case should be reopened. In response, New World asserted that the case should not be reopened because Turner 's petition for discretionary review, which New World received on May 1, 1991, had not been timely filed and because the allegations made by Turner in his petition were not supported by the evidence. Turner's counsel asserted that he had received the judge's decision on April 2, 1991, and had filed Turner's petition for discretionary review on April 29, 1991.

The judge's jurisdiction over this case terminated when his decision was issued on March 28, 1991. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review in the Commission's Docket Office within 30 days of the decision's issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.5(b) & .70(a). The Commission has recognized this 30 day time limit and has dismissed petitions for discretionary review filed outside this period. See, e.g., North American Coal Corp., 2 FMSHRC 1694, 1695 (July 1980); Haro v. Magma Copper Co., 5 FMSHRC 9, 10 (January 1983). The Commission's procedural rules expressly provide that the filing of a petition for discretionary review is effective only upon receipt. 29 C.F.R. §§ 2700.5(d) & .70(a). In addition, the copies of the judge's decision sent to the parties included a document that provides: "PETITIONS FOR DISCRETIONARY REVIEW MUST BE RECEIVED BY THE COMMISSION WITHIN THIRTY (30) CALENDAR DAYS AFTER THE ISSUANCE DATE OF THE DECISION TO BE CONSIDERED .... If you mail the petition, you should therefore allow enough time for delivery by the thirtieth day." (Emphasis in the original.) The record reflects that such a notice was sent to, and received by, Turner's counsel's office.

The thirtieth day after issuance of the judge's decision was Saturday, April 27, 1991. In order for Turner's petition for discretionary review to be timely filed, it had to have been received in the Commission's Docket Office no later than Monday, April 29, 1991. 29 C.F.R. §§ 2700.5(b), .8(a), .70(a) (1991). Turner's brief was not received by the Commission until May 1, 1991, was not filed in the Docket Office, and was not clearly identified as a petition for discretionary review.

In accordance with Fed. R. Civ. P. 60(b)(1), the Commission has afforded relief from final judgments upon a showing of mistake, inadvertence, surprise or excusable neglect. See, e.g., Lloyd Logging,Inc., 13 FMSHRC 781, 782 (May 1991). It appears from Turner's counsel's statements in response to the Commission's August 29 order that Turner's counsel may have mistakenly believed that a petition for discretionary review had to be filed within 30 days following receipt of the judge's decision. The Commission is aware of the existence of a possible excuse, and will afford Turner relief from final judgment. We will reopen the case for a determination of whether Turner's late-filed petition for discretionary review should be granted. See generally Patriot Coal Co., 9 FMSHRC 382, 383 (March 1987).

We note, however, that the Commission's relevant procedural rules are clear, that Turner's representative is an attorney, that explicit directions

for appeal had been forwarded to him by the Commission's Docket Office, and that Turner's counsel waited several months before contacting the Commission to determine the status of his appeal. Under these circumstances, and primarily out of concern that complainant Turner not be denied the opportunity to present his petition for review to the Commission, we reopen this case. We advise counsel to adhere carefully to all procedural requirements in practice before this Commission. See generally 29 C.F.R. § 2700.80(a).

For the foregoing reasons, this case is reopened for consideration by the Commission of whether to grant Turner's petition for discretionary review.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution

Donald E. Earls, Esq.
940 Park Avenue
P.O. Box 710
Norton, Virginia 24273

Karen K. Bishop
Attorney at Law
P.O. Box 1438
Wise, Virginia 24293

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-425-M
UNITED ROCK PRODUCTS CORP.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on December 18, 1991, finding respondent United Rock Products Corp. ("United") in default for failure to answer the civil penalty petition filed by the Secretary of Labor ("Secretary") and the judge's order to show cause. The judge assessed the civil penalty of $3,670 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On January 14, 1992, the Commission received a letter dated January 10, 1992, from William Cameron, United's Safety Director, in which Mr. Cameron requested that Judge Merlin revoke his default order. Cameron explained that on November 6, 1991, he had mistakenly sent United's answer to the Department of Labor's Office of Regional Solicitor in San Francisco, California, because he had directed all previous correspondence to the Secretary's counsel at that location. Attached to Cameron's January 10 letter was a copy of a letter dated November 6, 1991, that purports to be United's answer to the Secretary's civil penalty petition.

The judge's jurisdiction over this case terminated when his decision was issued on December 18, 1991. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Here, Cameron's letter, received by the Commission on January 14, 1992, seeks relief from the judge's default order. We will treat that letter as a timely petition for discretionary review of the judge's default order. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

The record discloses that United filed a "Blue Card" request for a hearing in this matter in response to notification by the Secretary of the civil penalties proposed for alleged violations of mandatory safety standards. On July 10, 1991, counsel for the Secretary served a civil penalty petition on United. Having received no answer to the petition, the judge issued an order on October 7, 1991, directing United to file an answer within 30 days or to show cause for its failure to do so. As noted, Cameron asserts that he sent United's answer on November 6, 1991, to the Secretary's counsel at the Solicitor's Office. Under the Commission's rules of procedure, the party against whom the penalty is sought must file an answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. §§ 2700.5(b) and 2700.28.

It appears that United, proceeding without benefit of counsel, may have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. It also appears that United may have attempted to respond to the judge's order to show cause but misdirected that response. Although United has brought the existence of a possible excuse to the attention of the Commission, we are unable to evaluate the merits of United's assertions on the basis of the present record. In light of this, we will afford United the opportunity to present its position to the judge, who shall determine whether relief from default is warranted. See, e.g., Patriot Coal Co., 9 FMSHRC 382, 383 (March 1987).

For the foregoing reasons, we grant United's petition for discretionary review, vacate the judge's default order, and remand this matter to the judge for further proceedings. United is reminded to file all documents with the judge, and to serve counsel for the Secretary with copies of all its filings. 29 C.F.R. §§ 2700.5(b) and 2700.7.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 31, 1992

CLIFFORD MEEK	:	
	:	
v.	:	LAKE 90-132-DM
	:	
ESSROC CORPORATION	:	

ORDER

On January 23, 1992, ESSROC Corporation filed a petition for discretionary review of the December 24, 1991 decision in this matter. In the decision the presiding Commission administrative law judge concluded that a violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 occurred, 30 U.S.C. § 801 et seq. However, the judge did not set forth specific monetary relief but ordered the parties to confer in an effort to stipulate to the appropriate amount of damages to be awarded. Indeed, the judge expressly stated that the December 24, 1991 decision was not a final disposition of the proceeding.

Accordingly, the respondent's petition for discretionary review is premature and therefore it is dismissed without prejudice. See, e.g., Joseph A. Campbell v. Anaconda Co., 2 MSHC 1519 (1981).

For the Commission:

Ford B. Ford
Chairman

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 6 1992

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 91-714-R
	:	Citation No. 9883187;
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 7 Mine
and	:	Mine No. 01-01401
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: H. Thomas Wells, Jr., Esq., and J. Alan Truitt, Esq., MAYNARD, COOPER, FRIERSON & GALE, Birmingham, Alabama, for the Contestant;
William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Respondent;
Patrick K. Nakamura, Esq., and George Davis, Esq. LONGSHORE, NAKAMURA & QUINN, Birmingham, Alabama, for the Intervenor.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant (JWR) against the respondent (MSHA) challenging the validity of an "S&S" Citation No. 9883187, issued on July 8, 1991, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977. The citation charges JWR with an alleged violation of the mandatory respirable dust requirements found in 30 C.F.R. § 70.100(a). The respondent filed a timely answer asserting that the citation was properly issued and a hearing was held in Birmingham, Alabama. The parties filed posthearing briefs, and I have considered their respective arguments in the course of my adjudication of this matter. I have also considered the oral augments made during the course of the hearing.

Issues

The issues in this case are (1) whether the contestant violated the requirements of 30 C.F.R. § 70.100(a), and (2) whether MSHA acted arbitrarily and unreasonably when it mandated a change in the "designated occupation" required to be sampled pursuant to MSHA's respirable dust regulations from code 044 to code 060 on the mechanized mining unit, MMU 016-0, the No. 2 Longwall, at JWR's No. 7 Mine. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Commission Rules, 29 C.F.R. § 2700.1, et seq.

3. Mandatory respirable dust standards, Part 70, Title 30, Code of Federal Regulations.

Stipulations

The parties stipulated to the following (Tr. 5-6; 22-23):

1. JWR and the No. 7 Mine are subject to the jurisdiction of the Mine Act and the Commission.

2. The respirable dust sample results which reflect an average concentration of 2.6 Mg/M3 of air in the working environment of the cited longwall mechanized mining unit (MMU) constitutes a violaton of 30 C.F.R. 100(a).

3. MSHA's procedures for processing the respirable dust samples collected and submitted by JWR, including the chain of custody, were properly followed.

4. There is a presumption that the respirable dust violation in question, if affirmed in this case, is a significant and substantial (S&S) violation.

5. JWR is currently in compliance with MSHA's respirable dust requirements on the cited MMU, and it came into compliance prior to the September 15, 1991, extended abatement date. The citation has been terminated.

Discussion

The contested section 104(a) "S&S" Citation No. 9883187, is signed by MSHA Inspector Judy A. McCormick, and it is dated July 8, 1991. It reflects that it was served on JWR by mail, and it cites an alleged violation of the mandatory respirable dust requirements found in 30 C.F.R. § 70.100(a). The cited conditions or practices are described as follows:

> Based on the results of 5 samples reported on the attached advisory number 0290, the average concentration of respirable dust in the working environment of mechanized mining unit (MMU) I.D. #016-0 was 2.6 mq/m3 of air. The operator shall take corrective action to lower the concentration of respirable dust to within the permissible limit of 2.0 mq/m3 and then sample each production shift until 5 valid samples are taken. Samples shall be submitted to 4800-D Forbes Avenue, Pittsburgh, PA 15213.

JWR does not dispute the fact of violation, nor does it challenge the fact that the five samples which it took indicates noncompliance with the dust concentration limits found in regulatory section 70.100(a). The thrust of JWR's contest lies in its challenge to MSHA's decision to change the designated occupation on which respirable dust sampling is required on the No. 2 longwall (MMU 016-0), from designated occupation 044 (tailgate shear operator), to designated occupation 060 (miner who works nearest the return side of the longwall face). The change was communicated to JWR by MSHA Form 2000-96, dated May 7, 1991, and signed by the District No. 7 Manager (Exhibit G-4). In a follow-up letter of June 3, 1991, the district manager advised JWR as follows (Exhibit C-2):

> * * * * When sampling occupation 060 (miner who works nearest the return side of the longwall face), the dust sampling instrument shall be alternated from person to person according to who is nearest the return side of the face (tailgate). For example, when the pump is being worn by the tailgate shear operator and the tail jacksetter goes on the downwind side of this shear operator, the tail jacksetter shall take the dust pump from the shear operator and shall wear the dust pump for as long as he is the miner working nearest the return. The pump shall be alternated from person to person following the above procedure.

MSHA's Testimony and Evidence

Kenneth Martin, MSHA Supervisory Health Specialist since 1974, testified that his duties include the review of health

plans, dust sampling, and coordinating and monitoring dust inspection, sampling, and compliance activities. He confirmed that the term "high risk occupation" means "an area that has the highest concentration of dust that miners could be exposed to", and that this is similar to the term "designated occupation". The rationale for requiring sampling for both of these is the same, and if there is compliance with the dust limits in those environments where there is the highest concentration of dust, one can assume that the other areas will also be in compliance (Tr. 23-27).

Mr. Martin stated that MSHA's dust sampling scheme is aimed at measuring the respirable dust in the working atmosphere environment at a particular location, and not to measure the dust exposure of an individual. He identified an MSHA memorandum dated April 4, 1988, and an excerpt from MSHA's policy manual which explains the sampling procedures (Tr. 29; Exhibits G-2 and G-3). The policy explanation of section 70.207(e)(7), is that "if individuals rotate out of a position that's the designated area, that the sampling unit would remain with that position and not with the individual" (Tr. 30).

Mr. Martin confirmed that he is generally familiar with longwall mining procedures, and he explained the types of miner occupations associated with a longwall, and with the use of a sketch, he explained the operation of a longwall mining system (Tr. 32-38; Tr. 40-47; Exhibit G-6). He confirmed that longwall operations, including the location of employees, vary from mine operator to mine operator and they are all not identical (Tr. 38). He confirmed that he would expect to find the greatest concentration of respirable dust at the tailgate side of the longwall face because "the dust that is generated upwind from that location should all be represented at that location from all your other generation sources". The mine intake air ventilation travels through or by all of these sources and then exits through the return (Tr. 48).

Mr. Martin identified exhibit G-4, as the May 7, 1991, MSHA notification to JWR that the designated occupation for dust sampling was changed from 044, the shear operator on the tailgate side, to 060, the person working nearest the return side of the longwall face. He confirmed that he was involved in this determination and he indicated that the language describing the newly designation occupation code is basically the language found in section 70.207(e)(7) (Tr. 56). Although this was the first change for JWR in his district, he cited two other mine operators in the district who also received changes to code 060 from MSHA, and he indicated that operators in district No. 5 have also received changes. All of these changes have occurred as early as 1988, and MSHA is presently implementing further changes on a mine-by-mine basis. He acknowledged that some longwall mine operators do not have the same designated changes as JWR and he

explained that a decision was made in his district that the designated occupation would be changed from 044 to 060 only in those instances where the mine operator is out of compliance with the dust standard. At the present time, those mines which are in compliance are not required to make the change to the 060 occupation or area designation (Tr. 5).

Mr. Martin confirmed that pursuant to the previously designated 044 designation, the tailgate shear operator would have to leave his sampling device with his replacement operator in the event there was a change in the persons operating the tailgate shear drum. However, since the change to the 060 designated occupation, the miner working nearest the return air side of the longwall working face would be required to wear the sampling device regardless of whether he is a shear operator, jack setter, mechanic, or electrician. This is because MSHA desires a sampling of the employee who works closest to the return air side of the face, and that location should represent the highest concentration of dust that any miner would be exposed to on the longwall face based on the various dust generation sources and the manner in which the face is ventilated. He identified the location by placing a red "X" mark on the sketch, and he confirmed that this is the last location on the face before the air enters the return (Tr. 60-64).

Mr. Martin stated that MSHA implemented the designation change in light of the wider longwall face areas being mined and increased production, and MSHA's belief that the sampling of the 044 occupation was not representative of the highest dust concentration and miner exposure (Tr. 64). Mr. Martin confirmed that MSHA's technical support division has conducted an environmental dust control investigation at the JWR No. 4 Mine, and he identified Exhibit G-5, as a copy of the report (Tr. 68). He further confirmed that the basic manner in which longwalls are mined and ventilated, including the route of intake air traveling through the dust generation sources and exiting out of the returns, is basically the same in all longwall operations (Tr. 72). The MSHA report in question recommended that MSHA consider changing the designated occupations in the No. 4 longwall because the 044 occupation did not always have the highest dust concentration. Sampling was done at fixed points in that mine, and the dust concentrations at these fixed points were higher than the 044 designated occupations (Tr. 74). In his view, the report supported the decision to change the designated occupation to the person working furthest downwind, or within 48 inches of the corner of the longwall face, and where the dust concentrations are higher at the fixed point near the return side of the longwall face (Tr. 75).

Mr. Martin confirmed that pursuant to the designated occupation change required of JWR, the sampling scheme in question is sampling the environment and not the individual miner

exposure, and that section 70.207(e)(7) of MSHA's regulations permits sampling the environment at the "worst location" where all of the "bad air" ends up on its way out of the return (Tr. 79).

On cross-examination, Mr. Martin stated that prior to 1988 there was no 060 code designated for the miner working nearest the return side of the face, and the typical and common MSHA practice at that time was to designate the 044 occupation code, which is the tailgate shear operator, and this was the typical designation for all longwalls in District No. 7 (Tr. 93). The reason for this was that the 044 occupation was the occupation normally closest to the return side of the longwall face. However, since longwall mining has changed over the years, more people are working downwind, and with remote control, people move about on the face more, and it has become obvious that the 044 occupation was not the proper occupation for sampling on a longwall operation (Tr. 94).

Mr. Martin confirmed that in making the change to the new occupation code, MSHA did not rely on dust samples collected at the cited MMU pursuant to MSHA's policy manual (Tr. 98). He explained the failure to sample as follows at (Tr. 99).

> A. In order for them to change the designated occupation from what's specified in the regulations, this is saying that we need the results of samples to make that change. And since we were only changing back to what the regulations specified, it's my interpretation that samples were not required to make that change.
>
> JUDGE KOUTRAS: So you determined you didn't need any samples. You would just make the change without them.
>
> A. Changing to what the regulation specified.

Referring to a page from the inspector's handbook, which was included as part of his deposition, and which mentions sample results, Mr. Martin explained that this requirement applied when MSHA was changing its sample procedures to deviate from what was required under the regulation (Tr. 100).

Mr. Martin stated that the tailgate shear operator is not necessarily the only occupation normally closest to the longwall face return over the course of an eight-hour shift, and that jack setters, mechanics, electricians, and others may be present downwind closer to the return side than the shear operator (Tr. 102). He confirmed that MSHA's current sampling scheme is to sample the environment that has all of the contaminated air passing by at any given time during the shift, and if the

environment of that unit is not in compliance, everyone would likely also not be in compliance (Tr. 105-106).

Mr. Martin stated that pursuant to MSHA's current designation of the 060 occupation and the instructions given to JWR, the dust sampler pump must be passed to the individual who at any given time is closest to the "X" location shown on the sketch and he explained how this was to be done when different people are in that area during the course of a working shift (Tr. 107-111). He confirmed that under this sampling procedure, the environment, rather than individual miner exposure, is being sampled (Tr. 111).

Mr. Martin confirmed that the mishandling of a pump, by turning it upside down, could possibly cause oversized particles, but he believed that following proper sampling procedures in changing and repositioning the pump should not cause problems (Tr. 115). He agreed, however, that mishandling a pump could create a sampling problem "depending on how it's mishandled" (Tr. 116).

Mr. Martin confirmed that MSHA did not rely on the study at the No. 4 Mine in making the designated occupation change at the No. 7 Mine, and he had no personal knowledge as whether the longwall mining practices in the two mines are the same (Tr. 117). He confirmed that some longwall sections in his district have the 060 designation, and that once a 044 designation is out of compliance changes will be made to the new 060 designation. In the event any 044 designations never go out of compliance, MSHA may still consider changing them all to 060 (Tr. 120).

Mr. Martin stated that the newly designated 060 occupation does not identify any particular individual or occupation, and it could apply to any employee who comes within the definition found in section 70.207(e)(7). The 060 computer code actually refers to anyone to who is in the area closest to the return on any given work shift for whatever period of time they are there (Tr. 126). He confirmed that a 060 sample over a working shift would be a sample of the area where people were working furthest downwind (Tr. 126).

Mr. Martin stated that there was no way to determine whether the five sample cassettes supporting the violation in this case were worn by five different individuals unless one were to learn who was wearing the specific devices on the sampling days in questions. He confirmed that the five cassettes found their way into the "060 occupational zone of hazard", and the sampling results indicated noncompliance (Tr. 127). He confirmed that each cassette represents a different sampling day, but the cassette may have been worn by any number of people on each of those days (Tr. 128-129). The sampling results "tells me the

area of where people were working downwind, what dust level was in the environment" (Tr. 130). The intent of MSHA's sampling scheme is to control the dust in the environment (Tr. 131).

In response to questions from the intervenor, Mr. Martin stated that the concept of measuring the designated occupation with the most dust exposure did not originate with the change to JWR's 060 designated occupation, and that it had its origins in 1980 when the "high risk" designated occupation method was placed in the regulations. The current procedure allows JWR to use one pump rather than putting a pump on everyone on the shift all of the time. The regulations do not require that an individual miner be sampled, and they only require sampling of the person exposed to the most dust, and this is the designated occupation. He explained why the pump is required to be placed on the person closest to the return (Tr. 144-146).

Mr. Martin confirmed that the 060 designation has also been required in his district at Arch of Kentucky's No. 37 Mine and U.S. Steel's Oak Grove Mine (Tr. 147). He confirmed that the decision to place any miner downwind of the longwall shear lies with the mine operator and JWR is free to submit a dust plan that does not require any miner to work downwind of the shear (Tr. 149). He further confirmed that the decision to implement the change at the JWR No. 7 mine was based on MSHA's belief that the old 044 occupation was not the proper occupation that should be sampled as the designated occupation because of the people working downwind, the wider faces, and the higher producing machinery. Consideration was also given to the comments of miners during the dust plan review that miners were working downwind (Tr. 162-163).

MSHA Inspector Judy McCormick testified that she is assigned to the health group and that her duties include working with operator and MSHA coal dust samples, and answering questions regarding sampling and sampling procedures. She identified a copy of a June 3, 1991, letter from MSHA's district manager to JWR regarding the change in the sampling occupation designation and she confirmed that she drafted the letter in response to an inquiry from Jerry Kimes and Jack Stevenson, who are employed by JWR's safety department (Tr. 187-191; Exhibit C-2).
Mrs. McCormick confirmed that prior to the date of the letter, she had discussed the sampling requirements with Mr. Kimes and Mr. Stevenson, and she believed that they understood what was required (Tr. 192).

JWR's testimony and evidence.

Gerald Kimes, safety supervisor, No. 7 Mine, testified that his duties include dust control, and he confirmed that he was familiar with the cited 016 MMU, which is the No. 2 Longwall. He confirmed that Exhibit G-6, generally depicts the longwall set-

up, and that prior to the receipt of the change notice sampling was conducted on the tailgate shear operator. This had been a longstanding standard practice on all longwall units, and the change in the designated occupation is the first one that he was aware of. He explained the operation of the sampling dust pump device, and although the pump itself is fairly rugged, he indicated that the cassette assembly can be mishandled. If the entire assembly were turned upside down, oversized particles could find their way to the cassette filter, and if the assembly is struck sharply, the dust that has already been collected may be dislodged (Tr. 193-200).

Mr. Kimes stated that prior to the designation change the dust pump was given to the tailgate shear operator and then given to each shift supervisor to give to each shearer operator and it stayed with that operator for the entire shift. Pursuant to the current 060 designated change the pump is passed from one person to another over the course of the shift, and he assumed that four or five, and possibly more, people would wear it depending on the situation. However he stated that "I'm not a highly qualified longwall man so I can't say about every situation" (Tr. 202). He was trained in dust sampling in 1975, and his duties include the dust sampling at the mine, but he has never been a "dust technician" (Tr. 203).

Mr. Kimes disagreed with the change in question because he believes that JWR was singled out and that other longwall operators are not required to change, and the pumps are likely to be damaged when transferred from one person to another. He does not have the manpower to keep records as to who wears the pump at any given time or how long it is worn. He was also of the opinion that the intent of the regulations is to monitor the individual exposure of unhealthy concentrations of dust, and that the 060 methodology does not give any accurate reading of the dust exposure of any individual miner. He could not state whether keeping the pump with the tailgate shear operator was a better method of monitoring an individual's dust exposure (Tr. 207).

On cross-examination, Mr. Kimes confirmed that since changing to the 060 designation, there have been no problems in obtaining dust samples. He stated that he has never operated the longwall equipment and that he does not routinely observe the circumstances under which the sampling devices are rotated among employees. He acknowledged that mechanics and electricians occasionally work downwind of the shear. He was generally familiar with MSHA's dust regulations, but he was not familiar with the regulatory definition of the designated occupation until it was pointed out to him. He was told that the designation to the 060 occupation was the result of the mine going out of compliance, and he had no prior knowledge that the No. 4 Mine had undergone a similar change (Tr. 208-215). He acknowledged that

one cannot assure that employees downwind of the shear operator are not exposed to greater respirable dust concentrations than the shear operator (Tr. 228).

In response to further questions, Mr. Kimes confirmed that he was aware that JWR is now in compliance and that the violation has been abated. He acknowledged that compliance was achieved by five valid samples of the new 060 designation taken at the No. 2 longwall and submitted by JWR, and that there was apparently no mishandling of the pump in those instances (Tr. 252). He confirmed that miners are supplied with personal dust protective devices and respirators if they request them (Tr. 256-258).

Deposition testimony.

In the course of the hearing, JWR's counsel moved for the admission of portions of the deposition testimony of Mr. Bobby Taylor and Mr. James Rivers, previously taken by the intervenor's attorney. These individuals were identified as associate safety supervisors who work for Mr. Kimes at the No. 7 Mine. The motion was granted, and without objections, the complete depositions were received as part of the record in this case (Tr. 261-263).

James Rivers disagreed with MSHA's requirement that JWR pass the pump to the miner who is most downwind because it was his opinion that the integrity of the sample is jeopardized when the pump is handled and exchanged by many people (Deposition pgs. 90-91).

Bobby Taylor believed that the passing of the pump was an unreasonable requirement because leaving the pump on the location all day while people are being switched out is not a representative sample of the dust exposure to a miner who may be in the area ten-to-fifteen minutes or an hour or two hours (Deposition pgs. 37-38).

Intervenor UMWA Testimony and Evidence

Ray Lee, JWR longwall mechanic, testified that he is responsible for the repair and maintenance of the longwall face equipment and that he works at the face every day. He has worked at the mine for over ten years, and has been a mechanic for over 8 years. He worked on the No. 2 longwall owl shift for seven years until July of 1991, and he is presently working on the No. 1 longwall. He described his duties downwind from the shear, and indicated that he works an average of 3 to 4 hours a shift at that location. He stated that he wore a dust sampler only one time, but he was not allowed inby the shear with the sampler (Tr. 264-271).

On cross-examination, Mr. Lee stated that sampling is not always done on the day shift, and he confirmed that samplers are

not hung on the mechanics who are not designated occupations. The shear may or may not be down when he is working on it (Tr. 272).

Neil Young, shear operator, No. 7 Mine, stated that he has worked at the mine since December, 1979, and he described his duties, which also include shoveling along the beltline and under the shields and pans as assigned (Tr. 276-278). He stated that he may spend 6 to 10 hours a week shoveling, and that he uses a remote control which places him upwind for 15 feet or more. He has worked as a shear operator since 1985, and at the No. 2 longwall since 1987 (Tr. 280).

Mr. Young stated that he had no trouble passing the pump to the next miner during the sampling process and he indicated that the pump weighs approximately one pound and can be passed in 15 to 20 seconds without any interruption to production (Tr. 283-284). He stated that on one occasion when he was sampled by MSHA in March 1991, everyone wore a pump for one week. However, he was the only one out of compliance, and after expressing concern about this, the longwall coordinator instructed him to sit in the dinner hole with the pump on from 8:30 to 2:00 without performing any duties (Tr. 286-287).

JWR's Arguments

As noted earlier, JWR does not dispute the fact that the five dust samples which it collected and submitted to MSHA pursuant to section 70.207, resulted in the issuance of the citation for noncompliance with section 70.100(a), and constitutes a violation of that section. JWR's contest focuses on several contentions which it believes amounts to an illegal, arbitrary, and unreasonable application of the dust standards to its mine.

JWR asserts that the newly designated "occupation" which requires sampling is really not an occupational designation to which any particular occupation will be exposed to respirable dust. JWR contends that sampling the newly designated 060 occupation does not reflect the individual dust exposure to any particular miner and that the sample is in fact a composite sample, rather than an individual sample (Tr. 9, 321).

JWR maintains that over the years MSHA has uniformly designated the tailgate shear operator (designated occupation 044) as the occupation required to be sampled by all mine operators. Relying on MSHA's argument that the change in the designated occupation required to be sampled (060 miner working nearest the return) is simply a reassertion of the mandate found in regulatory section 70.207(e)(7), JWR suggests that MSHA has admittedly improperly applied the regulation since it was promulgated in 1980. Conceding that MSHA is free to

change the designated occupation required to be sampled, JWR nonetheless argues that in doing so MSHA must follow its own policies and procedures. Citing MSHA's policy manual and an excerpt from the mine inspector's manual, JWR maintains that a change in the designated MMU occupation may only be considered after the results of samples collected by MSHA reflect a need for such a change. JWR points out that in this case MSHA has conceded that the mandated change in the designated occupation from 044 to 060 was not based on any MSHA respirable dust sampling or surveys supporting any conclusion that a change was needed or warranted (Tr. 11-12; 317-320).

JWR further contends that MSHA is not uniformly applying the change to the newly 060 designated occupation to all of its subdistricts, and that in district 5 the change has been applied to only three longwalls. JWR points out that Mr. Martin cited only one other MSHA district that is changing from the tailgate shear operator occupation to the newly designated 060 designation. Under these circumstances, JWR concludes that it has been singled out and treated unfairly by MSHA and that the mandated change, which has not been admittedly applied by MSHA "across the board" to all longwall mining systems, is an arbitrary and unreasonable abuse of discretion (Tr. 11-12; 317-320).

With regard to the application of Judge Weisberger's decision in Consolidation Coal Company, 9 FMSHRC 1509 (August 1987), JWR asserted that while that case dealt with "passing the pump", it involved a specific occupation, namely the tailgate shearer, and the pump was required to be worn by whoever was in that location at any given time. In the instant case, however, JWR pointed out that it is difficult to determine that any particular person will be nearest the return side of the face at any given time, and that several different occupations may, at any given time during the course of the shift, come within the definition of "the miner who works nearest the return side of the longwall face". Under the circumstances, JWR concludes that this would result in a continual passing of the pump, and that each time the pump is passed, there is a risk of an invalid sample because the pump can be turned over or dropped (Tr. 14). JWR expressed concern over the problems which may result from passing the dust sampling device from one miner to another (Tr. 321-322).

MSHA's Arguments.

MSHA asserts that its decision to change the previously applied occupation code 044 (longwall operator tailgate side) to the newly designated 060 occupation (miner who works nearest the return side of the longwall face), merely changed the designated occupation to conform with the occupation set forth at 30 C.F.R. § 70.207(e)(7), and that the district manager simply directed JWR to sample the occupation on the longwall section as defined by

that mandatory regulatory standard. Citing the appropriate statutory language of the Mine Act, and the implementing regulations found in Part 70, Title 30, Code of Federal Regulations, MSHA concludes that it acted clearly within its statutory and regulatory authority when it directed JWR to sample the newly designated 060 occupation.

MSHA states that in terms of the actual mining process, the 060 designated occupation could include only one miner or rotate among several miners during the course of a regular work shift. If the same miner remains in the occupation which works nearest the return air side during the work shift, it is MSHA's position that the dust sampling device must remain on that one single individual. However, in the event JWR's work practices resulted in several miners performing, at different times, in the occupation which worked nearest the return side, then the 060 designation would require that the sampling device be alternated or passed to whomever is working nearest the return air side.

MSHA asserts that it has determined that the return air side of the cited longwall unit, which it has characterized as the 060 designated occupation for any miner who performs works in that area, is the area which has been deemed to have the greatest concentration of respirable dust. MSHA's position is that the miner who is closest to the return air side, or "designated occupation", is required to wear the dust pump during sampling regardless of who he may be. As noted above, if one miner stays at the location of the designated occupation, the sampling pump must stay with him as long as he is there. However, if he leaves the area for any reason and someone else comes there to perform any work, the pump must be passed from the miner who leaves to the newly arrived miner in order to constantly monitor the atmospheric environment in that area (Tr. 10-11; 15-18).

In further support of its position, MSHA asserts that the Mine Act clearly speaks in terms of "mine atmosphere" and requires mine operators to continuously maintain the quality of air to which miners are exposed within underground coal mines. MSHA argues that the regulations have consistently adopted a "high risk" occupation sampling approach which is based upon the rationale that if persons in high-risk occupations are found not to be overexposed to respirable dust, then it could be safely concluded that other miners, in less risky occupations, are protected from excessive concentrations of respirable dust.

Citing the preamble to its regulations, 45 Fed. Reg. 23,990, 23,998 (April 8, 1980), which were affirmed in American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982), MSHA points out that samples for the high risk occupation measure the mine atmosphere in locations in the active workings, rather than exposure of any individual miner for the duration of a shift. MSHA concludes that such a sampling procedure measures the mine

atmosphere in the area of a work position, and that this method of sampling at the working face has been continued under the regulations by providing designated occupation sampling in each mechanized mining unit. MSHA emphasizes the fact that "designated occupation samples are taken in the environment of the occupation in the mechanized mining unit that is exposed to the greatest concentration of respirable dust".

During the course of oral arguments at the hearing, MSHA's counsel pointed out that the designated occupation sampling is indeed area sampling, notwithstanding the use of the word "occupation", and that what is being sampled is the area closest to the longwall return airside, and if any miner is exposed to any dust in that area, he must wear the dust pump (Tr. 21). Counsel reiterated that MSHA's rationale in requiring sampling of the newly designated 060 occupation is that if one samples the area designated as having the greatest concentration of respirable dust, and it is in compliance, then everyone else outby that area would be in compliance (Tr. 83). Counsel stated that "you've got to maintain the environment in compliance", and that MSHA's theory is "the furthest he (miner) goes towards the return air side, he is going into greater concentrations of respirable dust" (Tr. 85-86).

MSHA takes the position that it has not deviated from the regulatory definition of the designated occupation and that it has complied with it. In response to JWR's contention that MSHA failed to follow its policy guidelines when it mandated the change to the new designated occupation, MSHA's counsel pointed out that the policy manual explanation of section 70.207, is an interpretation of the regulations and that section 70.207(e), sets forth the procedure to be followed in the event MSHA is deviating from the regulation in designating an occupation for sampling. Since MSHA has not deviated from the regulation in this case, counsel concluded that there is no need for a comprehensive dust survey or analysis to support the mandated change in question.

Citing the court decisions in American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982), and Consolidation Coal Company v. FMSHRC, 824 F.2d 1071, 1086 (D.C. Cir. 1987), counsel further pointed out that the courts in those cases approved of MSHA's requirements regarding the sampling of the mine atmosphere, rather than an individual miner, as an appropriate method of achieving the intent of Congress in insuring compliance with the statutory and regulatory respirable dust requirements (Tr. 310-314).

In response to JWR's contention that it has been singled out for enforcement, MSHA's counsel pointed out that the section 70.207(e)(7) requirement for sampling the miner who works

nearest the return air side of the longwall working face has been in effect since 1980, and that designated occupation 060 has been in place in MSHA District No. 5 since 1988. Counsel asserted that JWR's mine is not the first mine subjected to the 060 designation, and that other mine operators nationwide have this designation. Counsel further argued that it is not disputed that the dustiest area on a longwall is the area nearest the return side of the longwall face. Since the entire purpose of the regulatory scheme is to monitor the mine atmosphere, counsel concludes that to measure anything else would be a disservice to miners and would be inconsistent with the statutory language (Tr. 314-315).

Citing Judge Weisberger's decision in Consolidation Coal Company v. Secretary of Labor, 9 FMSHRC 1509 (August 1987), MSHA asserts that the judge addressed the issue of who constitutes "the miner who works nearest the return air side", and relying on the plain language of section 70.207(e)(7), he concluded that a violation of that section occurred since the respirable dust sampling device was not alternated between the two miner as they changed position on the longwall face. MSHA points out that the judge specifically noted that the failure to transfer the sampling device to the miner who worked in the tailgate position had" the effect of not providing an accurate indication of exposure of coal dust", Consolidation Coal Company, supra, at 1512.

The UMWA's Arguments

The UMWA has expressed its agreement with the position taken by MSHA in this case. The UMWA takes the position that "passing the pump" (dust sampling device), provides the safest net for all of the miners on the longwall face, and that if the pump is passed to the person closest to the return, and the dust sample is in compliance, then one can be sure that all of the miners working on the face will be exposed to dust which is within the legal limits (Tr. 12-13). The UMWA also believes that the redesignation of the occupation in question for sampling not only complies with MSHA's regulation, but it also provides a safeguard for mine operators who may "try to beat the system" (Tr. 299). Further, the UMWA believes that in order to measure the dust adequately, the pump should stay on the face (Tr. 300).

The UMWA's counsel asserted that the intent of sampling is to prevent miners from contracting black lung. Given the nature of longwalls, counsel asserted that the dust pump must be passed in order to determine the worst dust concentration. Only in this way can one determine that all miners are breathing clean air (Tr. 319-320).

Findings and Conclusions

Section 202(b)(2) of the Act, 30 U.S.C. 842(b)(2), provides in relevant part that:

> . . . 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 such mine is exposed at or below 2.0 milligrams of respirable dust . . . (emphasis added).

The purpose of this respirable dust limitation is stated in section 201(b) of the Act, 30 U.S.C. 841(b), as follows:

> . . . it is the purpose of this title to provide to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period. (emphasis added).

The statutory limitation of 2.0 milligrams of respirable dust found in section 202(b)(2) of the Act is reiterated in the Secretary's regulations at 30 C.F.R. § 70.100(a). JWR is charged with a violation of this regulatory standard, which provides as follows:

> (a) 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).

MSHA's dust sampling procedures are found in Subpart C, Part 70, Code of Federal Regulations. Section 70.207(a) requires a mine operator to take five valid samples from the designated occupation in each mechanized mining unit on a bimonthly basis. The term "designated occupation" is defined by section 70.2(f), as "the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration". As correctly noted by MSHA in its pretrial memorandum, the regulations have consistently adopted a "high-risk" occupation sampling approach which is based upon the rationale that if persons in high-risk occupations are found not to be overexposed to respirable dust,

then it could be safely concluded that other miners, in less risky occupations, are protected from excessive concentrations of respirable dust. See: American Mining Congress ("AMC") v. Marshall 671 F.2d 1271 (10th Cir. 1982), where the court upheld MSHA's designated area respirable dust sampling regulations promulgated in 1980. In that case, the court noted that "the designated occupation sampling program is itself an an area sampling program", and stated as follows at 671 F.2d 1256:

> The Secretary has demonstrated a rational basis for the designated area sampling program: if the atmosphere in the area of a known dust generation source is in compliance with the statutory standard, then it can safely be assumed that all miners are protected from overexposure to respirable dust. This assumption is justified since no one individual constantly works next to an outby dust generation source over the course of an entire shift.

The designated occupations upon which the dust sampling device is to be placed are identified in section 70.207(e)(1) through (10). The relevant section applicable to the cited mechanized mining unit (MMU), No. 2 Longwall, in this case is section 70.207(e)(7), which provides as follows:

> (e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows:
>
> * * * * * * *
>
> (7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner;

MSHA's policy application with respect to the designated occupation sampling procedures pursuant to section 70.207, are found in the following:

1. CMS & H Memo No. HQ-88-44-H (6009), April 4, 1988, from MSHA's Administrator for Coal Mine Safety and Health to all District Mangers, which states as follows (Exhibit G-2):

   > Recently, it has come to our attention that both operator and inspector sampling of designated occupations (DO's), in some instances, may not be representative of the dust exposure of that occupation. This is because the sampling device is often kept with the individual miner who may not be

performing the duties of the DO during the entire shift. MSHA standards as set forth in 30 C.F.R. § 70.207 require that dust samples be taken "from the designated occupation" in each mechanized mining unit (MMU). Under this rule and as established in policy (page II-105, Coal Mine Health and Safety Inspection manual), correct sampling procedures require the sampling device to remain at the DO rather than with the individual miner, even when miners change positions or alternate occupations during the shift. In this way, all miners on the MMU are assured of being protected from exposure to excessive levels of respirable dust if the DO's exposure is at or below the applicable dust standard. Conversely, the practice of keeping sampling devices with individual miners can result in measurements of dust exposure that significantly underestimate the actual exposure of the DO if the miner changes work positions during the shift and takes the sampling device with him to other occupations.

Improper sampling of DO's has been reported and observed particularly at longwall operations. Some specific examples of improper sampling procedures are described in Attachment 1. Section 70.207(e)(7) requires that, except as otherwise directed by the District Manger, longwall DO dust samples must be taken (1) on the miner who works nearest the return air side of the longwall working face, or (2) along the working face on the return side within 48 inches of the corner. Therefore, when sampling is to be done with respect to either (1) or (2), the particular sampling procedure employed should be identified in the operator's ventilation system and methane and dust control plan. In addition the following newly established codes should be entered in the Occupation Code box (Item 11) of the dust data card: case (1) 060-Longwall (Return-Side Face Worker); and, case (2) 061 - Longwall (Return-Side Fixed). For instance, when sampling is done on 060, the sampling device must remain with the miner working nearest the return air side of the longwall working face at all times, even when the miner who was being sampled earlier in the shift is no

longer the one working nearest the return air side.

In many cases, District Managers have directed sampling of DO's other than those specified in Section 70.207. The typical DO's being directed to be sampled are longwall shearer operators. When sampling is conducted at these other occupations, identified through MSHA sampling as being exposed to the highest dust concentration on the MMU, the sampling device must be kept with the DO being sampled during the shift. It is not to remain with the miner if duties or work positions change during the shift.

2) MSHA's Program Policy Manual, Vol. V, Part 70, July 1, 1988, which states in relevant part as follows (Exhibit G-3):

(e) If the operator's mining procedures result in the changing of miners from one occupation to another during a production shift, the sampling device must remain on or at the designated occupation (DO). For example, if an operator alternates the duties of the continuous operator on a one-half shift basis between the continuous miner operator and helper, the dust sampler shall be worn for one-half of a shift by the continuous miner operator and the other one-half of a shift by the helper, while each is operating the continuous mining machine, or the sampler shall remain on the machines required by this section.

A change in the designated occupation of an MMU will be considered after the results of samples collected by MSHA indicate that a work position other than those identified in this section should be designated for bimonthly sampling. When the results of a sampling inspection demonstrate appreciably higher respirable dust levels at a nondesignated occupation within an MMU, consideration should be given to changing the designated occupation.

JWR's assertion that requiring it to sample the newly designated 060 occupation, which may involve more than one miner while the sampling pump is passed, does not accurately measure the dust exposure of any one particular miner and is therefore flawed, is rejected. A similar contention was made in American Mining Congress v. Marshall, supra, where it was argued that the area sampling program did not provide an accurate measure of any individual miner's dust exposure. The court rejected this argument, concluding that the Secretary's sampling method provided reasonable approximation of actual exposure. Commenting

on the merits of area sampling and personal sampling, the court stated in relevant part as follows at 671 F.2d 1256-1257:

> * * * * Nothing in the record supports the conclusion that either type of sampling provides a perfect measure of exposure to respirable dust. Since there is no perfect sampling method, the Secretary has discretion to adopt any sampling method that approximates exposure with reasonable accuracy. The Secretary is not required to impose an arguably superior sampling method as long as the one he imposes is reasonably calculated to prevent excessive exposure to respirable dust. On this record, the difference between area and personal sampling is not shown to be so great as to make the Secretary's choice of an area sampling program irrational. Keeping in mind that our task is not to determine which method is better, we hold that the Secretary's choice of area sampling over personal sampling is not legally arbitrary and capricious.
>
> We are not unmindful that area sampling may effectively require lower dust levels than might be required under a personal sampling program. This is because an operator might conceivably be cited for a violation of the 2 mg./m3 standard on the basis of area samples even though no individual miner was exposed to more than 2 mg./m3 of respirable dust during a shift. The fact that in theory the regulation may require operators to maintain a dust level below 2 mg./m3 in its person-by-person impact does not render the regulation legally arbitrary and capricious. We repeat that all proposed sampling methods are less than perfect and are designed to provide only estimates of actual exposure. Since measurement error is inherent in all sampling, the very fact that Congress authorized a sampling program indicates that it intended some error to be tolerated in enforcement of the dust standard. The method selected by the Secretary, while perhaps more burdensome in its impact on mine operators than other methods, is not beyond the scope of his discretion.
>
> * * * * Control of dust at the source will obviously contribute to reducing the level of personal exposure. By contrast, the results of personal samples do not allow identification of dust sources due to the movement of miners through various areas of the mine during the course of a working shift. Id. Thus, while a personal sampling system makes possible the identification of discrete individuals who have been overexposed, it does nothing to ensure reduction of dust generation because the source of the dust cannot be determined. Therefore, it clearly appears that area

sampling can rationally be found to be superior to personal sampling as a means of enforcing (as opposed to merely measuring) compliance with the 2 mg./m3 standard.

JWR's contention that the passing of the dust pump from miner to miner during the sampling cycle may jeopardize the integrity of the sample because of mishandling is rejected. JWR presented no evidence to support any conclusion that the five samples which it took and submitted to MSHA, and which reflected noncompliance, were in any way contaminated or otherwise invalid because of any abuse or mishandling. Indeed, JWR's safety supervisor Kimes acknowledged that the five samples subsequently taken to abate the violation were apparently not mishandled, and shear operator Young, who works on the longwall, testified credibly that he has had no problems in passing the pump to other miners and that the pump can be passed rather quickly without any interruption to production. Further, as noted by the D.C. Circuit in Consolidation Coal Company v. FMSHRC, 824 F.2d 1071, 1088 (D.C. Cir. 1987), MSHA's Part 70 regulations contain detailed procedures for mine operators to follow in taking respirable dust samples, and that any risks resulting from misuse of sampling equipment or deliberate contamination of samples lies with the mine operator.

I find no merit in JWR's contention that MSHA has failed to follow its own policy in mandating the change in the designated occupation sampling requirement. I agree with MSHA's position that the policy references which mention sampling as a condition precedent to any change in the designated occupation applies in those instances where MSHA's district manager has directed a change in a designated occupation other than the one specifically referred to in section 70.207(e)(7). In other words, if the change involves an occupation other than 060 (miner who works on the return side of the longwall face), then the policy language seemingly would require sampling to justify that change. In the instant case, MSHA's mandated "change" was in effect an affirmation of the specific requirements found in section 70.207(e)(7), and JWR has not rebutted the fact that the regulatory designated occupation is in fact the area which has the highest concentration of respirable dust on the longwall unit in question.

I find some merit in JWR's arguments that MSHA has not applied the requirement for sampling the 060 designated occupation "across the board" to all mine operators. Since MSHA's position in this case with respect to the requirement that JWR sample the 060 occupation is based on its assertion that it is simply relying on the specific requirement found in section 70.207(e)(7), I find it somewhat contradictory that MSHA has not seen fit to apply the regulation to all mine operators. However,

on the facts of this case, I cannot conclude that JWR has been prejudiced or arbitrarily singled out for special treatment. Mr. Martin's credible and unrebutted testimony reflects that other mine operators in the JWR enforcement district, as well as in at least one additional district, have also been required to sample the 060 designated occupation pursuant to section 70.207(e)(7). Mr. Martin confirmed that MSHA intends to implement further changes on a mine-by-mine basis as those mines are found to be out of compliance with the dust requirements based on sampling of occupations other than 060, and that these mines will in the future be required to sample the 060 occupation.

As noted earlier, JWR does not dispute the fact that the dust sample results relied on by Inspector McCormick in issuing the citation establish that the average concentration of respirable dust in the working environment of the cited mechanized mining unit (MMU) was 2.6 milligrams of respirable dust per cubic meter of air, and that this exceeded the regulatory limit of 2.0 milligrams of respirable dust per cubic meter of air found in the cited section 70.100(a).

JWR's contention that MSHA acted unreasonably and arbitrarily when it directed it to change the designated occupation from occupation code 044 to 060 for purposes of sampling to insure compliance with section 70.100(a), is rejected. I agree with MSHA's position in this case, and I conclude and find that in mandating the change in the designated occupation, MSHA acted within its authority and in Strict compliance with the sampling procedures found in section 70.207(e)(7), and in so doing, it acted reasonably in carrying out the intent of Congress and the Act to insure that miners are protected from excessive concentrations of respirable dust. Under the circumstances I further conclude and find that MSHA has established a violation in this case by a preponderance of the credible evidence, and the contested citation IS AFFIRMED.

ORDER

The contested "S&S" Citation No. 9883187, July 8, 1991, citing a violation of 30 C.F.R. § 70.100(a), IS AFFIRMED. The contest filed by JWR is DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

H. Thomas Wells, Esq., J. Alan Truitt, Jim Walter Resources, Inc., P.O. Box 830079, Birmingham, AL 35283-0079 (Certified Mail)

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35235 (Certified Mail)

Patrick K. Nakamura, Esq., LONGSHORE, NAKAMURA & QUINN
Suite 300, New South Federal, 2100 First Avenue North
Birmingham, AL 35203 (Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America,
900 Fifteenth St., NW, Washington, DC 20005 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 8 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 91-18 A. C. No. 40-03011-03509
v.	:	S & H Mine #7
S & H MINING, INCORPORATED, Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Nashville, TN, for Petitioner;
Mr. Paul G. Smith, Lake City, TN, for Respondent.

Before: Judge Fauver

The Secretary seeks a civil penalty for an alleged violation of an electrical safety standard, under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. S&H Mining, Inc., owns and operates S&H Mine No. 7, an underground coal mine, in Campbell County, Tennessee. The mine was opened in April, 1989. Paul Smith and Bob Swisher are owners of the operation. The mine produces coal for use in or substantially affecting interstate commerce.

2. MSHA Inspector Don McDaniel, who specializes in electrical inspections, issued § 107(a) Order No. 3381336 on May 18, 1990, to Tommy McCool, Mine Superintendent of No. 7 Mine, alleging the following condition as an imminent danger:

> [T]he high-voltage power line, 12,470 volts, that supplies power to the mine was installed

> from 8'6" to 15' off the ground from the first set of disconnection devices to the highwall which is a distance of approximately 300 feet.

3. Citation No. 3381337 was issued by Inspector McDaniel for a violation of 30 C.F.R. § 77.807 based on this condition. Section 77.807-1 requires that:

> High-voltage powerlines located above driveways, haulageways, and railroad tracks shall be installed to provide the minimum vertical clearance specified in National Electrical Safety Code: Provided, however, that in no event shall any high-voltage powerline be installed less than 15 feet above ground.

4. Inspector McDaniel began his electrical inspection of the mine one to two weeks before issuing the § 107(a) order and § 104(a) citation. When he began the inspection, he told McCool that he wanted to know the height of high-voltage lines installed on a slope going down to the high wall. The high-voltage lines have four wires: three phase wires and a neutral ground wire. Each phase wire carries 7,200 volts, and the entire system has 12,470 volts. There is no protective insulation jacket on the high-voltage lines, which are bare wires when hung. The magnetic field around each phase wire is about two feet. Both MSHA standards and the National Electrical Code require that high-voltage wires be hung at least 15 feet above the ground in areas where people may travel to avoid any likelihood of contact with the wires.

5. Normally, the three phase wires are hung about two to three feet above the neutral (ground) wire in a high-voltage system. Phase and ground wires are purposefully hung with a natural sag to allow some give.

6. The high-voltage wires at Mine No. 7 were strung on three poles. Two poles belonged to S&H Mining and a third pole belonged to Clinton Power Utility. The wires went from the Clinton Power Utility pole at the top of a hill through the two company poles and then over the highwall and down to a substation. The phase wires were loose with a lot of sag in them, and there was a possibility that the wind would blow them together.

7. The powerline was installed by a contractor who had been recommended to S&H Mining and had done other work for the company. The line was inspected by Clinton Power and by a state electrical inspector before it was energized.

8. The road leading to Mine No. 7 is a public access road to within 1/4 mile of the mine site. Graveyards are at the top of the hill. The road forks before reaching the mine site. Persons have

access to the area above the mine by this road, and the area is traveled by the public including children, hunters and four-wheel drive vehicles. In addition, goats roam the area above the highwall, adding to the attraction of visitors to the area. There are no barriers to this area.

9. A road leads from the mine site up the hill above the highwall, where the terrain is rough to steep.

10. Under the Act and regulations, the company is required to check the electrical system once every 30 days as part of their electrical exam. The examiner must check the high-voltage lines to see whether insulators or the neutral wire is broken and to check the height of the high-voltage lines. The area where Inspector McDaniel measured the wires is within the scope of these required exams. It is also subject to travel by the public, since there are no barriers preventing public access.

11. Inspector McDaniel arrived at the mine on Friday, May 18, 1990, and contacted McCool. The two proceeded to the top of the hill above the highwall where the company poles were located. McDaniel took measurements of the ground wire and the phase wires. McCool was the only company official present when these measurements were made. McDaniel began making measurements at the metering base at the top of the hill and measured again about 300 feet past the two company poles toward the highwall edge. He wore high-voltage gloves and used a measuring stick. McDaniel's notes show that the distances from the earth to the wires were: ground neutral line measurements 14'6", 12', 10'8", and phase lines 11'6" to 9'6". He stopped measuring about 20 feet from the high wall because he felt that he was putting himself in danger to go any farther.

12. The terrain in the area past the last company pole is very steep. Because of his fear of heights, McCool did not accompany the inspector all the way down the hill. He could see McDaniel at all times, but he could not always see the measurements being taken or the wire that was being measured.

13. Upon finding the above measurements, McDaniel told McCool that he was issuing an order based on the low heights of the high-voltage lines. McCool and McDaniel then walked back down the hill to the bottom of the highwall.

14. McDaniel's practice as an electrical inspector was that, when he found high-voltage lines as low as Respondent's he took them out of service immediately because of the danger of electrocution. He has issued imminent danger orders in the past for phase wires being less than 15 feet from the ground. McDaniel told McCool that he would have to remove power from the line.

15. Company officials were disturbed by the imminent danger

order and asked McDaniel to point out the conditions to them. McDaniel went back up the hill with them and took a second set of measurements. He was accompanied by White, McCool, and Smith. White went to within 50 feet of the location where McDaniel took the second set of measurements. Smith was about 300 feet from McDaniel when he took the second set of wire measurements.

16. White testified that, based on what he saw, he did not doubt that the phase wires were less than 15 feet of the ground, but that he did not personally witness McDaniel measure a phase wire. Smith stated that McDaniel did not in fact measure a phase wire, and that the order was based on the ground wire measurements alone. However, Smith could not see which wires were actually measured by McDaniel.

DISCUSSION WITH FURTHER FINDINGS

The parties are in sharp dispute whether Inspector McDaniel measured phase wires and the ground wire or measured only the ground wire.

Paul Smith, co-owner of S&H Mining and an active supervisor at No. 7 Mine, testified that, in the second measurements, Inspector McDaniel did not measure the phase wires and all indications to Smith were that McDaniel did not measure the phase wires in his first measurements. Although Smith was not present when McDaniel made his first measurements, Smith testified that when McDaniel discussed the order and citation with him, the ground wire was the only wire discussed. He stated that the first time that McDaniel stated that a phase wire was found to be under 15 feet was at the hearing of this case.

McDaniel testified that he used the term "high-voltage power line" to include the four wires, and did not base the order and citation on a finding that the ground wire was the only wire that was under 15 feet.

The evidence shows a misunderstanding between the inspector and mine management as to the basis for the order and citation. The inspector made the measurements shown by his notes, and found a phase wire below 15 feet from the earth. However, his order stated that the high-voltage line was from "8'6" to 15' off the ground." To him, the high-voltage line included all four wires, and he meant both the phase wires and the neutral wire in his order and citation.

I find that the order and citation reasonably specify the condition found by the inspector. However, the order and citation would have been clearer had the inspector stated his measurements of the phase wires.

Respondent contends that the facts in any event do not warrant

an imminent danger order and that the citation should be reduced to an allegation of a non-significant and substantial violation.

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822,825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. An illustration of this point is U.S. Steel Mining Co., Inc., supra, in which the Commission affirmed an S&S finding by a Commission judge. The judge found that:

> * * * [A]n insulated bushing was not provided where the insulated wires entered the control box for a water pump. The insulation on the wires was not broken or damaged. The water pump's electrical system was protected by two fuses - one a 30 amp fuse on the cable, and one a 10-30 amp control fuse inside the box. When it is operating, the pump vibrates, and the vibration could cause a cut in the insulation of the wire in the absence of a bushing. This could result in the pump to become the ground and, if the circuit protection failed, anyone touching the pump could be shocked or electrocuted. * * * [5 FMSHRC at 1791 (1983); emphasis added.]

As found by the judge, injury from the missing-bushing violation could result if the insulation wore through to metal and the circuit protection system failed to operate. However, one may observe that circuit protection devices are not presumed to be "reasonably likely" to fail unless they are found to be defective. There was no finding of defective fuses in the U.S. Steel case. The violation presented a substantial possibility of injury, not proof that injury was more probable than not. The effective meaning of the Commission's term "reasonably likely to occur" as applied in cases such as U.S. Steel is to find an S&S violation if the violation presents a substantial and significant possibility of injury or disease, not a requirement that injury or disease is more

probable than not. This meaning harmonizes with the statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, but states that an S&S violation exists if the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). In contrast, the statute defines an "imminent danger" as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated" [1] and expressly classifies S&S violations as less than imminent dangers. [2]

Thus, an "imminent danger" is a graver safety hazard than an S&S violation. I find that the height and location of the wires found by the inspector presented a substantial possibility of resulting in serious injury, but did not show an "imminent danger." The area was accessible to the public, and to the company's electrical examiners, but considering the lowest height of the phase wires at 9'6", and the relative infrequency of persons being in the area, I find that the Secretary did not prove that it "could be reasonably expected" that the condition would "cause death or serious physical harm before [it could] be abated."

Accordingly, the imminent danger order will be vacated, and the § 104(a) citation will be affirmed.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $300 is appropriate for the violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. The Secretary did not prove that an imminent danger existed as alleged in Order No. 3381336.

3. Respondent violated 30 C.F.R. § 77.807 as alleged in Citation No. 3381337.

ORDER

1. Order No. 3381336 is VACATED.

2. Citation No. 3381337 is AFFIRMED.

---

[1] Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977.

[2] Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger. . . ."

3. Respondent shall pay a civil penalty of $300 within 30 days of the date of this decision.

William Fauver
Administrative Law Judge

Distribution:

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

Mr. Paul G. Smith, S&H Mining, Inc., P. O. Box 480, Lake City, TN 37769 (Certified Mail)

/fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 8, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 92-168 A. C. No. 46-03149-03567
v.	:	No. 2 Mine
T & T FUELS INCORPORATED, Respondent	:	

DECISION GRANTING AND DENYING IN PART MOTION TO APPROVE SETTLEMENT

Before: Judge Fauver

This case is a petition for assessment of civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § et seq.

Petitioner has moved for approval of a settlement of one citation to reduce the alleged from "significant and substantial" to non-S&S, to reduce the allegation of negligence from ordinary to low negligence, and to reduce the penalty to $63. Settlement of the remaining three citations is proposed without changing the original proposed penalties.

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822,825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that

injury or disease will result. An illustration of this point is U.S. Steel Mining Co., Inc., supra, in which the Commission affirmed an S&S finding by a Commission judge. The judge found that:

> * * * [A]n insulated bushing was not provided where the insulated wires entered the control box for a water pump. The insulation on the wires was not broken or damaged. The water pump's electrical system was protected by two fuses - one a 30 amp fuse on the cable, and one a 10-30 amp control fuse inside the box. When it is operating, the pump vibrates, and the vibration could cause a cut in the insulation of the wire in the absence of a bushing. This could result in the pump to become the ground and, if the circuit protection failed, anyone touching the pump could be shocked or electrocuted. * * * [5 FMSHRC at 1791 (1983); emphasis added.]

As found by the judge, injury from the missing-bushing violation could result if the insulation wore through to metal and the circuit protection system failed to operate. However, one may observe that circuit protection devices are not presumed to be "reasonably likely" to fail unless they are found to be defective. There was no finding of defective fuses in the U.S. Steel case. The violation presented a substantial possibility of injury, not proof that injury was more probable than not. The effective meaning of the Commission's term "reasonably likely to occur" as applied in cases such as U.S. Steel is to find an S&S violation if the violation presents a substantial and significant possibility of injury or disease, not a requirement that injury or disease is more probable than not. This meaning harmonizes with the statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, but states that an S&S violation exists if the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). In contrast, the statute defines an "imminent danger" as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated" [1] and expressly classifies S&S violations as less than imminent dangers. [2]

---

[1] Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977.

[2] Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger. . . ."

Proposed Settlement

Citation 33151966 alleges that the panic bar for an emergency stop of an electric scoop, used at the face, was not properly maintained and produced friction and difficulty in using it. The inspector found that this condition would significantly and substantially contribute to the cause and effect of a coal mine safety hazard. The parties move to reduce the charge to a non-S&S violation on the ground that the scoop operator had reported the problem to the maintenance foreman before issuance of the citation.

A violation is evaluated, for S&S or non-S&S purposes, on the assumption that normal mining conditions would have continued without abatement of the violation. The settlement motion does not state that the friction and difficulty in using the panic bar did not present a substantial possibility of contributing to a serious injury. The proposed reduction to a non-S&S violation will therefore be denied.

The proposal to reduce negligence to low negligence has a factual basis in the motion, and will be granted.

The motion proposes settlement of the other three citations on the basis of their original allegations and the original proposed penalties. That part of the motion will be granted.

Provisional Order

If the parties agree to entry of the following provisional order, the charges herein will be disposed of as indicated. In such case, the parties should file, within 10 days of this date, a joint motion for entry of the provisional order as a final order.

If the parties do not agree to the provisional order, they may file a revised settlement motion.

"PROVISIONAL ORDER

"Upon motion of the parties, settlement of the charges in this case is approved as follows, without modification of the citations (except citation 3315196, which is redesignated as a low negligence violation):

Citation	Approved Civil Penalty
3315196	$ 63
3315195	136
3315198	20
3315199	20
	$239

"Respondent shall pay the above civil penalties within 30 days of the date of this order."

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Tina C. Mullins, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Om P. Magoon, Mining Engineer, T&T Fuels Inc., P. O. Box 206, Bruceton Mills, WV 26525 (Certified Mail)

/fas

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 1992

OLD BEN COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 91-53-R
	:	Citation No. 3537139; 1/9/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 91-54-R
	:	Order No. 3537140; 1/9/91
	:	Mine No. 26
	:	Mine ID 11-00590

SUMMARY DECISIONS

Appearances: Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, Washington, D.C., for the Contestant;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern Notices of Contest filed by the contestant (Old Ben) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of a section 104(a) citation and a section 104(b) order issued on January 9, 1991, by MSHA Inspector Robert S. Stamm. The citation and order are as follows:

Section 104(a) non-"S&S" Citation No. 3537139, issued at 8:03 a.m., cites an alleged violation of section 103(a) of the Act, and the cited condition or practice is stated as follows:

> While attempting to perform the on-going mandated quarterly Safety and Health inspection of the entire underground Mine 26, MSHA Inspector Robert Stamm was refused mantrip or other modes of transportation on the 8:00 AM to 4:00 PM shift on January 9, 1991, on instructions from Robert Roper, Mine Superintendent. This precluded Mr. Stamm's ability to properly travel and inspect the mantrip and associated areas of the mine, and impeded the inspection.

The inspector fixed an abatement time of 8:18 a.m., January 9, 1991, and thereafter at 8:19 a.m. that same day he issued section 104(b) Order No. 3537140, citing an alleged violation of section 103(a) of the Act. The order reflects that "no area" of the mine was withdrawn, and the condition or practice cited is described as follows on the face of the order:

> Roger Roper, Mine Superintendent, failed to abate 104(a) citation number 3537139. Roger Roper, Mine Superintendent, denied MSHA Inspector Robert Stamm the right to ride the mantrip transportation, which impeded his efforts to perform mandated inspection activities of the mantrip and associated areas.

The respondent (MSHA) filed timely answers to the contests and asserted that the citation and order were properly issued for violations of section 103(a) of the Act. Old Ben subsequently filed a Motion for Summary Decision pursuant to Commission Rule 64, 29 C.F.R. § 2700.64, accompanied by four (4) pre-trial depositions of the inspector, his supervisor, and MSHA's district and sub-district managers. MSHA filed a reply to Old Ben's motion, and Old Ben responded with a reply brief.

After consideration of Old Ben's summary decision motion, and MSHA's reply, I denied the motion after concluding that several issues precluded summary decision, and the matter was scheduled for hearing on the merits in St. Louis, Missouri. Old Ben subsequently filed a motion seeking clarification of the denial, and requested that I identify the material facts which required an evidentiary hearing. I thereupon issued an order clarifying the issues for trial, and the parties subsequently requested a continuance of the hearing in order to file further stipulations which they believed would enable me to proceed with a summary decision of the matter without an evidentiary hearing. The continuance was granted and the parties filed their stipulations.

Issues Presented

The principal issue in these proceedings is whether Old Ben violated section 103(a) of the Act when it refused underground mine transportation to Inspector Stamm during his inspection of January 9, 1991. Stated more specifically, the issues are whether or not Inspector Stamm had a legal right pursuant to section 103(a) to transportation furnished by Old Ben to aid him in his inspection, and whether or not Old Ben's refusal to provide such transportation constituted a denial of Mr. Stamm's right of entry for purposes of conducting his inspection, and precluded or impeded his inspection. Additional issues raised by the parties are identified and disposed of in the course of my decisions.

Stipulations

The parties stipulated to the following:

1. Old Ben's No. 26 Mine is subject to the Mine Act.

2. The Administrative Law Judge has jurisdiction over this proceeding.

3. Citation No. 3537139 ("Citation ") and Order No. 3537140 ("Order") were properly served on Old Ben.

4. The parties have agreed to put this case before the Administrative Law Judge for decision based on stipulated facts and the various briefs previously filed.

5. Beginning on December 13, 1990 and consistently thereafter (until abatement of the Order), Old Ben declined to furnish transportation around the Mine to Inspector Stamm, but no violation of the Act was alleged until the denial of transportation on January 9, 1991.

6. Because elevator transportation between the surface and the underground workings at the bottom of the shaft was necessary for access into and out of the Mine, Old Ben provided it to Stamm. Old Ben did not provide transportation within the underground areas of the Mine because it believed that Stamm could perform his inspection on foot.

7. Beginning on December 13, 1990 and continuing until January 15, 1991, Stamm continued to conduct his regular 4th quarterly inspection of the Mine on foot, accompanied also on foot by representatives of the miners and Old Ben.

8. During this period of time, other MSHA inspectors who came to the Mine were provided with transportation around the Mine by Old Ben.

9. The Mine is large, with several working faces during this time frame; the distances to be travelled from the shaft to the working faces varied from 2,400 feet (0.4 miles) for the closest face and up to 10,000 feet (2.1 miles) for the farthest.

10. Most of the mine (e.g., the bleeder entries) can only be inspected on foot; all of the active workings could be reached within a 30 to 40 minute walk from the bottom of the shaft.

11. During the time Stamm was denied transportation, transportation was otherwise available and could have been provided.

12. The Order was abated by Old Ben's agreement to transport Stamm to the location where he wished to commence his daily inspection and then to transport him back to the shaft at the end of that inspection, but not from place to place in the Mine during the interval between those times.

13. Stamm was not denied access to the mantrip for the purpose of inspecting it and that is not an issue in this proceeding.

14. It took Stamm three days longer to complete his 4th quarterly inspection (when transportation had been denied for over a month) than his 3rd quarterly inspection (when transportation had been provided). This may largely be explained by the extra time it took Stamm to walk into and out of the Mine in the 4th quarter.

15. Stamm issued more citations and orders during the subject 4th quarter than during the 3rd quarter, and substantially more than during any prior 4th quarter in recent years or in any quarter back through 1986.

16. MSHA believes that the denial of transportation slows down inspectors and means that inspections take longer to complete.

17. MSHA inspections may be conducted by multiple inspectors simultaneously.

18. MSHA inspectors are free to begin their inspections at any time of the day, anywhere in the Mine they choose, without prior notice.

19. MSHA's Program Policy Manual provides that a denial of MSHA's statutory right of entry can occur indirectly, but "[t]here must be a clear indication of intent and proof of indirectly denying entry." Indirect denial of MSHA's right of entry occurs when there is a "[r]efusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot."

20. Prior to December 13, 1990, Old Ben had complained to Stamm's supervisors that he was improperly conducting himself by issuing an excessive number of citations and orders, including many which they believed were legally defective, and by taking directions from the UMWA. Old Ben asserted that this was disrupting their operations because Stamm went to multiple areas of the Mine during each inspection day. MSHA acknowledges that Old Ben made these complaints but submits that MSHA inspectors are supposed to look into problems that they are told about by miners.

21. Of the approximately 285 citations and orders issued by Stamm during his 1990 3rd and 4th quarterly inspections, some 79 were vacated or modified by MSHA as a result of the 30 C.F.R. Part 100 conference process or after Old Ben had contested them at the Commission.

22. Although Old Ben contested additional citations and orders issued by Stamm, those cases were not set for hearing until many months later, offering no immediate relief from what Old Ben believed were improper and over-zealous enforcement actions. MSHA notes that Old Ben did not file motions to expedite these proceedings and Old Ben notes that it did not believe expedited hearings would have been granted since it had abated the alleged violations.

23. The only two mines in MSHA's District 8 which were put on MSHA's Special Emphasis program (based on the number of violations issued) are the two which Stamm had been inspecting. MSHA questions the relevance of this fact in light of other possible explanations.

24. Old Ben's Safety Director Dave Stritzel was an MSHA inspector for 11 years before he was hired by Old Ben in 1982. He served as a regular inspector from 1971-1976 and in 1976 was promoted to supervisory technical specialist (health).

25. As an MSHA inspector, Stritzel believed that there was no legal requirement that mine operators had to furnish transportation all around their mines to MSHA inspectors. Stritzel believed, based upon his experience as an MSHA inspector and his examination of the Mine Act and regulations, that providing in-mine transportation to an MSHA inspector, like offering him coffee in the Mine office, was voluntary on a mine operator's part and that an operator could cease to offer this courtesy to an obnoxious inspector, to an inspector who abused the privilege, or to an inspector who for any reason was deemed no longer deserving of such favors. MSHA notes that none of its current employees who worked with Stritzel in the District can remember him voicing these beliefs while he was an inspector. MSHA further notes that there never has been any official MSHA policy or interpretation of the Mine Act consistent with those beliefs. Old Ben responds that many of Stritzel's colleagues with whom he would have discussed this at MSHA are no longer with the agency.

26. Because of Stritzel's belief as stated in the foregoing paragraph, he believed that Old Ben was under no legal obligation to provide transportation to Stamm around the Mine, other than access into and out of the Mine by elevator, since he could perform his inspections on foot; accordingly, it was pursuant to Stritzel's direction that Old Ben refused to offer mantrip

transportation to Stamm on December 13, 1990 and thereafter, including January 9, 1991.

27. When transportation is provided to an MSHA inspector other than Stamm, the usual procedure is that a company safety representative drives them to a location specified by the inspector; they park the vehicle while the inspector examines conditions in that area; on occasion, the group may then drive the vehicle to other locations specified by the inspector. At the end of the inspection, the inspection party drives the vehicle back to the shaft.

28. Old Ben believes that its motive for not offering transportation to Stamm is not relevant to this proceeding, any more than it is relevant to whether one may rightfully invoke one's 5th amendment right not to testify, that one is doing so because he does not like the police investigator; that is, since Old Ben believes that the Mine Act does not in the first place require a mine operator to transport MSHA inspectors around its mine, Old Ben believes that its decision to voluntarily offer such transportation to others but not to Stamm cannot be a violation. MSHA believes that under these facts transportation is required by the Mine Act and that Old Ben's motives are relevant to this proceeding.

29. Old Ben clarifies that its statement on brief that "only in the limited range of circumstances where the denial of transportation effectively precludes MSHA's ability to exercise its right of entry could there be a section 103(a) violation in declining to chauffeur the inspector" refers to circumstances where operator-provided transportation is necessary to access all or part of a mine to inspect it, as with the elevator to the underground workings of Old Ben's No. 26 Mine.

Deposition Testimony

Old Ben took the depositions of Mr. Stamm and his MSHA superiors and filed them in support of its summary decision motion and supporting arguments. MSHA also relies on these depositions.

MSHA Inspector Robert Stamm, testified that his quarterly inspection of the mine began on October 29, 1990, and that prior to this time he had conducted another inspection beginning on or about July 6, 1990, and ending on approximately October 24, 1990. He was at the mine on a regular basis except for vacation periods, and this was the only mine he was inspecting during these time periods. He confirmed that on December 13, 1990, Mr. Bruce Harris, the mine safety manager, advised him that the company would no longer provide him with transportation while he was conducting his regular inspections. Mr. Harris could not provide him with any reason for the denial of transportation.

Mr. Stamm informed his supervisor Steve Kattenbraker about the matter on December 13, 1990 (Tr. 6-10).

Mr. Stamm stated that prior to December 13, 1990, he would ride in a diesel pickup truck driven by someone in the safety department to the area that he was inspecting. The truck would normally wait for him while he conducted his inspection, and it would then take him to the next area to continue his inspection. After Mr. Harris informed him that no transportation would be provided Mr. Stamm wrote up his notes and then proceeded to walk to the area to conduct his inspection, and he was accompanied by Mr. Harris and the miner's representative and they all walked (Tr. 10-12). Mr. Stamm confirmed that he subsequently prepared a memorandum on December 20, 1990, at the request of subdistrict manager Sakovich, documenting Mr. Harris' refusal to provide him with transportation (Tr. 16).

Mr. Stamm stated that except for December 19, 1990, when he rode a mantrip into the mine and walked, his inspections during the period December 13, 1990, and January 9, 1991, were all conducted on foot. He confirmed that in the past, when he conducted inspections, he usually rode into the area that he was to inspect, the vehicle would be parked, and he would conduct his inspections on foot. The only difference in this routine after December 13, 1990, was the fact that he had to walk to the locations where he was to conduct his inspections (Tr. 18).

Mr. Stamm confirmed that after December 20, 1990, and before arriving at the mine on January 9, 1991, he spoke with Mr. Sakovich about the transportation problem, and that on January 7, Mr. Sakovich "told me that when I went to the mine to try and ride in on a mantrip, see if they would provide transportation in a mantrip." Mr. Stamm confirmed that he followed these instructions and went to the mine on January 9, and traveled underground on the elevator. He proceeded to the empty mantrip and climbed in and sat down. Mr. Harris then informed him that he was not permitted to ride the mantrip. Mr. Stamm asked if he was being refused transportation, and Mr. Harris responded "yes" (Tr. 24).

Mr. Stamm stated that after getting out of the mantrip he issued a citation to Mr. Harris. He stated that he issued it "due to instructions received from district manager Mike Sakovich" on or about January 8, 1991, after he wrote his January 7, 1991, memorandum to Mr. Sakovich (Tr. 26). Mr. Stamm stated that Mr. Sakovich was acting on instructions, and he assumed "it was the headquarters in Arlington" because Mr. Sakovitch gave him typed suggested wording for the citation and order which he issued (Tr. 27-28).

Mr. Stamm stated that after verbally issuing the citation at approximately 8:30 a.m., he went to the surface to write it out

and advised Mr. Harris that he had 15 minutes to obey the citation and that he would have to issue an order if transportation were not provided. Mr. Stamm then called Mr. Sakovich, issued the citation and order, and returned underground to continue his regular inspection by walking. He stated that he walked the third north belt conveyor entry and that it took him approximately 45 minutes or an hour to walk one way, and he ended up where the belt conveyor starts, and left the underground area between 1:00 p.m. and 1:30 p.m., and left the mine at 2:25 p.m., and returned to his office (Tr. 33, 36).

Mr. Stamm confirmed that the order was terminated on January 15, 1991, after Mr. Harris informed him that transportation would be provided for him and that a diesel truck would take the inspection party where he wanted to go (Tr. 37).

Mr. Stamm explained that the phrase "or other modes of transportation" which appears in the citation refers to the diesel pickup truck which the mine safety department normally drove for inspection purposes (Tr. 38). He confirmed that he did not ask Mr. Harris to provide him with some other mode of transportation other than the mantrip when he was refused a ride in that vehicle (Tr. 39).

Mr. Stamm confirmed that Roger Roper is the mine superintendent, and that Mr. Harris told him that Mr. Roper had issued the instructions that no mode of transportation would be provided for him (Tr. 40). Mr. Stamm explained the cited conditions as follows at (Tr. 40-42):

> Q. Okay. Now, you -- say that it precluded your, um, the ability to properly travel and inspect the mantrip. Do you see those words in there?
>
> A. Yes.
>
> Q. All right. What do you mean by that, sir?
>
> A. Well, what we would normally do is if we want to travel the travel road into the unit, ride in the mantrip to see the condition of the traveled road, whether it be too rough or something that would affect the ability to operate that piece of equipment, and also while you were riding this mantrip to inspect it for steering, the brakes and things of this nature.
>
> Q. Did you tell Mr. Harris that you wanted to inspect the mantrip that morning?
>
> A. No.

Q. Um, you say that it -- and I'm quoting here again, "ability to properly travel". Let me stop there. What did you mean by, "properly travel"?

A. To ride that travel way. Like I say, to check for the condition of the travel way itself.

Q. And you said that, um, mention of the word and associated areas of the mine. What do you mean by that?

A. Well, the associated areas would be part of the travel road from the shaft to the working section.

Q. And then you go on and conclude by saying ability, and impeded the inspection -- I'm quoting, "and impeded the inspection". And why did it impede your inspection?

A. Because when you have to walk you can't get to the working section as quickly as you would like to get there to examine the things that we were required to examine.

Q. And with respect to the wording, all of the wording under paragraph eight on the citation under condition or practice, um, you -- I think said earlier that you were sort of given a narrative to put in there, and that's what you put in there; is that right?

A. Right.

Q. So these are not your words, these are someone else's words essentially?

A. Yes.

Q. But you agree with them, do you, sir?

A. Yes.

Mr. Stamm stated that the 15 minute abatement time that he established for compliance with the citation "was suggested" as enough time to allow him to ride the mantrip. He confirmed that the mantrip eventually filled up with people and he observed it leave while he was writing out his notes underground (Tr. 43). Mr. Stamm confirmed that he cited a violation of section 103(a) of the Act because of MSHA's policy interpretation of that section. He stated that the policy states "something to the effect that indirect denial would be if transportation was not provided and the inspection could not be performed, it would be

impossible to complete the inspection or impeded the progress, something to that effect" (Tr. 46).

On cross-examination, Mr. Stamm confirmed that he is required to conduct mine inspections four times a year, and that the inspections "are always on a time schedule" (Tr. 54). He further explained as follows at (Tr. 56-57):

> Q. In terms of conducting a complete inspection, AAA inspection, as you've mentioned was the responsibility when you went underground on January 9, 1991. Were there reasons pertaining to your inspection responsibilities that you needed to get to any section in a relatively short amount of time the transportation that you were refused would have assisted you in doing so?
>
> A. On that date, um, I can't -- I can't answer that. I don't know if that date that would have altered my inspection because had I planned on going to this working section with transportation I would have done that. Since I was not provided, then I would have altered my inspection to go to another area of the coal mine with time when I'm working an eight hour day.
>
> Q. And how would that interfere with your ability to compete an AAA inspection in terms of the area you would want to go to?
>
> A. Well, it would either take a lot longer days than normal than what we normally would perform or possibly by walking every area in a coal mine you possibly wouldn't get the inspection done within the allowed time.
>
> Q. Okay. And, um -- and you were in terms of your transportation when you take this equipment that you normally took, was it part of your responsibilities with AAA to inspect the area as you entered into the area from this bottomless shaft to wherever you might be going?
>
> A. Yes, I'm inspecting throughout wherever I'm going.
>
> Q. Does that matter whether it's one day or the next day or whatever day it is?
>
> A. No, you're just always constantly inspecting and looking.

Mr. Stamm stated that he knew of at least four inspectors who were provided transportation throughout the mine while he was

conducting his inspection (Tr. 57). He confirmed that prior to December 13, 1990, he was always provided underground transportation to conduct inspections and that transportation has always been provided him unless there was an equipment breakdown (Tr. 58).

On re-direct examination, Mr. Stamm stated that he has to complete his inspections in a "timely manner" so that he can complete four a year. He further confirmed that it is an MSHA practice to perform four regular inspections a year on a calendar quarter basis, and there is nothing to preclude more than one inspector conducting a regular inspection (Tr. 59).

Steven R. Kattenbraker, MSHA supervisory inspector, stated that the "transportation situation" concerning Mr. Stamm first came to his attention on December 13, 1990, after Mr. Stamm had issued an order shutting down the longwall. Mr. Stamm informed him that he was denied transportation and would have to walk back in to abate the order (Tr. 10). Mr. Kattenbraker believed that the refusal to provide transportation was the result of complaints by Old Ben that Mr. Stamm "was writing a lot of violations". He explained that he "conferenced" many of Mr. Stamm's violations and that the working relationship "was not the best" (Tr. 12). Mr. Kattenbraker confirmed that Mr. Stamm had been refused transportation from December 13, through the rest of the year, and he identified copies of Mr. Stamm's memorandum of December 20, 1990, and January 7, 1991, and also referred to additional memorandums by inspectors Michael Pace and Robert Cross, documenting the fact that they conducted section 103(i) spot inspections at the mine during the last half of December, 1990, and had been provided transportation (Tr. 16-18).

Mr. Kattenbraker confirmed that he was present in the MSHA field office at the time the transportation situation involving Mr. Stamm was discussed by telephone by Mr. Sakovich and Mr. Childers with representatives of the MSHA solicitor's office in Arlington, Virginia (Tr. 23). The result of that conversation was that "we decided upon a course of action" and a citation and order were issued on January 9, 1991 (Tr. 24). Mr. Kattenbraker confirmed that Mr. Stamm was given suggested wording to include in the citation and order which he issued (Tr. 24).

Mr. Kattenbraker stated that from January 9, 1991, when the order was issued to January 15, 1991, when it was terminated, he "monitored" the situation. He confirmed that other than the denial of transportation, Mr. Stamm was not denied entry to the mine or barred from going anywhere in the mine, and that he conducted inspections on several days during this time period (Tr. 31). Mr. Kattenbraker confirmed that only one inspector was used on the inspection which began in October, 1990, and that he decides how many inspectors to use during any given inspection (Tr. 32).

Mr. Kattenbraker confirmed that he met with company safety officials Dave Stritzel and Bob McAtee on December 14, 1990, at Mr. Stritzel's request, and that Mr. Stritzel was concerned about Mr. Stamm. Mr. Kattenbraker explained this concern as follows at (Tr. 36):

> THE WITNESS: Specifically there were some statements made that Mr. Stamm was issuing violations that were not in their minds violations, that he was perhaps -- I've lost my train of thought here. He was perhaps more, I don't know what the word is, but he was too strong on some of the orders. They just had an order the night before, and they were very upset about the issuance of the order, did not feel it was warrantable, and made some general statements as to whatever takes place now, it can't replace the 12 hours of production, things like, that.

Mr. Kattenbraker stated that during the meeting with Stritzel and McAtee "a statement was made that Mr. Stamm would not be provided transportation as of yesterday" (Tr. 35). Mr. Kattenbraker believed that the denial of transportation to Mr. Stamm was a "type of denial" of his responsibility to conduct an inspection (Tr. 42). Mr. Kattenbraker confirmed that he visited the mine a week after Christmas, 1990, accompanying another inspector on a spot inspection, and they were not denied transportation (Tr. 42-45).

Mike Sakovich, MSHA sub-district manager, stated that he first became aware of a transportation problem on or about December 14, 1990, when Mr. Stamm informed him that he was told that he would not be provided transportation. Mr. Stamm did not further explain why he would be denied transportation, nor did he indicate his understanding as to the reasons why he would be denied transportation.

Mr. Sakovich stated that he "did not do too much of anything" at the time he spoke with Mr. Stamm and simply told Mr. Stamm "to go to the mantrip, and if they refused transportation to just go about his business and do his job" (Tr. 6-7). Since Mr. Stamm had inspection duties which did not require him to have transportation, Mr. Sakovich could not recall his next contact with Mr. Stamm. However, on December 19, 1990, he had a conversation with Mr. McAtee, and he informed Mr. McAtee that "they were impeding Stamm's inspection by not permitting him to ride available transportation" (Tr. 10). Mr. Sakovich explained that the number 26 mine is a large mine and that if an inspector is not permitted to use available transportation, he would double or triple the time it takes to inspect the mine, there would be "a lot of lost motion", and he would be traveling the same area on foot day after day and would "have a hard time

covering the mine". Mr. Sakovich expressed his doubt that Mr. Stamm could inspect the mine once a quarter by walking (Tr. 10-11).

Mr. Sakovich stated that on January 2, 1991 he discussed the transportation situation with MSHA field supervisors Kattenbraker and Wolf in Mr. Stamm's presence, and that on January 3, 1991, he advised district manager Maurice Childers, for the first time, about the situation. In order to resolve the matter, Mr. Sakovich suggested to Mr. Childers that a citation "might or should be issued" (Tr. 12). Mr. Sakovich confirmed that his research reflected that section 103(a) of the Act did not specifically address "indirect denial", but the MSHA manual did, and that Mr. Childers agreed with his assessment of the matter (Tr. 14).

Mr. Sakovich confirmed that he next discussed the matter of "indirect denial" with Mr. Childers on January 8, 1991, and that Mr. Larry Beeman, MSHA's Arlington, Virginia, office was also on the telephone line during the discussion which was initiated by Mr. Childers. Following this conversation, Mr. Sakovich was contacted by an unidentified attorney, and as a result of all of these discussions, he (Sakovich) instructed Mr. Stamm as to the procedure that he was to follow, and this was "played out in what happened the next day with the citation to the letter" (Tr. 17).

Mr. Sakovich confirmed that the narrative description of the cited "condition or practice" included in the citation had previously been faxed to his (Sakovich) office by the MSHA Arlington office where it had been prepared, and that Mr. Stamm simply copied it down on the citation form (Tr. 17). Mr. Sakovich also confirmed that he had instructed Mr. Stamm to go to the mine and to go to the underground mantrip, and get in it. If "he was refused, he was to issue a citation giving them 15 minutes to obey. If they took no action, he would come out on the surface and call me, and then I would instruct him to write the order, and that's exactly the procedure that was followed" (Tr. 18).

Mr. Sakovich identified Roger Roper as the mine superintendent and the "agent of the operator". Mr. Sakovich believed that Mr. Roper gave the instructions that Mr. Stamm would not be permitted to ride any transportation, but he did not personally discuss the matter with Mr. Roper (Tr. 20).

Mr. Sakovich stated that he received a telephone call on January 9, 1991, from Old Ben official David Stritzel, and that Mr. Stritzel was "a little hostile and upset", and wanted to discuss Mr. Stamm (Tr. 19). Mr. Sakovich confirmed that he had previously met with Mr. Stritzel, Mr. McAtee, and Mr. Stamm's supervisor (Kattenbraker) on or about December 14, 1990, and that

Stritzel and McAtee "were complaining about Stamm's performance" (Tr. 24). He believed that the complaints concerned Mr. Stamm's talking to the United Mine Workers and that "he was writing violations that were not citations for things that were not violations, stuff of that nature" (Tr. 25).

Maurice S. Childers, MSHA District No. 8 Manager, testified that he is the direct supervisor of Michael Sakovich and Steve Kattenbraker and indirectly supervises Inspector Stamm. He confirmed that he first became aware of a transportation problem concerning Mr. Stamm on January 3, 1991, when Mr. Sakovich advised him that Mr. Stamm was not permitted to ride a mantrip. Mr. Childers instructed Mr. Sakovich to tell Mr. Stamm "not to force himself on it, that he would proceed with his inspections" (Tr. 6). Mr. Childers also confirmed that Mr. Stamm was not being denied entry to the mine and that it was only "a local transportation issue" (Tr. 6).

Mr. Childers stated that Mr. Stamm followed his instructions of January 3, 1991, and that his conversation with Mr. Sakovich was brief on that day. Mr. Childers subsequently spoke with MSHA's attorneys, and he confirmed that the wording for the citation issued by Mr. Stamm on January 9, 1991, was prepared by the Solictor's office in Arlington, Virginia, and communicated to him. Mr. Childers agreed with the wording, and he believed that there was a violation of section 103(a) of the Act because "the company was impeding the regular inspection of the mines by refusing Mr. Stamm transportation, you know, underground to his wherever...whatever area he was going to" (Tr. 10). He confirmed that the "impeding the inspection" language appears in MSHA's program policy manual as part of the explanation of section 103(a).

Mr. Childers confirmed that he instructed Mr. Sakovich to have the citation issued by Mr. Stamm, and that Mr. Stamm was to issue an order five minutes later if the operator did not comply (Tr. 11). He also confirmed that he sent a letter to Mr. Roper on January 9, 1991, and he confirmed that it was drafted by MSHA's Arlington office and faxed to him (Tr. 13). Mr. Childers stated that he subsequently received a telephone call from Mr. Markel Chamness, Old Ben's vice-president for underground operations, and Mr. Chamness advised him that he would provide transportation for Mr. Stamm (Tr. 14).

Mr. Childers confirmed that MSHA's regulations do not state that transportation shall be provided for inspectors. However, he indicated that it has been an industry practice throughout Illinois to provide transportation for inspectors and that "it's never been a problem before". He also stated that there are times when an inspector must ride the mantrip, and when he is not, it has also been a practice to provide transportation for the inspector, the company official, and the walkaround (Tr. 15).

Mr. Childers agreed that if no transportation is available, the company need not purchase a special vehicle for the inspector, and if a piece of equipment is not available because it is broken down or operating elsewhere, the company is not required to make a special effort to supply transportation. He confirmed that an inspector is not authorized to displace regular workers who may need transportation, and that if an inspector finds that a mantrip has left or was filled with workers, the inspector would be expected to start walking to conduct his inspection and that "they do not sit and wait" (Tr. 17).

Mr. Childers stated that the "local transportation" provided by the contestant is in a sense "a courtesy to the inspectors and helpful to the operator, too" (Tr. 18). He confirmed that an operator is not obliged to provide an inspector with lunch, safety equipment, or clothing (Tr. 18).

On cross-examination, Mr. Childers stated that there are times when it is necessary for an inspector to get to a mine area in the least amount of time as possible, and as an example, he cited a situation where an inspector intends to go to an area two miles away with an inspection party, and that it would be beneficial for the inspector to complete his inspection as quickly as possible. He also indicated that an inspector must inspect an actual ongoing complete mining cycle to determine whether the equipment is being properly operated, whether there is adequate ventilation, and "things of that nature, that's part of his routine inspection" (Tr. 20). He believed that expedient transportation would assist the inspector in doing this.

Mr. Childers stated that he was not aware that Mr. Stamm was denied transportation because of the unavailability of a mantrip, and as far as he knew transportation was available for inspectors to conduct their inspections. He confirmed that inspectors are required to conduct four underground inspections a year, and that mobile transportation would assist them in achieving that result. He believed that denying an inspector transportation would interfere with his accomplishing the required inspection because of the distances that he would be walking, and the inspection would take several weeks longer. Although he did not know the distances or all of the areas which would be travelled by the inspector, he stated that "in this mine it would hinder completing the required number of inspections" (Tr. 21-22). He also confirmed that an inspector is responsible for observing any imminent dangers or other safety concerns, and to insure that any cited violative conditions are corrected. The use of mobile transportation would help expedite his inspection in these situations (Tr. 23).

On re-direct, Mr. Childers agreed that there are situations when an inspection may be expedited by using more inspectors, and that his testimony that an inspection would be delayed for

several weeks assumed that only one inspector was involved (Tr. 25). He confirmed that Mr. Roper's name is included in the citation and order because he is the mine superintendent and because "he is the top guy", and it was his understanding that Mr. Roper issued the instructions to refuse transportation for Mr. Stamm. Mr. Childers confirmed that if Mr. Roper had refused transportation to all inspectors, his views in this matter would still be the same (Tr. 26).

Old Ben's Arguments

Old Ben argues that the citation and order are invalid because section 103(a) of the Act does not require mine operators to furnish transportation to MSHA inspectors in order to facilitate their inspections. Old Ben asserts that not only does the statute itself not impose such a duty on mine operators, but the legislative history also does not indicate any congressional intent that mine operators would be required to afford transportation to MSHA inspectors. Old Ben further states that there is no case law supporting MSHA's claim to a right of transportation, and even MSHA's own interpretive guidelines do not go that far.

Old Ben maintains that nothing in section 103(a) of the Act in any way requires that transportation must be furnished to the Secretary or her authorized representative, and that a mine operator's duty is a passive one and limited to an obligation not to block or otherwise interfere with the Secretary's "right of entry". Old Ben argues that this same scheme is echoed and reinforced in section 108(a)(1) of the Act where the Secretary has been provided with a remedy when an operator has denied the Secretary her rights under § 103. Again, the operator's obligation (the breach of which entitles the Secretary to injunctive relief) is passive: it is to guide the inspection, not to help the Secretary conduct it, not to speed it, ease it, or otherwise make it a more comfortable and relaxing experience. Section 108(a)(1) provides for judicial relief if, in pertinent part, the operator "interferes with, hinders or delays" the Secretary, "refuses to admit [her] to the . . . mine," "refuses to permit the inspection," or "refuses to permit access to and copying of . . . record . . . " Just as the operator is not required to copy the records for the Secretary, just to "permit access and copying" of them, Old Ben concludes that it is not required to transport the Secretary around the mine, just to permit her to inspect it without a warrant.

Old Ben concludes that although Congress gave the Secretary a unique power to enter and inspect a mine without operator consent, and without a search warrant, it did not go as far as the Secretary now would like. Old Ben points out that while Congress gave the Secretary a right of entry, it did not also give her the novel and unheard of right to be transported, nor

did it give her the power of requiring the mine owner to convey her representatives as passengers in mine vehicles so that they "could be whisked around the mine to speed their inspection of it". Old Ben further points out, however, that Congress did not entirely ignore the issue of transportation in the mine when it required that mine operators provide transportation for injured persons in emergencies. Old Ben concludes that this shows that Congress knew how to grant a right of transportation when it intended to, by expressly providing one for injured persons.

Old Ben maintains that if section 103(a) were construed not only to provide the Secretary with a right of access, but also to require mine operators to transport her inspectors all around the mine, the statute would have to be ruled unenforceably vague since it is silent as to creating any such operator duty and "a statute violates due process if it is so vague that a person of common intelligence cannot discern what conduct is prohibited, required, or tolerated", citing Mini Spas, Inc. v. South Salt Lake City Corp., 810 F.2d 939, 9439 (10th Cir. 1987), citing Connally v. General Contr. Co., 269 U.S. 385, 391 (1926). Accord, Phelps Dodge corp. v. FMSHRC, 681 F.2d 1189 (9th Cir. 1982).

Old Ben asserts that its search of the legislative history of the Mine Act, the 1969 Coal Act, and the law in which MSHA's right to inspect mines originated in 1941, establish that a federal mine inspector's right of access has been an entitlement "to admission" to a mine to inspect it, and the mine operator has, since the inception of that right in 1941, been subject to punishment only if he "refuses to admit" the inspector, not if he refuses to transport him. Citing the legislative committee reports, Old Ben concludes that MSHA must be limited to a right of entry, and that there is no right to operator-furnished transportation.

Old Ben further asserts that its review of the case law reveals no decisional authority to support the Secretary's claim that section 103(a) of the Act confers authority for inspectors to require that they be ferried about by mine operators ("Nor was there found any such authority for OSHA inspectors as they roam the rest of America's workplaces"). Old Ben cites United States Steel Corp., 6 FMSHRC 1423 (June 1984), in which the mine operator was cited under section 103(a) for denying an inspector access to the scene of an accident. In that case, the inspector, who was at the mine at the time of the accident, sought to accompany mine personnel on their way to examine the scene in a company vehicle but was not permitted to do so. The operator's personnel testified that they refused to allow the inspector to "accompany [them] to the accident because the inspector had no right to investigate an accident until [the operator's] personnel had first investigated . . . to determine whether a reportable

"accident" within the meaning of [Part 50] had occurred." 4 FMSHRC at 620.

As a result of U.S. Steel's action, Old Ben points out that the inspector was unable to visit the accident scene, and that the judge "held that U.S. Steel violated section 103(a) of the Mine Act when [it] prevented [the MSHA inspector] from going to the scene of the [accident]." 6 FMSHRC at 1429. The Commission affirmed, noting not that the operator had denied the inspector transportation and that therefore § 103(a) was per se violated, but that under the circumstances the operator "violated section 103(a) of the Act by preventing [the inspector] from inspecting the scene of the [accident]." Id. at 1431. Old Ben maintains that the denial of transportation was not itself deemed a violation of § 103(a), but merely one fact bearing on whether the operator had prevented the inspector from inspecting the accident scene, which it clearly had under the circumstances, and which was a violation of § 103(a).

Old Ben argues that the facts in the instant case are different from those in U.S. Steel, and unlike that situation, there was no intent whatsoever (and no claim by MSHA of any intent) to prevent the inspector from inspecting anything, and no claim that the inspector did not have the right to inspect any incident or any location in the mine. Citing the text of the citation, which was drafted by MSHA attorneys in Arlington, and which alleges that the inspector was precluded from inspecting "the mantrip and associated areas of the mine", Old Ben concludes that this "is a pure red herring" in that it was neither the inspector's intent to inspect the mantrip or associated areas, nor did he request to do so (Citing the Inspector's deposition, Tr. 33, 41).

Old Ben states that there is nothing in the record that indicates that inspector Stamm was ever, or would be ever, denied the opportunity to inspect the mantrip or other vehicles if that were his expressed intent, and it points out that the section 104(b) order was terminated when Mr. Stamm was given a ride in a diesel truck, not the mantrip. Moreover, when asked by his supervisor to recount the facts concerning the denial of transportation to the inspector from December 13, 1990, and thereafter, Mr. Stamm's only mention of any effect on his inspection was to complain that not having transportation required him to be "repeatedly walking the same areas to reach (his) destination" (Stamm deposition, exhibit 2), and no mention was made of the mantrip.

Old Ben asserts that when denied transportation on December 13, 1990, and thereafter, Mr. Stamm continued with his inspections on foot, free to examine any portion of the mine, accompanied by the company safety representative and the miners' representative as usual. Indeed, he continued his daily

inspections without needing to be driven around the mine, without any claim by the inspector or his supervisor that Old Ben was violating section 103(a) of the Act, at least not until the District Manager called Arlington.

Old Ben concedes that had its refusal to chauffeur Mr. Stamm around the mine actually precluded him from inspecting, then section 103(a) would arguably have been violated. It also agrees that where a denial of transportation is effectively a denial of the inspector's right of entry, then section 103(a) would arguably be violated. However, Old Ben maintains that merely because Mr. Stamm would have to walk and therefore might not be able to finish the inspection as quickly as he would have if Old Ben had conveyed him around the mine cannot be held to be a violation of MSHA's right under section 103(a).

Old Ben emphasizes the fact that although MSHA's published policy manual interprets section 103(a) not only to prohibit direct denials of the right of entry, but also "indirect denials", the policy makes no claim that there is an absolute right to transportation or that a refusal to provide transportation is itself an indirect denial in violation of section 103(a). Instead, the policy specifically identifies as a possible "indirect denial" an operator's "refusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot". Old Ben asserts that this was clearly not the case since Mr. Stamm continued his inspection on foot after the citation and order were issued.

Old Ben asserts that the "walkaround" right of a miners' representative to accompany the MSHA inspector on his rounds is aptly named to reflect the longstanding, traditional approach to mine inspections. Old Ben recognizes that MSHA inspectors may prefer to "be chauffeured around", and that being driven around the mine may save MSHA time and thus inspection resources. It also recognizes the fact that denying transportation to an MSHA inspector may not be a very wise management practice and will likely not be widely replicated in the future.

In conclusion, Old Ben maintains that although MSHA has a right of entry pursuant to the Act, it does not have a right of transportation under section 103(a). Old Ben believes that at most, only in a limited range of circumstances where the denial of transportation effectively precludes MSHA's ability to exercise its right of entry, could there be a section 103(a) violation in declining to chauffeur an inspector as he conducts his warrantless search of the mine. Old Ben further believes that this was not the case in the instant proceedings and that the citation and order should be vacated.

MSHA's Arguments

MSHA asserts that the obvious and primary purpose for right of entry authority under section 103(a) of the Mine Act is to provide an unannounced opportunity for an inspector to enter upon or through a mine in order to adequately inspect it for health and safety hazards and/or violations. MSHA takes the position that if an inspector is merely permitted to walk into a large complex modern mine, such as Old Ben's Mine No. 26, while at the same time being denied readily available transportation to the working areas, the inspector is, in effect, denied entry to the mine area most crucial to a proper inspection. MSHA believes that if Inspector Stamm is not permitted to observe the actual mining cycle, related ventilation, roof control, and general safety practices when and where there is peak mining activity, then he is, in effect, denied entry to these areas at the most crucial time, and is unable to adequately inspect these important areas. MSHA concludes that this practice has the same effect as not permitting the inspector to enter upon or through the mine at all.

MSHA maintains that in order to achieve the purpose of a mine inspection (the protection of miner safety and health), the authority of an inspector to enter "through" a mine must apply to those mine areas where and when mining extraction activity is occurring. By not permitting the inspector to use available mobile transportation to inspect the active mining extraction cycle areas of the mine when such activity is at its peak, is tantamount to denying him entry "through" the mine in a manner in which health and safety hazards, conditions, and violations may be readily and timely observed.

MSHA asserts that mobile transportation is readily available at the No. 26 Mine, and that a specific vehicle is routinely and customarily made available to take inspectors wherever they direct. MSHA points out that prior to December 13, 1990, Inspector Stamm was permitted to be transported to any mine area he requested. Further, during the time period he was refused transportation while conducting a quarterly inspection of the mine, transportation was made available to other mine inspectors and these inspectors were transported from place to place as they requested in a company vehicle. Although Old Ben concedes its obligation to provide elevator transportation to the bottom of the shaft, MSHA maintains that it ignores the plain meaning of the word "through" when it denies readily available transportation from the elevator to the working areas.

MSHA asserts that contrary to Old Ben's narrow interpretation, timeliness is an important aspect for adequate inspection under section 103(a) of the Mine Act, since it also bars advance notice of inspections for violations and imminent danger conditions or practices. MSHA concludes that by requiring

Inspector Stamm to walk in a large, complex mine where a substantial distance exists to the actual mining extraction areas, Old Ben has created an advance notice problem because by the time the inspector arrives at the mining cycle face areas, mining personnel could easily have been informed of the ensuing inspection. Regardless, denial of available mobile transportation hinders, delays and impedes the inspector's opportunity to inspect crucial areas of the mine, and in effect, denies entry into these areas.

Citing the Commission's decision in United States Steel Corporation, 6 FMSHRC 1423 (June 1984), MSHA asserts that the Commission affirmed MSHA's position that denial of transportation to an inspector, under appropriate circumstances, is a violation of section 103(a) of the Mine Act. MSHA points out that in the United States Steel case, an inspector was not permitted access to an accident scene when a company official refused to permit the inspector to accompany him to the scene in a company vehicle even though the company had customarily provided MSHA personnel with a company vehicle driven by a company representative. MSHA further points out that the Commission clearly affirmed that an inspector, when performing regular inspections required under the Act, had the authority to inspect the mine in its entirety and that section 103(a) does not limit the areas he may inspect or the sequence he may employ to complete his inspection.

MSHA asserts that by denying Inspector Stamm vehicle transportation routinely provided for other inspectors, Old Ben singled him out and denied him access "through" the mine. MSHA maintains that this denial of access must be viewed in the context of the availability of transportation and Old Ben's practice of providing such transportation to other inspectors and on other occasions. MSHA concludes that a denial of entry occurred when Inspector Stamm was denied transportation customarily available, thereby preventing him from inspecting important mining activities in the mine at the time sequence of his choosing and preventing him from fulfilling the inspection requirements under section 103(a) of the Mine Act.

Findings and Conclusions

Section 103(a) of the Act, 30 U.S.C. 813(a), provides in relevant part as follows:

> . . . . For the purpose of making any inspection or investigation under this Act, the Secretary . . . or any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

The judicial enforcement remedies available to the Secretary pursuant to section 108(a)(1) of the Act, 30 U.S.C. 818(a)(1), provide in relevant part as follows:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States . . . whenever such operator or his agent - -
>
> * * * * * * *
>
> (B) interferes with, hinders, or delays the Secretary or his authorized representative . . . . in carrying out the provisions of this Act,
>
> (C) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine,
>
> * * * * * * *
>
> (F) refuses to permit access to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of this Act.

MSHA's Program Policy Manual, Volume I, Section 103, July 1, 1988, which discusses "Denials of Entry" policy, provides in relevant part as follows:

> * * * * * * *
>
> Denials of entry can be either: (a) direct denials involving confrontation; or (b) indirect denials involving interference, delay and/or harassment.
>
> Upon being denied right of entry, the inspector should first attempt to determine the reason for the denial. Was it direct or indirect? Specific actions must be taken for the different types of denials:
>
> * * * * * * *
>
> 2. Indirect: Indirect denials are those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication

of intent and proof of indirectly denying entry. For example, access to the mine is blocked by a locked gate or other means of blockage. However, a locked gate or other means of blockage, in and of itself, does not necessarily constitute a denial of entry. Mine management may have only closed the mine for the day and blocked the mine access road to prevent vandalism. However, when a locked gate is accompanied by continued production and deliberate avoidance of communication with the inspector, the mine operator is denying MSHA right of entry to the mine property. Other examples are listed below. The list is not meant to be all-inclusive, and reference is made only to some of the situations which may constitute an indirect denial.

a. Refusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot; (emphasis added).

* * * * * * *

In this case the citation and order charge Old Ben with a violation of section 103(a) of the Act on January 9, 1991, for refusing the inspector transportation on the mantrip, or other modes of transportation, thereby allegedly impeding and precluding his ability to travel and inspect the mantrip and associated mine areas. The parties have stipulated that the inspector was not denied access to the mantrip for the purposes of inspecting it and that this is no longer an issue. Accordingly, that portion of the citation and order which allege that the denial of transportation precluded or impeded the inspector's efforts to inspect the mantrip IS VACATED.

The parties have stipulated that elevator transportation between the surface and the underground workings at the bottom of the shaft was provided to Inspector Stamm out of recognition of the fact that such transportation was necessary for his access into and out of the mine. They also stipulated that the usual inspection procedure for an MSHA inspector and his party (union walkaround and company safety representative) other than Mr. Stamm calls for an Old Ben representative to drive the party to any location specified by the inspector and to park the vehicle while the inspector examines the conditions at that location. On occasion, the group may then drive the vehicle to other locations specified by the inspector, and at the end of the inspection, the inspection party drives the vehicle back to the shaft.

Old Ben takes the position that since the Act does not in the first place require it to transport MSHA inspectors around its mine, its motive for not offering transportation to Mr. Stamm is not relevant, and that its decision to voluntarily offer transportation to all other MSHA inspectors except Mr. Stamm cannot be viewed as a violation. In short, Old Ben believes that it may discriminate against any inspector for whatever reason, and in this case it seems obvious that Old Ben is not too enchanted with the manner in which Mr. Stamm conducts his inspections. Old Ben has complained to Mr. Stamm's superiors that he was improperly conducting himself by issuing an excessive number of citations and orders, that he was taking directions from the UMWA, that his inspections of multiple areas of the mine each inspection day was disrupting its operations, and that the only two mines in MSHA District 8 which were put on MSHA's "Special Emphasis Program" are the two inspected by Mr. Stamm.

Old Ben has characterized Mr. Stamm's enforcement actions as "improper and over-zealous", and it believes that many of the citations and orders which he issued prior to December 13, 1990, the day the denial of transportation initially began, were legally defective. MSHA acknowledges that Old Ben has complained to Mr. Stamm's superiors, and the parties have stipulated that some 79 of the 285 citations and orders issued by Mr. Stamm during the last half of 1990 were either vacated or modified by MSHA during the Part 100 conference process. Thus, while it would appear that Old Ben has availed itself of an opportunity to redress some of its complaints about Mr. Stamm, it obviously reacted rather strongly and directly when on December 13, 1990, it summarily discontinued its customary practice of providing transportation to Mr. Stamm and his inspection party, while continuing to provide it to other inspectors.

I have reviewed the Commission's decision in the U.S. Steel, case, supra, and I agree with Old Ben's position that the principal issue in that case was whether or not the cited mine operator prevented the inspector from going to the scene of an accident, and not whether or not section 103(a) of the Act directly required the operator to furnish transportation to the inspector to go to the accident scene.

In Climax Molybdenum Company, 2 FMSHRC 542 (February 1980), I affirmed a citation issued to a mine operator for a violation of section 103(a) of the Act because of the operator's refusal to allow an inspector to use a camera in the course of his inspection. MSHA argued that the use of a camera to preserve conditions observed by an inspector in the course of his inspection was a natural extension of his right of entry, and that an operator's refusal to allow an inspector to bring or use a camera in the mine hindered and impaired MSHA's ability to conduct the inspections authorized by section 103(a).

I concluded that the use of a camera as an inspection tool was an extension of the Secretary's right of entry and inspection authorized by section 103(a). 2 FMSHRC 571. However, I rejected MSHA's argument that the refusal to permit the use of cameras constituted harassment and intimidation of the inspector per se, and I ruled that absent any credible evidence of harassment, or the impeding of the inspection, the operator's refusal to allow the use of cameras did not warrant a substantial civil penalty assessment. 2 FMSHRC 572-573.

I believe that it is clear from the legislative history of section 103(a) of the Act, and the case law, that Congress intended to confer on the Secretary broad inspection authority, including the right of mine entry by inspectors without advance notice and without the necessity of obtaining a warrant. Although I find no inherent right to operator furnished transportation pursuant to section 103(a) of the Act, given the fact that the mining industry is a pervasively regulated industry that requires a broad and liberal construction and application of the inspection and enforcement provisions of the Act, I conclude and find that an inspector has a qualified right, as a natural and reasonable extension of his right of entry through a mine pursuant to section 103(a), to use readily available operator furnished transportation to facilitate his mine inspection. I further conclude and find that in a given set of circumstances, and on a case-by-case basis, denying an inspector routinely and customarily available transportation which does not unreasonably burden or disrupt mining operations, and which unduly delays or obstructs an inspection is contrary to the spirit and intent of section 103(a) of the Act and may constitute a violation of that section.

I recognize the fact that section 108(a) of the Act prohibits a mine operator from interfering, hindering, or delaying the Secretary or her authorized representatives in carrying out the provisions of the Act, and provides for U.S. District Court injunctive remedial relief in such instances. However, given the great numbers of daily mine inspections, I find it unrealistic and unreasonable to expect the Secretary to inundate the courts with injunction actions each time mine management decides to withhold a transportation "privilege or favor" from a mine inspector because of his perceived "overzealous" inspection and enforcement actions.

Contrary to Old Ben's position in these proceedings, I conclude and find that safety director Stritzel's motives in denying Mr. Stamm available transportation, while at the same time making it routinely and customarily available to other MSHA inspectors, is relevant. Mr. Stritzel, who served as an MSHA inspector for 11 years prior to 1982, believes that Old Ben is under no legal requirement to furnish "voluntary and courtesy" transportation all around its mines to MSHA inspectors and that

such transportation may be denied for any reason, particularly in the case of "an obnoxious inspector . . .an inspector who abused the privilege, or to an inspector who for any reason was deemed no longer deserving of such favors". On the facts of this case, and although not stated directly, it seems rather obvious to me that Mr. Stritzel's view of Mr. Stamm is that he is an "obnoxious" inspector who has "abused the privilege" of company furnished transportation and is therefore no longer deserving of such a company bestowed favor. It appears to me that Mr. Stamm has fallen out of favor with Old Ben's safety director because his inspections have resulted in an increased number of citations and orders, and have apparently resulted in at least two of Old Ben's mines being subjected to MSHA's Special Emphasis program.

I am somewhat surprised by Old Ben's admissions and suggestions that its safety director may curry favor with MSHA inspectors by making available coffee and transportation as "favors" which may be withheld or granted by management on the basis of whether an inspector is "no longer deserving" of such "privileges of favors". In my view, such a policy could subject inspectors to undue pressures, and influences, and possible harassment or intimidation, which may adversely impact on the effectiveness or integrity of their inspections. Further, in some instances, a practice of bestowing "favors" on inspectors may be illegal or contrary to government regulations.

On the facts of this case, I find that the denial of transportation to Mr. Stamm, who had fallen out of favor with Old Ben's safety director, while at the same time making such transportation routinely and customarily available to other MSHA inspectors, was a petty and unprofessional way of dealing with an inspector who had become persona non grata because of his purported "overzealous" enforcement of the Act and MSHA's regulatory safety and health standards. In these circumstances, and if it can be established by a preponderance of the credible evidence that the denial of transportation to Mr. Stamm obstructed or unduly delayed his inspection on January 9, 1991, as charged by MSHA in the contested citation and order, I would find a violation of section 103(a) of the Act.

As correctly argued by Old Ben in its briefs, MSHA's policy manual interpretation of section 103(a) of the Act makes no claim that there is an absolute right to transportation or that a refusal to provide transportation is itself an indirect denial in violation of section 103(a). MSHA's policy statement specifically states that refusal to furnish <u>available</u> transportation when it is <u>difficult or impossible to inspect on foot</u> may constitute an indirect denial of entry to the mine for inspection purposes. Thus, in order to establish a violation of section 103(a) pursuant to MSHA's policy interpretation, it must be shown that transportation was available, but denied to the inspector,

and that it was difficult or impossible for the inspector to conduct his inspection on foot.

The record in this case establishes that the narrative allegations in the citation and order that the denial of transportation to Mr. Stamm "precluded his ability to properly travel and inspect associated areas of the mine and impeded his inspection" were drafted by the Arlington Solicitor's office and faxed to the MSHA District office so that Mr. Stamm could incorporate that language in the citation and order which he was directed to issue on January 9, 1991, after he was refused transportation. Mr. Stamm conceded that these were not his words, but he agreed with the statements. However, I find nothing in the citation or order, as written, which alleges or suggests that it was difficult or impossible for Mr. Stamm to conduct or complete his inspection on January 9, 1991.

The record reflects that Mr. Stamm was initially denied transportation on December 13, 1990, and that with the exception of December 19, 1990, when he rode a mantrip into the mine and walked, all of Mr. Stamm's inspections from December 19, 1990, to January 9, 1991, were conducted on foot. Mr. Stamm testified that the only difference in his inspection routine after December 13, 1990, was the fact that he had to walk to the locations where he was to conduct his inspections, whereas prior to December 13, he was transported to these locations. Aside from Mr. Stamm's conclusion that requiring him to walk "impeded" his inspection because he could not get to the working section as quickly as he would like, I find no evidence that it was difficult or impossible for him to conduct his inspections on foot during this time frame. Indeed, when specifically asked why it was necessary for him to timely reach the section on January 9, 1991, and whether or not the transportation which was refused would have assisted him in timely reaching the section, Mr. Stamm responded "I can't answer that. I don't know if that date that would have altered my inspection . . .", and he explained that he would have gone to another area of the mine to continue his inspection within his eight hour day. Although Mr. Stamm alluded to the "possibility" of not being able to complete a AAA inspection within the allowed time, he confirmed that once he entered the underground workings from the bottom of the shaft, he is "constantly inspecting and looking" wherever he travels, and that it does not matter whether this is done on any one particular day (Tr. 56-57).

Supervisory Inspector Kattenbraker testified that Mr. Stamm was not denied entry to the mine, nor was he barred from going anywhere in the mine to conduct his inspections. He confirmed that Mr. Stamm conducted inspections on several days during the period December 13, 1990, to January 9, 1991. Sub-district manager Sakovich testified that when Mr. Stamm was denied transportation from December 13, 1990, to December 19, 1990, he

instructed Mr. Stamm "to go about his business and do his job". Mr. Sakovich confirmed that during this time period, Mr. Stamm had inspection duties which did not require him to have transportation.

District manager Childers characterized the denial of transportation to Mr. Stamm as a "local transportation problem" and he did not believe that Mr. Stamm was denied entry to the mine. Mr. Childers testified that when he first learned of the problem on January 3, 1991, he instructed Mr. Sakovich to tell Mr. Stamm "not force himself on it and to proceed with his inspections". Mr. Childers confirmed that providing transportation to inspectors was a "courtesy" and an industry practice in Illinois and that there were no prior problems in this regard in his district. He also indicated that if transportation is unavailable because it is operating at another location, is down for maintenance, or is filled with company personnel, an inspector would be expected to walk to his place of inspection and should not "sit or wait".

Mr. Sakovich and Mr. Childers were of the opinion that due to the size of the mine, the denial of transportation to Mr. Stamm "impeded" his inspections. Mr. Sakovich believed that the denial of transportation would "double or triple" Mr. Stamm's inspection time and he doubted that Mr. Stamm could inspect the mine once a quarter by walking. Mr. Childers was of the opinion that Mr. Stamm's inspections would take "several weeks longer" due to the denial of transportation. Mr. Childers believed that the language "impeding the inspection" is found in MSHA's section 103(a) policy statements, and both he and Mr. Sakovich relied on the policy in support of their conclusions that Old Ben violated section 103(a) of the Act by denying transportation to Mr. Stamm.

I have carefully reviewed MSHA's section 103(a) policy statements, and I find no "impeding the inspection" language. Although the language found at page 10, of the July 1, 1988, policy manual explains that "interference, delays, or harassment" to prevent an inspection may be considered an indirect denial of entry, the policy goes on to state that there must be a clear indication of intent and proof of indirectly denying entry. The only policy reference to a refusal to provide transportation is the qualified policy statement found in paragraph 1(a) at page 10, which indicates that refusal to furnish available transportation when it is difficult or impossible to inspect on foot may constitute an indirect denial of entry.

I find no credible evidence to support any conclusion that it was difficult or impossible for Mr. Stamm to conduct his inspection on January 9, 1991, after he was denied transportation. I also find no evidentiary support for any conclusion that it was difficult or impossible for Mr. Stamm to conduct his inspections during the period December 13, 1990, to

January 9, 1991, or thereafter. Indeed, the parties stipulated that most of the mine can only be inspected on foot, and that all of the active workings can be reached within a 30 to 40 minute walk from the shaft bottom. The parties further stipulated that Mr. Stamm continued to conduct his regular 4th quarterly inspection of the mine on foot from December 13, 1990, and continuing until January 15, 1991, (when the order was abated), and that it took him only three days longer to complete his 4th quarterly inspection when transportation had been denied for over a month than his 3rd quarterly inspection when transportation had been provided.

Although the parties stipulated that the three day delay was largely attributable to the extra time it took Mr. Stamm to walk into and out of the mine in the 4th quarter, I take note of the fact that Mr. Stamm issued more citations and orders during the 4th quarter than during the 3rd quarter, and substantially more than during any prior 4th quarter in recent years or in any quarter back through 1986 (stipulation #15). Under these circumstances, I would venture a guess that Mr. Stamm spent more "inspection" time in the fourth quarter on the necessary "paperwork" incident to issuing citations and orders and documenting the cited conditions than he did during the 3rd quarter.

I take further note of the fact that Inspector Stamm began his fourth quarterly inspection on October 29, 1990, one month after the start of the fourth calendar quarter and during the time when he was provided with transportation. I also note that on January 9, 1991, after issuing the citation and order, Mr. Stamm continued his inspection by walking, left the underground area sometime between 1:00 p.m. and 1:30 p.m., and left the mine at 2:25 p.m. to return to his office. Assuming that Mr. Stamm's normal work day ended at 5:00 p.m., and absent any explanation to the contrary, it would appear to me that Mr. Stamm either completed his inspection that day and left the mine, or left it early for other reasons. As for Mr. Stamm's beginning his fourth quarterly inspection well into the last quarter, I find no evidence that the delay was the result of any transporation difficulties, and absent any further explanation, I believe one may reasonably conclude that a fourth quarterly inspection which begins a month late will end late.

I find no evidentiary support for Mr. Sakovich's belief that the denial of transportation doubled or tripled Mr. Stamm's inspection time, or Mr. Childer's belief that the inspection would take several weeks longer. I further find no evidentiary support for any conclusion that the denial of transportation to Mr. Stamm from December 13, 1990, to January 9, 1991, and thereafter to January 15, 1991, when the order was abated, violated MSHA's policy or unduly delayed or obstructed Mr. Stamm's inspections in violation of section 103(a) of the Act.

In short, I conclude and find that MSHA has failed to prove any violations by a preponderance of the evidence of record, and that the contested citation and order should be vacated.

Old Ben has conceded the necessity for providing Mr. Stamm with elevator transportation from the mine surface to the underground workings, and while it abated the order by agreeing to transport him to the location where he wished to commence his daily inspection and back to the shaft at the end of that inspection, it did not agree to transport him from place to place in the mine during the interval between those times, and did not provide him with transportation within the underground mine because it believed that he could perform his inspection on foot. It is not clear whether Old Ben's agreement to provide Mr. Stamm with transportation from the elevator shaft bottom to the initial point of his inspection and then back to the shaft when he has finished his inspection was limited to the abatement of the order, or whether Old Ben will in the future continue to accommodate the inspector in this manner.

I find it rather unfortunate that Old Ben's safety director, a former MSHA inspector himself, and the incumbent MSHA mine inspector have become adversaries in what should ordinarily be a mutually cooperative effort to insure safe and healthy working conditions in the mine. I take note of Old Ben's candid recognition of the fact that "antagonizing MSHA inspectors, with their broad discretion and substantial enforcement powers, including the power to issue ex parte closure orders, is likely ill-advised" (fn. 8, Old Ben's Motion for Summary Decision). It is hoped that both parties to this dispute can reach some accommodation and mutual understanding so as preclude any further escalation of the obvious breakdown in the working relationship between the inspector and Old Ben's safety director.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Section 104(a) Citation No. 3537139, January 9, 1991, IS VACATED, and Old Ben's contest IS GRANTED.

2. Section 104(b) Order No. 3537140, January 9, 1991, IS VACATED, and Old Ben's contest IS GRANTED.

George A. Koutras
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, DC 20004
(Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor 4015 Wilson Boulevard, Room 400, Arlington, VA 22203
(Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 10 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-725
Petitioner	:	A.C. No. 11-00590-03846
v.	:	
	:	Mine No. 26
OLD BEN COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Illinois, for Respondent.

Before: Judge Weisberger

It is ORDERED that this case be severed from Docket Nos. LAKE 91-416 and LAKE 91-720. This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). On December 16, 1991, subsequent to a hearing on the merits on another matter, Petitioner made to approve settlement agreement and to dismiss the cases. A reduction in penalty from $500 to $250 is proposed. I have considered the representations and documentation submitted in these cases, 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 penalties of $250 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 15 1992

HENRY GALVAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 91-191-DM
	:	MSHA Case No. SC MD-9107
NEW MEXICO POTASH CORPORATION,	:	
Respondent	:	Hobbs Potash Facility

ORDER OF DISMISSAL

Before: Judge Melick

Complainant, in essence, requests approval to withdraw his complaint in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed. The hearings previously scheduled to commence on January 21, 1992, are accordingly cancelled.

Gary Melick
Administrative Law Judge

Distribution:

Mr. Henry Galvan, 1306½ West Shaw, Carlsbad, NM 88220 (Certified Mail)

Ira Bolnick, Esq., Fitzpatrick & Bolnick, 1101 Cardenas Drive, N.E., Suite 205, Albuquerque, NM 87110 (Certified Mail)

Michael E. Dargel, Esq., McCormick, Forbes, Caraway and Tabor, Bujac Building, 112 North Canyon, P.O. Box 1718, Carlsbad, NM 88221-1718 (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 15 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 91-721 A.C. No. 11-00589-03791
v.	:	
	:	Docket No. LAKE 91-754 A.C. No. 11-00589-03797
OLD BEN COAL COMPANY, Respondent	:	
	:	Docket No. LAKE 92-3 A.C. No. 11-00589-03798
	:	
	:	No. 24 Mine
	:	
	:	Docket No. LAKE 91-685 A.C. No. 11-02392-03835
	:	
	:	No. 25 Mine
	:	
	:	Docket No. LAKE 91-487 A.C. No. 11-00590-03834
	:	
	:	Docket No. LAKE 91-686 A.C. No. 11-00590-03837
	:	
	:	Docket No. LAKE 91-724 A.C. No. 11-00590-03845
	:	
	:	No. 26 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 91-718 A.C. No. 11-00586-03655
v.	:	
	:	Docket No. LAKE 91-748 A.C. No. 11-00586-03656
ZEIGLER COAL COMPANY, Respondent	:	
	:	Docket No. LAKE 91-796 A.C. No. 11-00586-03658
	:	
	:	Murdock Mine
	:	
	:	Docket No. LAKE 91-728 A.C. No. 11-02408-03644
	:	

: Docket No. LAKE 91-729
: A.C. No. 11-02408-03645
:
: Docket No. LAKE 91-730
: A.C. No. 11-02408-03646
:
: Docket No. LAKE 91-747
: A.C. No. 11-02408-03647
:
: No. 11 Mine

DECISION APPROVING SETTLEMENT

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Illinois, for Respondent.

Before: Judge Weisberger

In order to expedite a decision on these cases, it is ORDERED that they be severed from Docket No. LAKE 91-29 et al.

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). On December 16, 1991, subsequent to a hearing on the merits on another matter, Petitioner moved to approve settlement agreement and to dismiss the cases. A reduction in penalties from $3,443 to $1,391 is proposed. I have considered the representations and documentation submitted in these cases, 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 penalties of $1,391 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Gregory S. Keltner, Esq., Old Ben Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 15 1992

MINUTEMEN COAL CO., INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. VA 91-415-R
	:	Mine No. 4 44-04871
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-470
	:	A.C. No. 44-04871-03570D
v.	:	
	:	No. 4 Mine
MINUTEMEN COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Broderick

On December 4, 1991, the Secretary of Labor (Secretary) and Minuteman Coal Co. Inc. (Minuteman) filed a Motion to Approve Settlement and to Withdraw Notice of Contest. The Secretary asserts that the violation alleged resulted from a deliberate act of tampering with dust filter media. Minutemen denies that it deliberately tampered with or altered any of the dust filter media. The violation was originally assessed at $1200.

The motion states that the parties agree to settle the case by reducing the proposed penalty to $960 based on a dispute between the parties as to the degree and existence of negligence.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, **IT IS ORDERED:**

1. The settlement reached between the parties is **APPROVED.**

2. Minuteman shall, within 30 days of the date of this order, pay the sum of $960 as civil penalties for the violation alleged in the citation contested herein.

3. The contest proceeding Docket No. VA 91-415-R is **DISMISSED.**

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Mark R. Graham, Esq., White, Elliott and Bundy, 601 State Street, Suite 600, Post Office Box 8400, Bristol, VA 24203 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 15 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 91-471
Petitioner	:	A.C. No. 44-05541-03536D
v.	:	
	:	No. 1 Mine
SHENANDOAH COAL CO., INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On December 4, 1991, the Secretary of Labor (Secretary) and Shenandoah Coal Co Inc. (Shenandoah) filed a Motion to Approve Settlement in the above case. The docket involves six alleged violations of 30 C.F.R. § 71.209(b) in which the Secretary alleged that Respondent altered the weight of a respirable dust sample submitted by Respondent as part of its sampling requirements. The Secretary states that the violations resulted from a deliberate act; the operator denies that it deliberately tampered with or altered any of its dust filter media.

The motion states that the parties agree to settle the case by reducing the proposed penalty for each violation from $1200 to $960 based on a dispute between the parties as to the degree and existence of negligence.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, **IT IS ORDERED:**

1. The settlement agreement is **APPROVED.**

2. Respondent shall within 30 days of the date of this order pay the sum of $5760 as civil penalties for the alleged violations.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Mark R. Graham, Esq., Suite 600, Dominion Bank Bldg., P.O. Box 8400, 601 State St., Bristol, VA 24203-8400 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 17 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-683 A. C. No. 11-00612-03556
v.	:	Spartan Mine
ZEIGLER COAL COMPANY, Respondent	:	

PARTIAL DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;
Gregory S. Keltner, Esq., Zeigler Coal Company, Fairview Heights, Illinois, for Respondent.

Before: Judge Weisberger

Statement of the Case

Pursuant to a request by the parties, this case is severed from Docket No. LAKE 91-29 et al.

In this civil penalty proceeding the Secretary (Petitioner) seeks civil penalties for alleged violations by Ziegler Coal Company, (Respondent) of various mandatory standards set forth in volume 30 of the Code of Federal Regulations. Pursuant to notice the case was heard in St. Louis, Missouri on December 17, 1991. At the hearing Ronald Sara testified for Petitioner, and Byford Carl Reidelberger testified for Respondent. The parties waived the opportunity to submit post-hearing briefs.

Citation No. 3847632

I.

The parties stipulated as to the following facts:

> On April 15, 1991, Inspector Ronald Zara [sic] of the Federal Mine Safety and Health Administration conducted an inspection at the 2nd main west off main south (unit 3). During the course of the inspection the inspector found that the tram pedal (deadman pedal)

> of the joy continuous miner (serial no. JM 3729) was stuck in the tram position. The machine could be moved without pushing the pedal and would continue to tram when the deadman pedal was released. The tram levers were operating properly and would stop the machine when released and the panic bar was operating properly and would de-energize the tram motors when activated. This machine comes from the manufacturer with the deadman pedal installed and was approved with it. Two persons were in the area. The inspector issued Citation No. 3847632 for an alleged violation of 30 C.F.R. 75.1725(a). Respondent showed good faith in terminating the violation by having the switch cleaned and lubricated and restored in proper operating condition. (Joint Exhibit No. 1, paragraph 9)

According to Sara the purpose of the deadman's pedal is to prevent inadvertent contact by the operator of the continuous miner ("miner") with the tram levers which could cause the miner to unexpectedly move left or right. Sara explained that because the mine floor is muddy, the operator, upon entering the cab with mud on his shoes, could slip on the metal floor of the cab. Sara opined that should the operator thus stumble or fall, inadvertant contact with the levers could occur, especially considering the "close quarters" of interior of the cab of the continuous miner, which be also described as being "very tight" (Tr. 41,42).

On cross-examination Sara conceded that simply touching the tram levers is not sufficient to move them, as there must be pressure applied to push or pull the levers to cause the miner to go forward or backward. Sara further indicated on cross-examination that when removing pressure on the deadman pedal, the miner cannot be trammed either forward or reverse, but it does not become de-energized. Accordingly it is still possible to rotate the drum, and swing the tail of the miner. Both these actions have a potential of causing an injury.

Byford Carl Reidelberger, the superintendent of the subject mine, testified that the continuous miner in question at times is operated from a remote position even while the operator is inside the cab, and as such, the deadman pedal is bypassed. He further testified that, originally, the purpose of the deadman pedal was to protect the operator of the miner from being injured as a consequence of losing consciousness and thus being unable to stop the movement of the miner. According to Reidelberger, before self-centering levers were required, if pressure was released from a tram lever upon the operator losing consciousness, the lever would not have returned to neutral and the miner would have continued to tram.

Reidelberger indicated that, at present, the deadman pedal is no longer necessary as miners are equipped with panic bars and

self-centering levers. Activating the panic bar immediately stops the motion of the miner. In the same fashion, if pressure is released from a tram lever that was in a forward or reverse position, the lever automatically immediately returns to neutral and the motion of the miner immediately stops. Thus, in Reidelberger's opinion, the miner that was cited was not unsafe, even though the deadman pedal did not operate as designed.

II.

Section 75.1725 supra provides, in essence, that machinery and equipment "...shall be maintained in safe operating condition and the machinery or equipment in unsafe condition shall be removed from service immediately." Webster's Third New International Dictionary, (1986 edition) ("Webster's") defines "safe" as "2. Secure from threat of, danger, harm or loss:", Webster's defines "Secure" as "2 a: free from danger "Danger" is defined in Webster's as "3. liability to injury, pain, or loss: PERIL, RISK... ."

Based on the testimony of Sara, I find that, because the deadman pedal was stuck, miners were exposed to the risk of injury from unexpected movement of the miner caused by inadvertent contact with the tram levers. In this connection, Sara explained that miner operators are now accustomed to stepping on the deadman pedal in order to operate the tram levers, and that accordingly, if the deadman pedal is not depressed, it is expected that contact with the levers would not cause the miner to tram. Hence, Sara opined that should the levers be inadvertently pushed at a time when the deadman pedal is stuck, the resulting movement of the miner would be unexpected, thus causing the risk of an injury either to the operator located in the cab, or to the assistant working alongside the miner. In this connection, Sara explained that the assistant works in a close, confined area, inasmuch as there is usually less than 5-feet clearance on each side of the miner. Thus, according to Sara, sudden movement by the miner, left or right, could result in a injury. I accept Sara's testimony in this regard as it was not rebutted or impeached. Hence, applying the common usage of the term "safe" as defined in Webster's infra I conclude that the miner in question was not in safe operating condition. Since it was in operation, I find that Respondent herein did violate Section 75.1725 supra.

III.

Petitioner did not adduce any evidence of negligence on the part of Respondent in connection with the violation herein. Also, considering the statutory factors set forth in Section 110(i) of the Act as stipulated to by the parties, I conclude that a penalty of $20 is appropriate for this violation.

Citation No. 3847638

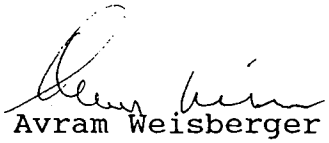
At the hearing Petitioner moved to approve a settlement agreement with regard to Citation No. 3847638 and indicated that Respondent agreed to pay the assessed violation of $20. I have considered the representations and documentation submitted on behalf of the motion, and I conclude that the settlement is appropriate. Hence, the Motion to Approve Settlement is granted.

Citation No. 3847637

At the hearing the parties moved that further proceedings concerning Citation No. 3847637 be stayed on the grounds that the identical issue involved in this citation is pending before another Commission judge who has already held a hearing on this issue. Accordingly it is ORDERED that further proceedings on Citation No. 3847637 be stayed pending a Decision by Judge Koutras in Docket No. LAKE 91-635.

ORDER

It is ORDERED that Respondent pay $40 as a civil penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Gregory S. Keltner, Esq., Old Ben Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 17 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 92-15 A. C. No. 11-00586-03659
v.	:	Murdock Mine
ZEIGLER COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;
Gregory S. Keltner, Esq., Zeigler Coal Company, Fairview Heights, Illinois, for Respondent.

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). On December 16, 1991, subsequent to a hearing on the merits concerning another matter, Petitioner made a motion, on the record, to approve a settlement agreement and to dismiss the case. A reduction in penalty from $500 to $100 is proposed. I have considered the representations and documentation submitted in this 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 $100 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 17 1992

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1766-R Citation No. 3105784; 6/19/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 91-1767-R Citation No. 3105785; 6/19/91
	:	Docket No. WEVA 91-1768-R Order No. 3105797; 7/8/91
	:	Docket No. WEVA 91-1769-R Order No. 3105798; 7/8/91
	:	Docket No. WEVA 91-1771-R Order No. 3105788; 7/1/91
	:	Martinka No. 1 Mine
	:	Mine ID 46-03805

DECISION

Appearances: Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia, for the Contestant;
Glenn M. Loos, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Maurer

At the hearing in Morgantown, West Virginia, on August 7, 1991, the parties jointly moved to settle these cases and three other as yet undocketed matters as a package deal.

The Secretary proposes to vacate Citation No. 3105784 because the evidence at trial would not support the fact of violation. More particularly, the Secretary concedes that the MSHA inspector who issued the citation failed to measure the gaps of the switch gear so that there is no accurate measurement of what the gaps were at the time the citation was issued.

The contestant, SOCCO, wishes to withdraw its contest of Citation No. 3105785 contained in Docket No. WEVA 91-1767-R and accept whatever penalty is assessed.

SOCCO also wishes to withdraw its contest in Docket No. WEVA 91-1768-R because the Secretary has agreed to delete the "unwarrantability" finding on that section 104(d)(2) Order, effectively transforming it into section 104(a) Citation No. 3105797 with "S&S" special findings. As modified, SOCCO has agreed to accept the citation and pay the civil penalty when it is assessed.

I have been holding the captioned cases up waiting for these assessments to be made by MSHA until now to no avail. Pursuant to a telephone conference call on January 16, 1992, the parties have agreed to handle any potential civil penalty problems related to these contest cases in the civil penalty docket when it is forthcoming, thereby facilitating the disposition of these contests at this time.

The Secretary further proposes to vacate the two section 104(b) Orders involved in this proceeding, Order Nos. 3105788 and 3105798 and as part and parcel of this settlement, Citation No. 3105791 and Order Nos. 3105799 and 3310101, which are as yet undocketed.

Another docket, Docket No. WEVA 91-1770-R, was originally heard at the same time, but has subsequently been severed and stayed, pending the outcome of a section 101(c) Petition for Modification presently under consideration before the Department of Labor.

The basic theme of the settlement package is that the parties have agreed to perform testing on the air gaps on the switch gear and dead blocks in the Martinka Mine to determine exactly what length gap is necessary to make the switch gears safe. Pending the outcome of that testing, SOCCO agrees to establish an interim air gap length between 1/2 and 1 1/2 inches. In the past, MSHA has provided the operator with differing requirements as to air gaps. With the full implementation of this settlement agreement, the technical problems of compliance should be resolved and the interests of mine safety advanced.

I therefore conclude that the proffered settlement is appropriate under the Act and in furtherance of the public interest, and accordingly, will be approved, including the vacation of the undocketed items, although the actual orders with respect to the undocketed citation and orders will have to be deferred until such time as they are docketed and before me for disposition.

ORDER

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

1. Citation No. 3105785 **IS AFFIRMED.**

2. Order No. 3105797 **IS MODIFIED** to a section 104(a) S&S Citation and **AFFIRMED** as such.

3. Citation No. 3105784 **IS VACATED.**

4. Order Nos. 3105788 and 3105798 **ARE VACATED.**

Roy J. Maurer
Administrative Law Judge

Distribution:

Rebecca Zuleski, Esq., Furbee, Amos, Webb & Critchfield, 500 Hampton Center, Suite 4, Morgantown, WV 26505 (Certified Mail)

Glenn M. Loos, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 21 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 91-344
	:	A.C. No. 11-00585-03789
v.	:	
	:	Mine No. 10
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Susan J. Bissegger, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
David R. Joest, Esq., Midwest Division Counsel, Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge one citation issued by the Secretary of Labor for a violation of the mandatory standard at 30 C.F.R. § 75.1107-7(b). The general issue before me is whether the Peabody Coal Company (Peabody) violated the cited regulatory standard as alleged, and, if so, what is the appropriate civil penalty for such violation.

The citation at bar, No. 3537743 alleges a "significant and substantial" violation of the cited mandatory standard and charges as follows:

> The water type fire suppression system for the No. 17 Joy Miner was not being maintained in a working condition in the sub-main north unit. When actuated from the tail valve it would not operate.

The cited standard, 30 C.F.R. § 75.1107-7(b), provides as follows:

> Where water spray devices are used for inundating attended underground equipment the rate of flow shall be at least 0.18 gallon per minute per square foot over the top surface area of the equipment (excluding conveyors, cutters, and gathering heads), and the supply of water shall be adequate to provide the required flow of water for 10 minutes.

The facts are not in dispute. On April 18, 1989, the administrator for Coal Mine Safety and Health of the Federal Mine Safety and Health Administration (MSHA) issued program policy letter P89-V-11 which "describes acceptable compliance methods for fire suppression systems on remotely controlled mining equipment." The letter stressed the need for a means of activating fire suppression systems on mining equipment which would allow the system to be activated from under supported roof while the machine is mining in extended cuts under remote control, and described two acceptable methods of compliance.

Following receipt of the program policy letter, Peabody submitted to MSHA a proposal dated May 5, 1989, for compliance at its Mine No. 10. The proposal stated that Peabody had installed "a system for manually actuating the fire suppression system on continuous miners while operating in the remote control mode," and described the system, which consisted of a valve near the end of the tail of each miner. By letter dated October 20, 1989, MSHA's District Manager informed Peabody that the May 5, 1989, proposal was acceptable.

On January 23, 1991, MSHA inspector Edward J. Banovic conducted an inspection of Mine No. 10 and cited the Joy No. 17 continuous miner because the tail valve would not activate the fire suppression system. The parties have stipulated that the tail valve had been damaged and rendered inoperable by a collision occurring toward the end of the evening shift on January 22, 1991. For the remainder of that shift, the No. 17 miner was used only for 20 foot cuts although extended cuts were authorized in Mine No. 10's ventilation plan and there was nothing to prevent Peabody from taking extended cuts. The midnight shift on January 23, 1991, was a maintenance shift only, and the No. 17 miner was not used to mine coal on that shift. The citation was issued on the next production shift, the January 23, 1991, day shift. The No. 17 miner had not taken any cuts on that shift when the citation was issued.

Inspector Banovic testified that in his experience, extended cuts are taken at Mine No. 10 about 75 percent of the time, and that the continuous miners are operated by remote control 85 percent to 90 percent of the time. He stated that the remote control device was present in the section and that he "assumed" the No. 17 miner would take an extended cut. However, he did not see any extended cuts being taken with the No 17 miner on January 23, 1991, and no statements were made to him by anyone present concerning any intention to take an extended cut. Additionally, the parties have stipulated that there is no evidence that any extended cuts were taken between the time the tail valve became inoperable and the time the citation was issued.

The parties have stated in the following stipulations their respective positions in this proceeding:

> 24. The parties agree that the fire suppression system described in the citation is required to be operable while the miner is making extended cuts greater than 20' under remote control and the other 2 manually operated fire suppression system could not be activated without going under unsupported roof.
>
> 25. The Secretary contends that if a continuous miner is used to make extended cuts at any time, the tail fire suppression system is required to be maintained in operable condition at all times, whether or not the miner is actually making extended cuts at any particular time.
>
> 26. Peabody contends that the tail fire suppression system at issue is required to be maintained in operable condition only when the continuous miner is actually being used to make extended cuts so that the other manually activated systems cannot be used without going under unsupported roof. Peabody contends that if the tail fire suppression system becomes inoperable, Peabody has the option of either immediately withdrawing the miner from service for repairs or of using the miner only to make conventional cuts (20' or less) until the tail fire suppression system can be repaired.

In her posthearing brief, the Secretary places great emphasis in support of her position on the Commission decision in Solar Fuel Company, 3 FMSHRC 1384 (1981). In Solar Fuel, the Commission held that electric face equipment "stipulated to be in non-permissible condition and intended for use inby the last open mine crosscut" was in violation of 30 C.F.R. § 75.503, even though located outby the last open crosscut at the time of the inspection. The Commission stated that, under section 75.503,

> [E]quipment habitually used or intended for use inby must be maintained in permissible condition and may be cited regardless of whether it is located inby or outby when inspected. The emphasis is not on where equipment is located at the time of inspection, but simply whether it is equipment which is taken or used inby.

Upon close scrutiny of the Solar Fuel decision however, I am satisfied that it is precisely limited to violations under the mandatory standard there at issue i.e., 30 C.F.R. § 75.503. Clearly that decision was premised upon the grammatical interpretation of that specific standard and it is inapposite hereto. In any event it was stipulated in this case that the

cited No. 17 miner was not actually used in a violative manner. Moreover, I do not find that the Secretary would have met her burden of proving that the cited miner was intended to be used in a violative manner. Under the circumstances I cannot find that a violation of the standard at 30 C.F.R. § 75.1107-7(b) has occurred.

ORDER

Citation No. 3537743 is hereby vacated.

Gary Melick
Administrative Law Judge

Distribution:

Susan J. Bissegger, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

David R. Joest, Esq., Midwest Division Counsel, Peabody Coal Company, 1951 Barrett Court, P.O. Box 1990, Henderson, KY 42420-1990 (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 21 1992

DAVID L. STRITZEL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 91-633-D
v.	:	VINC CD 91-05
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, and CHARLES RATH & MARK O. ESLINGER, Respondents	:	

ORDER LIFTING STAY AND GRANTING MOTION TO DISMISS

This case was stayed pending the Court of Appeals decision in Wagner v. Secretary of Labor, No. 91-2025, 4th Circuit. On November 5, 1991, the Court issued its decision, affirming the Commission's decision of June 6, 1990. The Court and the Commission have held that MSHA and its employees acting within the scope of their statutory authority are not "persons" within the meaning of § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. I find these rulings to be dispositive of the issues raised in the Secretary's motion to dismiss and Complainant's response to the motion.

WHEREFORE IT IS ORDERED that:

1. The STAY is lifted.

2. The Secretary's motion to dismiss is GRANTED and this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

Gregory S. Keltner, Esq., Zeigler Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

Mr. David L. Stritzel, 500 North DuQuoin, Benton, IL 62812 (Certified Mail)

Tana M. Adde, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

/fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 21 1992

CLYDE C. COLE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 91-191-DM
v.	:	
CANYON COUNTRY ENTERPRISES, d/b/a CURTIS SAND & GRAVEL, a Corporation, Respondent	:	Soledad Canyon Mine

DECISION

Appearances: David P. Koppelman, Esq., International Union of Operating Engineers, Local 12, Pasadena, California, for Complainant;
Ben W. Curtis, President, CURTIS SAND AND GRAVEL, Canyon Country, California, for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (herein "the Act"). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) resulted in MSHA's issuance of a Section 105(c)(2) complaint in his behalf which was originally filed on April 9, 1990, in Docket No. WEST 90-165-DM, and which was amended on June 18, 1990. On December 14, 1990, MSHA and Respondent Curtis filed its "Stipulation for Dismissal" indicating, inter alia, that "Having undertaken and completed discovery, the Secretary and Curtis now agree that the matter should be dismissed with prejudice." By my Decision entered January 22, 1991, the proceeding initiated by MSHA in Docket No. WEST 90-165-DM was dismissed. After petition for Commission review was filed, the Commission on March 1, 1991, denied Cole's petition, affirmed my decision, gave Cole 30 days to initiate a proceeding under Section 105(c)(3), and provided that "The record in the 105(c)(2) proceeding case may be noticed judicially in any such new proceeding."

The discrimination complaint by Cole individually was then filed in the instant docket on February 12, 1991, alleging that Respondent Curtis "discriminated against Clyde C. Cole when it terminated his employment on or about July 19, 1988."

ISSUES

1. Whether the Complaint with MSHA (filed beyond the 60-day period provided in Section 105(c) of the Act) was untimely; whether the determination of the Labor-Management Adjustment Board issued pursuant to the grievance procedures of the collective bargaining agreement between I.U.O.E. and the Rock Products and Ready-Mix Employers of Southern California is preclusive of the action; and assuming arguendo that both the Complaint and this action are viable, whether Complainant was discriminatively discharged on July 19, 1988, for refusing to operate what he alleges to be an unsafe front-end loader (#5312).

2. Respondent contends Complainant quit. Complainant contends he was discharged. Respondent contends Complainant did not communicate a safety complaint when he left employment on July 19, 1988. Two final questions arise:

a. Whether Complainant was constructively discharged by being given a choice by his foreman of operating a loader which he reasonably believed was unsafe or of being sent home and being deemed to have quit employment.

b. Whether reasonable basis existed for Complainant Cole's alleged safety concern and complaint about the loader on July 19, 1988.

Timeliness of Filing Discrimination Complaint

Respondent contends that Cole's discriminatory "discharge" complaint was untimely and should be dismissed since it was not filed until some four months after he left employment on July 19, 1988. Timeliness questions are to be resolved on a case-by-case basis. Joseph W. Herman v. Imco Services, 4 FMSHRC 2135 (December 1982). It appears that Mr. Cole actually filed two complaints with MSHA.

Complainant Cole filed his first MSHA Complaint (Ex. C-8) on August 1, 1988, which alleged inter alia that he was assigned for work at Curtis on May 16, 1988, and that

> "I am currently in grievance procedures against Curtis Sand and Gravel because I refused to run an unsafe piece of equipment. The piece of equipment I am referring to is a Cat 988, #5312. These are the things that I feel are unsafe about this loader:

1. Center pins are completely worn out.

2. The steering locks and will hardly turn from right to left.

3. Steering pins are worn out.

4. Brake pressure is on the red, with very little braking power, like only one wheel has a brake. That could also be a part of steering problem. (The steering is a lot harder in tight places when loading trucks while using the brakes).

5. No backup alarm.

6. No parking brake.

This is not the only piece of equipment that I feel is unsafe. I also see some hazards in the plant area of the Long Plant. The surge pile escape tunnel is crushed. The catwalks are loose and coming apart. There are no guards on tail pulleys. Not all but there are a few more than is safe. It only takes one to get a man killed. I have never seen a lockout used there. It seems to be a general lack of concern for the working men and safety. Whatever we can get away with seems to be the motto.

I hope it isn't going to take someone to get hurt bad or even maybe killed to get some things to change there. I certainly hope not. That's why I am writing this letter today. Thank you very much for your cooperation in this matter.

It is concluded after careful scrutiny of the wording of this complaint and the record that Mr. Cole did not at this time complain to MSHA about his allegedly unlawful discharge. Thus, his August 1 complaint does not actually mention he was discharged, but does specifically mention that he was "currently in grievance procedures," listed what he felt was unsafe about Loader #5312, complains that other equipment was unsafe, and complains about other "hazards." MSHA apparently did not consider this to be a complaint of discriminatory discharge (T. 123) and I conclude properly so.

On or about August 10, 1988, MSHA commenced investigation of this first complaint, confined to the "safety" allegations therein [1] and on August 10, 1988, a "Notice of Negative Finding" (see Exs. R-2 and C-9) was issued indicating that the alleged hazards did not exist. [2]

Mr. Cole's second complaint was filed on or about December 15, 1988, nearly five months after he left Curtis's employment. This complaint alleges:

> I, Clyde C. Cole, feel I have been discriminated against because I refused to run what I knew to be an unsafe front-end loader #5312. In violation of Article VI, Section 1, RSG contract. I want to be reinstated to my previous position with full back pay from July 19, 1988, to whenever I am reinstated, benefits and seniority. And due to mental anguish, discrimination and harassment over this wrongful termination and conspiracy to cover the wrongful termination, I am seeking restitution in the amount of $150,000 over and above the previously mentioned items.

This document does comprise a complaint of unlawful discharge cognizable under the Act and the question of timely filing is analyzed with respect thereto.

Section 105(c)(2) of the Mine Safety and Health Act provides that "[a]ny miner ... who believes that he has been discharged,

---

[1] The allegedly hazardous conditions investigated were those mentioned in Mr. Cole's August 1, 1988, complaint, to wit, bad center pins, poor steering, poor brakes, no back alarm, and also poor condition of escapeway, lockouts not being used, tail pulleys not guarded, and loose handrails.

[2] Insofar as the alleged hazards pertaining to Loader #5312 are concerned, the investigation was not dispositive one way or the other whether the tail pin complaint made by Mr. Cole actually showed unsafe conditions. (Ex. C-21, p. 15). The deposition of the MSHA inspector, Bill Wilson, strongly indicates that there was no basis to Mr. Cole's safety complaints about Loader #5312, as well as the other items of his complaint (Ex. C-21, Deposition pp. 15, 16, 17, 18 and attached notes pertaining to Inspector Wilson's inspection).

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 [of Labor] alleging such discrimination." 30 U.S.C. § 815(c)(2). (Emphasis added).

Significantly, Respondent did not allege or establish any specific direct prejudice from the three-month-late filing of the complaint. Complainant testified that, after filing his "safety" complaint, he was never advised by MSHA that he should file a discrimination complaint (T. 79-80, 123) and that he had not held any union positions or filed MSHA complaints prior to July 1988. (T. 128-129). He indicated it was after November 2, 1988, that he found out he had to file a discrimination complaint and that he thought everything "was taken care of" by his first "safety" complaint. (T. 123).

While some general prejudice would ordinarily be inferred from the passage of several months after the allegedly adverse action before a complaint is filed and a party is put on notice that it must defend a claim of discriminatory discharge, it is noted that here the Respondent, because of a grievance brought by Complainant, was brought into the process of defending itself from a similar charge (Ex. C-5, Grievance dated July 20, 1988) and thus cannot convincingly contend that it was deprived of an early opportunity of investigating the facts of the incident, or perpetuating testimony by taking statements from its witnesses, etc. Sometimes a delaying complainant can achieve overwhelming advantage springing from tardy filing. While Complainant's asserted justification for late filing was not convincing, nevertheless in view of the immediate bringing of the grievance and filing of the "safety" complaint, it cannot be said that the instant discrimination complaint was a completely stale claim from Respondent's standpoint. Nor can it be concluded that the Respondent mine operator actually demonstrated specific prejudice attributable to the delay, Secretary of Labor on behalf of Hale v. 4-A Coal Company, 8 FMSHRC 905 (June 1986).

On the other hand, Cole's failure to file a discrimination complaint with MSHA nearly five months after the date his employment terminated and after (1) he filed both a grievance under the labor contract and a safety complaint with MSHA and, (2) both complaints had been denied, constitutes the basis for inference

of some prejudice to his employer. [3] Certainly, Respondent was not aware until December 15, 1988, that it had to defend a claim of the nature of a federal action under the Mine Act for discriminatory discharge with its complexity and impressive potential economic remedies available to a successful complainant. Having been the subject of a specific MSHA investigation for safety violations after Cole's complaint thereto was filed promptly after he left employment, Respondent would have been entitled to believe that the MSHA processes were over and that further litigation of the matter was not in prospect. More specifically, while it was on notice to defend the grievance (a very informal process more specifically desribed subsequently herein) and the various MSHA safety matters raised by Mr. Cole, it was in no way on notice to prepare for and defend a Mine Act discriminatory discharge proceeding. I thus infer and find that on the unique circumstances of this case and the one-at-a-time manner in which Complainant proceeded in filing various actions that Respondent would have incurred general prejudice. [4]

---

[3] The sequence of various pertinent dates in 1988 is as follows:

1. Cole hired: 5-16
2. Cole quit: 7-19
3. Grievance Filed: 7-20
4. MSHA Safety Complaint Filed: 8-1
5. MSHA Safety Complaint Denied (Negative Finding): 8-10
6. Cole's Grievance Denied: 11-2
7. MSHA Discrimination Complaint Filed: 12-15

[4] Complainant's grievance was filed the day after he quit (I subsequently conclude he was not discriminatorily discharged) and reflects his allegation that he was wrongly discharged and his desire for reinstatement. Yet his first complaint with MSHA--filed after his grievance--while mentioning that there was a grievance proceeding alleges only safety complaints. I find this inconsistent with a deliberate choice made at the time by Cole to proceed through the labor agreement's grievance procedure to redress any wrong about his employment status and to simultaneously proceed against his employer with the MSHA safety complaint. His testimony that he thought "everything was taken care of" by the safety complaint does not ring with credibility, but seems more to be calculated to skirt the ban of the 60-day filing limitation. It was only after the failure of these first two complaints that the discrimination complaint was forthcoming.

More particularly and decisively, it is found that this question is governed by the decision of the Federal Mine Safety and Health Review Commission in David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 25 (January 1984).

The circumstances in Hollis, supra, are similar to those presented in this action. The miner in Hollis alleged that he was discharged on September 29, 1980, in retaliation for safety concerns expressed to both MSHA and his employer. Rather than immediately filing a complaint under the Act, the miner, David Hollis pursued a grievance under the collective bargaining agreement, filed a charge with the National Labor Relations Board, and initiated proceedings before the state human rights commission. Not until seven months after his discharge, and before the resolution of his alternative actions, did Hollis file his MSHA complaint. Shortly thereafter, based on the 60-day statute of limitations, his employer moved to dismiss the action as untimely.

During argument on the motion to dismiss, Hollis contended that he was unaware of his rights under the Act until March 1981, and that he filed his complaint within 60 days of discovering those rights. Since he allegedly was not aware of his rights before that time, Hollis argued that he justifiably failed to file his complaint in a timely manner. The Commission, however, rejected his assertion. Observing that he served his union as chairman of the safety committee, and that Hollis had filed a grievance through his union, a charge with the National Labor Relations Board, and a complaint with the West Virginia Human Rights Commission, the Commission concluded that Hollis knew of his rights, but chose to pursue alternate avenues of relief. It held that "a miner's late filing [will not be excused] where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act." (Emphasis added).

Similarly, in Herman v. Imco Serv., supra, the miner alleged that he was terminated because of his numerous complaints about the safety of a suspended storage bin. Despite his numerous contacts with MSHA officials both shortly before and after his discharge, Herman delayed filing his complaint until 11 months after his termination. Granting his employer's motion to dismiss, the Commission held that Herman's

> prolonged hesitation in filing a discrimination complaint cannot be attributed to his being mislead as to or a misunderstanding of his rights under the Act. Rather, the record

> reveals that he had direct contact with MSHA officials during the period that the events now complained of occurred, as well as after his termination. Quite simply, he had abundant opportunity and the ability to go forward with his complaint in a more timely fashion, if he had then desired to do so. (Emphasis added).

The 60-day rule, as applied by the Commission in both Hollis and Herman, compels dismissal of Cole's complaint. There is no dispute that, less than two weeks after resigning his employment, Cole complained to MSHA and filed a charge with that agency alleging safety hazards on the replacement loader. Cole was in direct contact with MSHA as early as August, was aware of his rights under the Act, and was also familiar with the procedures required to file an MSHA complaint. Like the miner in Herman, Cole's "prolonged hesitation in filing a complaint cannot be attributed to his being mislead as to or a misunderstanding of his rights under the Act."

Moreover, like the miner in Hollis, Cole pursued an alternate avenue of relief, a grievance under the Agreement, and not until he lost that claim did he file the subject complaint. As the Commission made clear in Hollis, an untimely filing will not be excused "where a miner has invoked the aid of other forums while knowingly sleeping on his rights under the Act."

Accordingly, on this basis, Complainant's initial complaint with MSHA is found untimely and this proceeding is to be dismissed. Discussion of the issues of preclusion and the merits of the discriminatory discharge allegation follow.

Respondent's Defenses--Res Judicata, Collateral Estoppel: Preclusion

Although not repeated in its post-hearing brief, Respondent in its answer to the Complaint and during this proceeding has argued that the complaint is (a) barred by the doctrines of res judicata and collateral estoppel, and (b) that Complainant's exclusive remedy for any alleged discrimination is pursuant to the Labor Agreement the grievance procedures of which Complainant pursued to their conclusion.

Precedents of the Federal Mine Safety and Health Review Commission govern the issues raised by these defenses and guidance therefrom and U.S. Court decisions are utilized in the following determination. First, a brief summary of the background pertaining to these issues is helpful.

Complainant left employment on July 19, 1988. Grievance procedures provided in Article XIV of the 1985-1989 Agreement between International Union of Operating Engineers, Local No. 12, A.F.L.-C.I.O. and Rock Products and Ready Mix Concrete Employers of Southern California [5] (Court Ex. 1) establish a Labor-Management Adjustment Board to issue decisions which "shall be final and binding on either or both parties." The objective of the Board, however, is "for the express purpose of interpreting and enforcing all the terms and conditions" contained in the Agreement. The Grievance procedures also provide for Arbritration in the event the Board does not reach a decision (Article XIV, Section 1(b). The Board did reach a decision and the matter thus never went to an arbitrator. [6]

Mr. Cole filed a Grievance form (Ex. C-5), and after being turned down at Steps 1 and 2 of the Grievance procedures (Sections 2(a) and (b) of the Agreement) he proceeded to Step 3 which is referral to the Labor Management Adjustment Board.

The six-member Board (3 union and 3 management) met on November 2, 1988, at the union offices in Los Angeles, California, and heard and decided the cases of some five grievants including Complainant on that date. The provision of the Agreement shown by the Board's decision (Ex. R-1) to be the point of reference was Article VI, Section 1 which provides:

---

[5] Of which Respondent Curtis is a member.

[6] Even in arbritration, as the U.S. Supreme Court in Alexander v. Gardner-Denver Company, 94 S. Ct. 1011, 415 U.S. 36, 39 L. Ed. 147 (1974) noted, "... the fact-finding process ... usually is not equivalent to judicial fact-finding. The record of arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trial, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." Such procedures are generally available in the Mine Act proceedings before the Commission, however.

ARTICLE VI
Work Performance

> **Section 1. Discipline.** The Employer is the judge as to the competency of any worker. All employees must perform their work to the satisfaction of the Employer, provided, however, that no employee shall be discharged without good cause or discriminated against because of his membership in the Union or Union activities.

This provision framed the issue in the grievance process: Whether Curtis violated Article VI, Section 1 of the Agreement by allegedly discharging an individual employee without "good cause." See "Judgment on Stipulation for Entry of Judgment" entered by the Superior Court of the State of California for the County of Los Angeles on August 17, 1990. (Ex. R-5, par. 5). The parties to the Stipulation upon which the Judgment was entered were Curtis and the union. The Judgment confirmed in all respects the decision of the Labor Management Adjustment Board denying Cole's grievance. (Ex. R-5, pg. 6).

It is clear that the Court's judgment was based on the stipulation for it to do so by Curtis and the union and was not based on judicial review of the matter. Cole, who brings this action as an individual complainant under the Act was not a party to the stipulation. The stipulated Judgment did not directly or indirectly determine his rights under the Act or attempt to resolve his rights other than under the Labor Agreement in question. The effect of the Judgment, as indicated in the last sentence thereof, merely confirmed "in all respects" the decision of the Labor Management Adjustment Board denying Mr. Cole's grievance. It was not a judgment by a court on the merits of the litigation. See Bradley v. Belva Coal Company, 4 FMSHRC 982, 986 (June 1982). Examination of the Board's decision then is in order to determine its adequacy in terms of judicial fact-finding, procedural due process, and consideration and application of Mine Act discrimination formulae and concepts. The Board's decision provides:

> Dispute:
>
> Clyde Cole protests termination.
>
> Contract Reference: Article VI, Section 1

Company Position:

The grievant is a loader operator and was hired May 23, 1988, at the Company's Soledad Canyon Plant. On July 19, 1988, the loader that the grievant normally operates broke down and he was assigned to operate a different loader. (Both loaders were of the same type and approximate age.) When he was told to operate the other loader, he refused alleging that the loader was unsafe. He stated that he would do other work and the Supervisor thereupon told him that that was the only work he had for him and further that if he elected not to do the work and left the Plant he would be considered a voluntary quit. One of the Company mechanics with approximately 15 years of employment stated that the loader was safe to operate. Further subsequent to the Step Two meeting on August 1, 1988, the grievant filed a charge with MSHA and as a result of that investigation the inspector found that the loader was indeed safe to operate. (On the notice the box saying "alleged hazard did not exist" was checked.)

Union Position:

The grievant admitted refusing to operate the loader but alleged he had been told to go home if he was not going to operate that loader. Although at the time he did not state why he believed the loader was unsafe, he said at the hearing that since the loader had to go on the highway he didn't believe it was safe because of the steering.

Decision:

Moved and seconded that based on the evidence presented in this case the claim of the Union be denied.

Motion Carried. (Emphasis added).

Analysis of this decision of the Board--actually only "minutes" of its proceeding--shows that the actual principles underlying the decision are not ascertainable. The findings of fact

are exceedingly limited. [7] It is concluded that the Board's fact-finding process was not equivalent to judicial fact-finding, and more particularly in any way comparable to that of the Commission. Certainly, the record of its proceedings, including notes thereof (Ex. C-6), is not as thorough or complete. Respondent has the burden of establishing the applicability of its defenses seeking to preclude litigation of the discrimination issues in this matter on the basis that such were litigated and adjudicated by a court or forum of competent jurisdiction on the merits in a prior proceeding, i.e., res judicata. On the basis of the record presented in this matter, such a determination can not be made, although it does clearly appear that the Mine Law's discrimination formulae were not in issue, were not applied, and were not determinative. [8] Thus, it is concluded that this litigation under the Mine Act is not precluded. Further, since it does not appear that precise issues relevant under the Mine Act including some that were specifically raised in this proceeding (Such as whether Complainant quit voluntarily, was discharged, or was constructively discharged by being given the forced choice of (1) either working under unsafe conditions or (2) going home and being considered to have quit, were raised and discussed and determined in the Board's proceedings, Respondent is found not to have carried its burden inherent in its defense of issue preclusion, i.e., collateral estoppel.

Accordingly, Respondent's defenses of res judicata and collateral estoppel are rejected. Bradley v. Belva Coal Company, supra.

Nevertheless, as the Commission has held with respect to the decisions of arbitrators, although the Commision is not bound by the determination of Labor-Management Adjustment Board, within the boundaries of sound discretion some weight can be accorded to its specialized competence in labor-management relations matters.

---

[7] One of the Board's findings from its proceeding, that "Although at the time he (Cole) did not state why he believed the loader was unsafe, he said at the hearing that since the loader had to go on the highway he didn't believe it was safe because of the steering," is found significant and mentioned subsequently herein.

[8] There certainly appears to be good reason "to doubt the quality, extensiveness, or fairness of procedures followed" in the prior proceeding before the Labor-Management Adjustment Board insofar as the determination of the "preclusion" questions are concerned. See Montana v. United States, 440 U.S. 147 (1979).

Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980); David Hollis v. Consolidation Coal Co., supra.

Discrimination

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., supra, rev'd on other grounds sub nom., and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981).

The Commission has held that a miner's work refusal is a protected activity under the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. Secretary on behalf of Pasula v. Consolidation Coal Co., supra, Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., supra. See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982).

Ultimate determination of the merits of the discrimination issue turns on whether Complainant's refusal to operate Loader #5312 was based on a reasonable belief that it was unsafe (and whether such was reasonably communicated to management) or whether it was due to some subjective reason or Complainant's temperament. [9]

The 33-year-old Complainant has equivalency of a high school education. He commenced employment with Curtis on May 16, 1988, and worked as a heavy equipment operator (loader operator) for 65 days until his employment terminated on July 19, 1988. He regularly operated front-end Loader #5303, which was one of approximately seven such loaders in use.

Complainant's account of pertinent events differs sharply with Respondent's. We start first with Mr. Cole's version.

Complainant testified that in mid-June 1988 (T. 62), he operated Loader #5312--the one he subsequently refused to operate--for a period of five hours and that at that point he determined the brakes "were poor," the center pins "were shot," and that it would "jolt" left or right "whichever way it wanted

---

[9] See T. 102, 140-141, 148, 169-160.

to go." (T.59). Since the center pins are what hold the machine together he said that if the machine "should come apart half way" there was a good chance of having both legs crushed and of death. (T. 60). After getting off the machine, he testified, he told his plant foreman Juan Moran that the loader was "flat unsafe" to run (T. 63) but he did not tell Moran what was unsafe about it. (T. 63-64). He also testified he told Mechanic Homer Pennington that the loader was unsafe. (T. 63).

About one week before July 19, 1988, Cole again operated Loader #5312 for 15 minutes and he testified no safety repairs had been performed on it, i.e., to the brakes, steering, back-up alarm and center pins. (T. 65). He decided at this time he would not run it if asked to do so again and he testified he asked Homer Pennington for a red tag so he could keep it available if he was asked to run #5312 again. Pennington advised him the company did not have red tags.

On July 19, according to Complainant, his regular machine #5303 broke down and the crucial conversation with his foreman Juan Moran was given by Mr. Cole as follows:

> Just shortly thereafter Mr. Moran came up and asked what the problem was with the machine (5303), and I told him that the tilt wouldn't work, the bucket wouldn't roll back, or it wouldn't dump. He asked me if I could make it up to the Soledad Plant with the machine, and I said yeah ... .
>
> * * * * *
>
> And so I had the Euclid drive out from underneath the bucket and I lowered it down and I took the machine up to the Soledad Plant. This is a narrow, two-lane highway, blacktop, open to civilian personnel. Up an incline to the Soledad Canyon Plant at which point I parked the machine and Juan (Moran) called for Homer Pennington to come up and take a look at it. Homer came up and climbed up on the machine and he moved the lever back and forth and back and forth, and him and Mr. Moran had a conversation, and then Juan told me to go over on 5312, take 5312 down in the mud hole and run it, and I refused at that point to run the machine.
>
> * * * * *

> Mr. Moran told me to run 5312; take number 5312 down to the mud hole and continue working. At that point I refused to operate machine number 5312 and spelled out exactly what I felt was unsafe about the equipment, starting with number one, the center pins, the steering, the brakes, no backup alarm. Then he told me he didn't have anything else for me to do that day, if I wasn't going to run 5312, and he thought it was safe enough to run down in that mud hole, to go home.
>
> I asked him if he was firing me and he said, no. I says I'll go down to the Lang Station Plant. I said I will be more than happy to run a scraper; I said I will stay here; I said I will shovel tail pulleys, I will go down to the Lang Station Plant and shovel the tail pulleys. (T. 68-69). (Emphasis added).
>
> He told me to go home. And I asked him if he was firing me and he said no. I says okay. And then got my lunch box off the machine and he said if you leave, you quit. I said I thought you just said you weren't firing me? He says I am not, I am just sending you home. I said okay. So I got in my car and I left. (T. 70).

The other party to the primary events of July 19, 1988, Respondent's plant foreman, Juan Moran, testified in direct contradiction to the main points of Mr. Cole's presentation, i.e., as to whether Loader #5312 was unsafe, whether he (Moran) sent Mr. Cole home, whether Mr. Cole quit, whether Mr. Cole said the loader was unsafe, and whether Mr. Cole specified the various items (brakes, steering, backup alarm, center pins) that he considered unsafe on the loader.

Mr. Moran testified he has been an employee of Respondent Curtis for some 20 years and has been plant foreman since 1976. As plant foreman, he was at pertinent times, in charge of Curtis's two operations, Lang Station (which had approximately 100 employees in 1988) and Soledad Canyon which had approximately 8 employees. (T. 56, 131).

Mr. Moran testified that he had never heard of or had experience with a center pin breaking, that he had never had to refuse to operate equipment at Curtis in order to get it repaired, and that while the center pins on loader 5312 were loose they were not unsafe. (T. 132-133).

According to Mr. Moran, on the day that Mr. Cole quit employment, he then ran #5312 for three hours and two other employees, Efrem Ramirez and Neal Wallens, also ran it without complaint. (T. 133-234). [10]

Portions of Mr. Moran's testimony--which I credit as being the more trustworthy and persuasive over Complainant's--concerning events and conversations on July 19 after Complainant's #5303 loader broke down with hydraulic pump failure follow:

> ... Like he described before, I told him to let the Euclid to pull for under the loader and I knew that he can drive it to the upper plant--to the plant--and I told Homer we've got a problem with a loader, don't want to tilt. Homer looked at it and says the pump went out. I said to him, how long will it take to fix it. He said approximately about two days by the time I get parts and all that. I said okay.
>
> I looked at Mr. Cole and I said, Cole, we've got 5312 over here which is generally our spare loader for a few hours or a day or two, will you get the loader and go down to the pond to continue working, we've got three other guys working over there and he said, no, I won't go on the loader. Homer Pennington asked him why. He said I just don't like it; I won't run it. And he proceeded to go back into the loader 5305 loader which he was running, picked up his lunch, came down and started walking away. I said, you mean you are quitting? He turned around and said to me, he said, no, are you going to fire me? I said I don't have no reason to fire you; all I am asking you is to continue working so we can keep doing bailing of all the silt out of the pond. And as soon as your loader is ready, you will go back to your loader.
>
> He said, no, I won't do that. I don't like the loader. Homer said--in fact Homer Pennington said oh, you are one of those operators that

---

[10] I have considered this evidence as one of the factors leading to the conclusion that Complainant's alleged safety concern was unreasonable.

likes to ride Cadillac like, not Chevrolet. I said what is the difference between operators? And he continued to walk away and my remark to him was if you walk away from the plant, that means you just quit. And he continued to just walk away. (T. 134-135).

* * * * *

Q. So you went immediately to work loading trucks while someone went to get another operator to relieve you so you could continue with your duties?

A. Exactly.

Q. Did you feel at the time you got on that loader that is was unsafe?

A. No. If I felt I would get hurt on the loader I wouldn't get in it, especially when we have to travel a short distance over the highway with a loader.

Q. Prior to that date, do you recall Clyde Cole telling you and/or Homer in your presence about the center pins being bad to the point of this loader being unsafe?

A. No, he never mentioned it to me anything about being unsafe. He run the particular loader, I believe, was twice, and a short period of time-five hours or four hours. Whenever he is loaded, he will go around and he will use that one and I think it happened twice in the short time that he was with us. He never got to run 12 on Soledad.

Q. Did he ever request from you that the loader be red-tagged because it was unsafe?

A. Never.

Q. When he refused to run 5312 did you tell him? "Go home."

A. No.

Q. Did he volunteer to shovel on the conveyor belts and do other work in lieu of running a loader?

A. No, he never asked for anything else.

Q. So when he left, what did you assume his intentions were?

A. He was quitting. (T. 136-137).

Mr. Moran contradicted Complainant and denied telling him on the following morning that he (Cole) had been replaced, pointing out that Mr. Cole was never replaced. (T. 147-148). Mr. Moran also credibly testified that because of the way such heavy equipment is built it has a center pin and that "they wear a little they feel like they are going to fall apart, but that does not mean they are unsafe." (T. 150). It also appears that Curtis does not have the equipment to change such pins (Tr. 155, 158) which further supports Mr. Moran's testimony and deletes the viability of Complainant's position on this point. [11]

Mr. Moran's opinion that Loader #5312 was safe to operate was shored up to some extent by the fact that he drove it after Mr. Cole left on July 19, 1988, that two other employees also drove it without complaint, and that no repairs were made on it. (T. 156-157).

Complainant did not actually establish that Loader #5312 was unsafe due to defective center pins or the other problems complained of. Thus, in his deposition (Ex. C-21) Inspector Wilson testified that during the MSHA inspection following Cole's safety complaint that the backup alarm was working, that the brakes were not checked during the inspection, that the union representative, Mr. Pat Stubbins, felt there was nothing wrong with the loader, and that Complainant was a "bitcher." (Wilson deposition, pp. 15-17, 18). The other safety complaints made by Mr. Cole not related to the loader were found not to have any basis also. (Ex. C-21, p. 18).

I conclude that the MSHA inspection following Complainant's safety complaints supports the testimony of Mr. Moran that the loader was not unsafe (see also T. 155-158), and that the center pins were not replaced also casts serious doubt on the reliability of Complainant's testimony generally. [12]

---

[11] See also Statement (Declaration) of Homer Pennington, lead mechanic, attached to Respondent's Motion for Summary Decision dated September 5, 1991, indicating that the center pins were never replaced and remained on the loader until his retirement in October 1990.

[12] In summary, the record in its entirety indicates that foreman Moran, Master Mechanic Pennington, Union Representative Pat Stubbins, and MSHA Inspector Bill Wilson all concluded that there was no basis to Mr. Cole's safety complaints. Further, the

Based on the foregoing findings, resolution of conflicts in testimony based on observation of the demeanor of witnesses and the harmonizing of testimony with the general record, it is concluded

a. that on July 19, 1988, Loader #5312 was safe to operate;

b. that Complainant refused to operate such without justifiable reason for doing so;

c. that Complainant's alleged belief that the loader was unsafe, assuming arguendo that such was in good faith, was not reasonable and accordingly was not an activity protected under the Mine Act, Bush v. Union Carbide Company, 5 FMSHRC 993, 997 (June 1983);

d. that in refusing to operate Loader #5312 Complainant did not communicate safety concerns to his foreman, Juan Moran; [13]

e. that the termination of Complainant's employment occurred as a result of his voluntarily quitting employment and not as a result of his being contructively discharged by Mr. Moran by being given a choice between

---

cont'd fn. [12]

Labor-Management Adjustment Board, after deliberation (T. 165-166), denied Mr. Cole's grievance. I have considered this as one of the factors to be weighed in resolving the conflicting testimony of Moran and Cole in Moran's favor. In rejecting Mr. Cole's testimony I also have considered that the safety complaints concerning other matters involving the #5312 loader did not prove out and that his explanation concerning the late filing of his MSHA discrimination complaint, while tidy, was more convenient than logical and convincing.

[13] Where reasonably possible a miner refusing to work should ordinarily communicate, or attempt to communicate, to some representative of the operator his belief in the safety hazard at issue. At least one purpose of this rule is to weed out "work refusals infected by bad faith." Secretary on behalf ofDunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

operating an unsafe piece of equipment or being deemed to have quit employment. [14]

ORDER

Complainant's complaint of discriminatory discharge under the Mine Act is found (a) to be without merit, and (b) to have been untimely filed, and on these two independent bases, this proceeding is **DISMISSED.**

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Clyde C. Cole, 8237 Soledad Canyon Road, Acton, CA 93510 (Certified Mail)

David P. Koppelman, Esq., International Union of Operating Engineers, Local 12, 150 East Corson Street, Pasadena, CA 91103 (Certified Mail)

Mr. Ben W. Curtis, President, CURTIS SAND AND GRAVEL, P.O. Box 1367, Canyon Country, California 91386 (Certified Mail)

ek

---

[14] Secretary v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984).

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 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 91-93-M
	:	A.C. No. 09-00265-05511
v.	:	
	:	Docket No. SE 91-663-M
BROWN BROTHERS SAND COMPANY, Respondent	:	A.C. No. 09-00265-05512
	:	
	:	Docket No. SE 91-756-M
	:	A.C. No. 09-00265-05513
	:	
	:	Junction City Mine

DECISIONS

Appearances: Michael K. Hagan, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for the Petitioner;
Carl Brown and Steve Brown, Brown Brothers Sand Company, Howard, Georgia, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for five (5) alleged violations of certain mandatory safety and health standards found in Part 56, Title 30, Code of Federal Regulations. Hearings were held in Macon, Georgia and the parties appeared and participated therein. The parties waived the filing of posthearing briefs but I have considered their oral arguments made in the course of the hearings in my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the cited conditions or practices constituted violations of the cited safety or health standards; (2) whether two of the alleged violations were Significant and Substantial (S&S); and (3) the appropriate civil penalty assessments for the cited violations.

Applicable Statutory and Regulatory Provisions

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

2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

3. Mandatory Safety and Health Standards, Part 56, Title 30, Code of Federal Regulations.

Stipulations

The parties stipulated to the following:

1. The respondent is subject to the Act and to the Commission's jurisdiction.

2. The respondent is a small sand mine operator employing nine to ten persons.

3. The payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

4. Petitioner's exhibit P-7, a computer print-out reflecting the respondent's history of prior violations, accurately reflects two prior citations during the period March 26, 1989 through March 25, 1991.

5. All of the citations in these proceedings were timely abated by the respondent in good faith.

Procedural Ruling

Although Docket No. SE 91-756-M, dealing with the alleged noise violation (Citation No. 3605258) does not reflect that an answer was filed by the respondent, I take note of the fact that the answer filed by the respondent in Docket No. SE 91-663-M, makes reference to the noise violation. Under the circumstances, I have accepted this as an answer by the respondent in Docket No. SE 91-756-M.

Discussion

The contested violations in these proceedings are as follows:

Docket No. SE 91-93-M

Section 104(a) non-"S&S" Citation No. 3251229, September 24, 1990, cites an alleged violation of 30 C.F.R. § 56.14107(a), and

the condition or practice cited is described as follows:

> The V-belt drive for the pump, located near the shaker screen was not guarded to protect persons from contacting the moving belts.

Docket SE 91-663-M

Section 104(a) "S&S" Citation No. 3605255, March 26, 1991, cites an alleged violation of 30 C.F.R. § 56.14103(b), and the cited condition states as follows:

> The operator's cab on the John Deere 644CB front end loader has a shattered windshield.

Section 104(a) non-"S&S" Citation No. 3605256, March 26, 1991, cites an alleged violation of 30 C.F.R. § 56.14101(a)(2), and the cited condition is described as follows:

> The park brake on the John Deere 644 CB front-end loader will not hold the equipment on the grade it travels.

Section 104(a) non-"S&S" Citation No. 3605257, March 26, 1991, cites an alleged violation of 30 C.F.R § 56.14101(a)(2), and the cited condition is described as follows:

> The park brake on the John Deere 444 front end loader will not hold the equipment on the grade it travels.

Docket No. SE 91-756-M

Section 104(a) "S&S" Citation No. 3605258, March 26, 1991, cites an alleged violation of 30 C.F.R. § 56.5050, and the cited condition is described as follows:

> On day shift March 26, 1991, the dredge operator was exposed to mixed noise levels of the dredge (barge) and exceeded unity (100%) by 149.71 times, 149.71% as measured with a dosimeter. This is equivalent to an 8-hour exposure to 93 dBA. Personal hearing protection was not being worn. Feasible engineering or administrative controls were not being used to eliminate the need for hearing protection.

Petitioner's Testimony and Evidence

Docket No. SE 91-93-M

MSHA Inspector Kenneth Pruitt testified that he has served as an inspector for 16 years. He confirmed that he issued the citation on September 24, 1990, after finding that a V-belt drive

for a pump motor near the shaker screen was not guarded. He explained that during a previous inspection there was a cover over the pump and some maintenance work had been done. The respondent had cut an old tank in half and installed it over the pump and motor as a guard. However, there were two openings cut into the cover to provide access to this equipment. In the event someone were to go into the tank area, they would be exposed to the unguarded V-belt and pinch points and their hand or clothing could be caught in these pinch points.

Mr. Pruitt stated that he considered it unlikely that an injury would result since the pump was located in an isolated area where no one works on a regular basis. Accordingly, he considered the violation to be non-S&S. However, he believed that if someone contacted these unguarded pinch-point with their finger or hand they would likely sustain permanently disabling injuries.

Mr. Pruitt stated that he based his moderate negligence finding on the fact that the respondent had all of the other pumps at the facility properly guarded. Abatement was achieved by blocking the area going into the tank and pump area so that no one could enter. He confirmed that there was a two to two and one-half feet distance between the tank and the opening and that the exception found in section 56.14107(b) did not apply in this case.

On Cross-examination, Mr. Pruitt confirmed that during a prior inspection visit there was a metal type enclosure or cover placed over the motor and pump in question. Although the cover was over the equipment, the two openings would allow anyone to walk into the area where the pump and motor were located. He also confirmed that someone would have to walk around the motor to reach the unguarded V-belt drive area. He agreed that if there were no openings exposing the belt drive the large tank placed over the equipment would be an adequate guard.

Docket No. SE 91-663-M

MSHA Inspector Darrell Brennan testified that he has been so employed for 13 years. He confirmed that he issued Citation No. 3605255 (Exhibit P-2), on March 26, 1991, after finding that the windshield on the loader was completely shattered and loose at the top of the frame and that the rubber grommet around the windshield frame was the only means of holding it secure. The loader was being used by an employee in the pit and Mr. Brennan confirmed that he climbed on and in the loader in order to inspect the windshield. He believed that the loosely fitted windshield could have fallen out while the machine was being operated, and if it did, the operator could sustain cuts from the jagged glass edges. Although the condition of the windshield obscured the visibility of the operator, the greater hazard was

the fact that the operator could sustain cuts on his hands in the event the windshield broke and fell in on him while operating the machine.

Mr. Brennan stated that he based his significant and substantial finding on his belief that it was reasonably likely that the windshield could fall in on the operator, and if it did, it would result in severe cuts to the operator's hands. He confirmed that abatement was achieved by removing the windshield. He also confirmed that he based his moderate negligence finding on his belief that the equipment operator and the respondent should have observed the condition of the windshield and taken steps to correct the condition.

On cross-examination, Mr. Brennan confirmed that the rubber grommet which is used to hold the windshield secure and in place is normally used for that purpose regardless of the condition of the windshield.

Inspector Brennan stated that he issued Citation No. 3605256, on March 26, 1991, after determining that the parking brake on the same loader with the shattered windshield would not hold the machine (exhibit P-3). The loader was coming out of the pit on a slight incline, and after it was stopped, the operator applied the parking brake and it would not hold or stop the machine. The loader was empty, and the operator initially stopped the machine with the service brakes. He took it out of gear and applied the parking brake and it would not hold the machine.

Mr. Brennan stated that he considered the violation to be non-"S&S" because the service brakes were operational and could stop the machine, and there was no hazard exposure to many people. He based his moderate negligence finding on his belief that the equipment operator and the respondent should have been aware that maintenance was needed and that the brake condition should have been reported. Mr. Brennan confirmed that when he next returned to the mine the condition was abated and he terminated the citation. He believed that the respondent installed a new brake cable and brake shoes.

On cross-examination, Mr. Brennan stated that the service brakes were workable. He confirmed that the loader bucket could be dropped to stop the machine and he recalled that the operator applied the service foot brake and dropped the bucket at the time he stopped the machine so that he could inspect it.

Inspector Brennan stated that he issued Citation No. 3605257 on March 26, 1991, (exhibit P-4) after inspecting another loader and finding that the parking brake would not hold the machine when it was applied by the operator. He confirmed that this loader was also operating in the pit and that the service foot

brakes were operable. He considered the violation to be non-S&S, because an injury was unlikely. However, in the event of injury resulting from the machine running into someone, it would result in "lost workday or restricted duty" type injuries. He believed the violation was the result of moderate negligence because the equipment operator should have been aware of the condition and reported it so that repairs could be made. A new parking brake cable and brake shoes were installed to abate the violation.

On cross-examination, Mr. Brennan stated that he did not further inspect the loader to determine whether it was equipped with a transmission parking device.

Docket No. SE 91-756-M

Inspector Brennan testified that he issued Citation No. 3605258, on March 26, 1991, after determining that the dredge operator on the barge used to suck up sand was exposed to noise levels in excess of the noise limits stated in the cited mandatory standard section 56.5050. Mr. Brennan stated that he conducted a noise survey for the full eight hour work shift from 7:00 a.m. to 3:00 p.m., using a Quest noise dosimeter. The device was clipped to the shirt collar near the ear of the employee operating the dredge. He checked the device readings periodically during the testing period. The results of his test are shown in exhibit P-6.

Mr. Brennan stated that the sound level meter readings varied from 90 to 96 dBA's, but that the average noise exposure during the shift was equivalent to an eight hour exposure of 93 dBA's. This exceeded the required and acceptable level of 90 dBA's pursuant to section 56.5050. He confirmed that the source of the noise was the dredge electric pump motor, and that the operator was not wearing personal hearing protection.

Mr. Brennan stated that the violation was abated after the respondent constructed an insulated plywood barrier and installed it between the electric motor and the dredge operator. The measured noise exposure after this installation was reduced to 86.5 dBA's, and he attributed this to the barrier. He estimated the cost of construction of the barrier at approximately $100,and he did not believe that this expense was out of proportion to the reduced noise exposure which was achieved.

On cross-examination, Mr. Brennan stated that he had no knowledge as to whether any previous noise studies or tests were ever made at the respondent's mining operation. He did not know the cost of the dosimeter which he used at the time of the inspection, and indicated that such a device could be purchased at Radio Shack for approximately $20.

In response to further questions, Mr. Brennan stated that he considered the violation to be significant an substantial because it was reasonably likely and proven that long exposure to excessive noise levels can cause permanent hearing loss. He confirmed that he did not test any other equipment for noise and believed that the plant was down for maintenance at the time of his inspection. He confirmed that the violation was the result of moderate negligence and that the respondent should have been aware of the noise requirements found in section 56.5050. He further stated that the respondent had the option of using administrative controls to limit the noise exposure by rotating different employees to operate the dredge. As far as he knew, the employee who he tested was the only person regularly assigned to the dredge.

Respondent's Testimony and Evidence

Docket No. SE 91-93-M

Carl Brown, the operator, produced three photographs of the cited pump V-belt drive in question (exhibits R-1 through R-3). Mr. Brown stated that the cover which was previously placed over this equipment was placed there to protect it from the sun which at times generated a lot of heat. The tank enclosure was installed to guard the pump and V-belt drive and the doors were cut out and a fan installed to provide cooling. Mr. Brown was of the opinion that the metal enclosure previously placed over this equipment provided adequate guarding. He also pointed out that the area in question is a remote area and that "not even a rabbit" could get caught in the cited V-belt drive.

On cross-examination, Mr. Brown stated that the V-belt drive in question is visible and accessible through the doorway opening shown in photographic exhibit R-3, and that the wire mesh enclosure shown in exhibit R-2 was installed as a guarding device to abate the citation.

Docket No. SE 91-663-M

Carl Brown testified that the cited John Deere 444 loader was purchased approximately 10 years ago as a used machine and that the parking brake was inoperative. He stated that parts were purchased at that time and the parking brake was repaired. He maintained that the loader operator does not use the parking brake and that the loader bucket is routinely dropped when the loader operator parks the machine or stops it. He also indicated that the loader transmission has a park mode which is used to hold the machine.

With respect to the cited 664 CB loader, Mr. Brown stated that the loader is rusty, sandy, and wet and that this affects the parking brake. He produced a photograph of the interior

braking pedals and devices to support his description of the machine (exhibit R-2). He also indicated that the parking brake is not used and that the operator drops the bucket to hold the machine.

With regard to the cited loader windshield condition, Mr. Brown produced three photographs of the loader in question (Exhibit R-1). He took the position that the condition of the windshield did not obstruct the vision of the operator. He disagreed that the windshield was totally shattered, and he described the conditions shown in the photographs as cracks. He also did not believe that the windshield could fall out and shatter and he stated that when it was removed from the machine it came out intact and in one piece, and that it was "safety glass".

Docket No. SE 91-756-M

With regard to the cited noise violation, Mr. Brown suggested that he was not aware of the noise requirements found in the cited regulation and he stated that he did not have a dosimeter to conduct any noise exposure tests. He further stated that MSHA inspectors have not previously tested his equipment for noise and he believed that an inspector should first inform him of what is required for compliance rather than issuing him citations and fines for violations. He also believed that noise from trains which pass by his property are louder than the noise from the cited dredge motor.

Findings and Conclusions

Citation No. 3251229

I conclude and find that the unrebutted and credible evidence presented by the petitioner establishes a violation of mandatory safety standard 30 C.F.R. § 56.14107(a). Although the respondent made an initial effort to guard the cited pump V-belt drive, the testimony of the inspector and the photographs presented by the respondent establish that the two openings in the tank enclosing the pump exposed the unguarded pinch points and presented a hazard to anyone who may have inadvertently come in contact with these moving parts. The standard requires that such moving machine parts be guarded to prevent persons from contacting the exposed drive. While it is true that the cited equipment was located in a remote area where employees did not routinely work or travel, and mitigates the gravity, this is no defense to the violation. The citation IS AFFIRMED.

Citation 3605255

In this instance, the respondent is charged with a violation of 30 C.F.R. § 56.14103(b), because of the cited condition of the

windshield on the front-end loader. The standard requires the replacement or removal of damaged self-propelled mobile equipment windows which obscure visibility necessary for safe operation, or create a hazard to the equipment operator.

Although the citation written by the inspector states that it was "shattered" and does not reflect whether the condition posed a visibility problem,or created a hazard to the equipment operator, the inspector testified that his principal concern was that the shattered windshield, which he personally inspected and observed and found to be loosely fitted in the frame and held into place by a rubber grommet, could have fallen in on the equipment operator and cut his hands.

The respondent's defense is that the windshield condition did not obscure the operator's visibility. The respondent also maintained that since the damaged windshield was removed in one piece to abate the citation, it was unlikely that it would fall in on the operator and that it did not pose a hazard.

The photographic exhibits submitted by the respondent reflect that the operator has a clear view out of the window from his position in the cab. Accordingly, I conclude and find that the condition of the windshield did not obscure his visibility.

After viewing the photographs, I find that the windshield was shattered at the top and contained several large cracks and "pitted" areas along the entire surface, particularly at the bottom immediately in front of the steering wheel where the operator is seated. In view of these conditions, I conclude and find that they created a hazard to the operator while he was seated behind the windshield while operating the loader in the pit. I further conclude and find that given the condition of the windshield, as shown in the photographs, it was reasonably likely that the loosely fitted, cracked, and shattered windshield could have fallen in on the operator while the loader was operating in the pit, exposing him to a hazard and placing him at risk. Under the circumstances, I conclude and find that a violation has been established and the citation IS AFFIRMED.

Citation Nos. 3605256 and 3605257

The credible testimony and evidence presented by the petitioner establishes that the parking brakes which were installed on the two cited front end loaders would not hold the empty equipment when the brakes were applied by the operator on the sight pit grades. The cited mandatory section 56.14101(a)(2), provides that if self-propelled mobile equipment is equipped with parking brakes, the brakes must be capable of holding the equipment with typical loads on the maximum grade it travels. In these instances, the brakes would not hold the loaders, which were empty, on slight pit grades.

The respondent's defense is that the loader's were subjected to wear and tear and that one or both of them were equipped with transmissions which had a stopping or parking mode, and that the buckets are routinely dropped to prevent the loaders from moving is rejected. The standard does not provide for the use of transmissions or dropped buckets to hold a loader which is equipped with a parking brake. The parking brake must be operable and capable of holding the machine, independent of any other devices. In this case, it is clear that the parking brakes would not hold the loaders, and that they did not function as they were obviously intended to function when they were installed on the equipment. Under the circumstances, I conclude and find that the violations have been established, and the citations ARE AFFIRMED.

Citation No. 3605258

I conclude and find that the credible and unrebutted evidence presented by the petitioner, including the noise survey test results, supports the inspector's finding that the dredge operator was exposed to noise levels in excess of the requirements found in the cited standard section 30 C.F.R. § 56.5050. Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violations

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

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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; (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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In United States Steel Mining Company, Inc., 7 FMSHRC 327, (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether if left uncorrected, the cited condition would reasonably likely result in an accident or injury.

Citation No. 3605255

I conclude and find that the has not rebutted the credible testimony of the inspector in support of his "S&S" finding concerning the windshield condition on the John Deere 644 CB front-end loader. I find that the inspector's testimony supports a reasonable conclusion that in the normal course of operating the loader in the pit area, the loader operator was exposed to a hazard in the likely event that the loosely fitted and broken windshield fell in on him while seated at the operator's control. If this occurred, I find that it was reasonable likely that the loader operator would sustain cuts of a reasonably serious nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Citation No. 3605258

I conclude and find that the inspector's credible and unrebutted testimony that long term exposure to excessive noise levels can result in permanent hearing loss support his "S&S" finding. The unrebutted evidence reflects that the dredge operator who was tested was the only person regularly assigned to the dredge, and he was not wearing personal hearing protection, and no administrative controls were being used. Given the fact

that the evidence suggests that the dredge operator had not previously been tested, and that prior noise surveys were not conducted at the mine site, I believe one can reasonably conclude that he was probably exposed to excessive noise levels over a relatively long period of time. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and that the payment of the civil penalty assessments proposed in these proceedings will not adversely affect its ability to continued in business. I adopt these stipulations as my findings in these proceedings.

History of Prior Violations

The evidence reflects that the respondent was served with two single penalty citations during the period March 26, 1989, through March 25, 1991, and paid a civil penalty assessment of $20 for one of these violations. The second violation is the contested Citation No. 3251229, which is the subject of Docket No. SE 91-93-M. I conclude and find that for purposes of the instant proceedings, the respondent has a good compliance history and I have taken this into account.

Gravity

Based on the inspector's gravity and non-S&S findings with respect to Citation Nos. 3251229, 3605256, and 3605257, I conclude that these violations were non-serious . With regard to Citation Nos. 3605255 and 3605258, concerning the condition of the loader windshield and the dredge operator's noise exposure, I agree with the inspector's gravity findings and conclude that these were serious violations.

Negligence

I agree with the inspector's moderate negligence findings with respect to all of the contested citations, and I conclude that all of the violations resulted from the respondent's failure to exercise reasonable care.

Good Faith Abatement

The parties stipulated that all of the violations in these proceedings were timely abated by the respondent in good faith. I adopt the stipulations as my findings.

Civil Penalty Assessments

Based on the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found is section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed.

Docket No. SE 91-93-M

Citation No.	Date	30 C.F.R. Section	Assessment
3251229	9/24/90	56.14107(a)	$20

Docket No. SE 91-663-M

Citation No.	Date	30 C.F.R. Section	Assessment
3605255	3/26/91	56.14103(b)	$40
3605256	3/26/91	56.14101(a)	$20
3605257	3/26/91	56.14101(a)(2)	$20

Docket No. SE 91-756-M

Citation No.	Date	30 C.F.R. Section	Assessment
3605258	3/26/91	56.5050	$35

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above for the citations which have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of these decisions, and upon receipt of payment these matters are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 339, 1371 Peachtree Street, NE., Atlanta, GA 30367 (Certified Mail)

Mr. Carl Brown, Brown Brothers Sand Company, Box 22, Howard, GA 31039 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 24 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-635 A.C. No. 11-02408-03642
v.	:	
	:	Zeigler No. 11 Mine
ZEIGLER COAL COMPANY, Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;
Gregory S. Keltner, Esq., Zeigler Coal Company, Fairview Heights, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $40, for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. A hearing was held in St. Louis, Missouri, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and health Act of 1977, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1, et seq.

3. Mandatory safety standards 30 C.F.R. § § 75.1105 and 75.316.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Commission has jurisdiction in this proceeding.

2. The respondent owns and operates the No. 11 Mine, an underground mine extracting bituminous coal, and the mine affects interstate commence.

3. As of February 5, 1991, the respondent extracted 14,918,109 tons of coal at all of its mines. The No. 11 Mine extracted 1,655,780 tons of coal from February 5, 1990, to February 5, 1991.

4. Respondent had 183 violations in the preceding 24 months ending on May 30, 1991, at the Murdock Mine and Mine No. 11.

5. The payment of the full civil penalty assessments for the citations in question will not impair the respondent's ability to continue in business.

6. On May 2, 1991, Inspector Robert Montgomery conducted an inspection in Mine No. 11. He found that belt air was traveling from the section belt tail outby and no regulator was provided in the intake stopping line. The check curtain was between the No. 23 and 24 crosscuts. This was in the east off 2nd north off main east unit No. 3 working section. The inspector issued Citation No. 3536731 for an alleged violation of 30 C.F.R. § 75.316.

Discussion

Section 104(a) non-"S&S" Citation No. 3842906, issued on April 17, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.1105, and the cited condition or practice is described as follows:

> The air current used to ventilate a battery charging station was not coursed directly into the return. The charging station contained a set of batteries for a battery powered scoop tractor that had the charging

leads connected to the battery but no power was on the charging box. A chemical smoke cloud was used to determine the direction of air flow in the charging station. This smoke cloud showed part of the air ventilating the charging station coursing into the haulage entry and not to the return entry.

The parties agreed to settle this violation and they presented arguments on the record in support of the settlement. The parties agreed that the issue with respect to the violation is whether or not the area cited as a battery charging station was in fact such a station covered by section 75.1105. The parties confirmed that after discovery, including the taking of depositions, the respondent conceded that the cited area was a battery charging station. Further, the respondent does not now dispute the fact that the station was not in compliance with the cited section 75.1105, and it concedes that the citation was properly issued (Tr. 12-13).

The respondent agreed to pay the full amount of the proposed civil penalty assessment and to withdraw its contest. After further consideration of the pleadings and arguments in support of the proposed settlement, and pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the settlement was approved from the bench (Tr. 15). My decision in this regard is herein re-affirmed.

Section 104(a) non-"S&S" Citation No. 3536731, issued on May 2, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, and the cited condition or practice states as follows:

> The ventilation plan was not followed in the No. 3 unit. The belt air was traveling from the section belt tail outby and no regulator was provided in the intake stopping line as depicted in sketch No. 6, page 15 of the plan. The check curtain was between the No. 23 and No. 24 crosscuts.

Petitioner's Testimony and Evidence

MSHA Ventilation Specialist, Robert M. Montgomery testified that he has been so employed for three years, and previously served as a mine inspector for approximately ten years. He confirmed that he was familiar with the MSHA approved mine ventilation plan through his review of the plan every six months, and he identified a copy of the plan (Exhibit R-5, Tr. 20). He confirmed that the plan addresses the basic way the mine is to be ventilated, and it includes drawings of how the face ventilation is to be obtained. He explained that sketches 5 and 6 which appear at pgs. 14-15 of the plan depict typical five entry panel or room sections, but there could be more or less than five entries. He further explained that the term "typical" means

"examples of the basic system by which they're going to advance the working places". The plan was in effect at the time the citation was issued, and he explained the symbols shown on the sketches. Referring to page 2 of the plan, he confirmed that the respondent may deviate from the plan sequences where mine conditions warrant (Tr. 23).

Mr. Montgomery confirmed that page 9, paragraph C of the ventilation plan covers the construction and operation of regulators. He explained that a regulator provides ventilation air from one location to another, and that "in order to comply with other sections of the regulations, it's necessary to separate your intake escapeway and return from the belt entry which means that you have to arrive at air provided for the neutral from a clean air source" (Tr. 24).

Mr. Montgomery stated that on May 2, 1991, he was in the process of making a six-month review of the mine ventilation plan and he walked the neutral air entries to the mouth of the section. He also walked the belt line and determined that the air was flowing out. After making several smoke tests and noting that there was no intake regulator, he determined that the air was coming through the curtain between the No. 23 and No. 24 crosscut as shown on the sketch which he made at that time (Exhibit P-2, Tr. 25-26). He confirmed that the intake air was in the No. 6 entry and the return was in the No. 1 entry. Entries No. 2 through No. 5 were neutral air entries, and the No. 4 entry was the belt entry (Tr. 28-29).

Mr. Montgomery stated that he walked the belt line and determined with a smoke cloud that the neutral air was traveling outby the face and away from the entries. He found a shuttle car parked against a check curtain between the No. 5 and No. 6 entries, at the No. 25 crosscut, and the air was passing under the curtain. He considered this to be a violation of section 75.316, because the ventilation plan required the installation of an intake regulator just outby the tailpiece in the No. 23 crosscut between the No. 5 and No. 6 entries. The purpose of the regulator is to allow clean intake air to be supplied to the belt and neutral entries. However, in this instance, instead of a regulator being used to supply the air, it was being supplied by the check curtain which had been pushed back by the shuttle car (Tr. 31-35).

Mr. Montgomery stated that if the shuttle car were moved, the curtain would drop and it would be reasonable to expect that "the air would travel to the No. 6 working face and then go back" (Tr. 37). He confirmed that he checked the air sweeping through the check curtain for methane and oxygen content and his test device alarm did not sound. He assumed from this that the air was "clean air". The air had not swept the face because it was coming off the intake and through the check curtain, and it was

probably the same quality of air that would have gone through the regulator if it had been there (Tr. 39-40).

Mr. Montgomery stated that the failure to install the regulator is a violation of sketch No. 6, page 15, of the ventilation plan. Even though clean air was passing through the curtain by the shuttle car, a violation still existed because "they were relying on a shuttle car being parked in the curtain as a place to gain their intake air for their neutral entries. When the shuttle car is moved, it ceases to become that" (Tr. 41). Mr. Montgomery did not know whether the use of the curtain in lieu of the regulator was by accident or design (Tr. 43).

Mr. Montgomery confirmed that he issued the citation and found a low degree of negligence because during his inspection of other units he found that the regulators were installed where they were supposed to be under the plan. He confirmed that the respondent did not challenge the need for a regulator and informed him that one would be installed. He also determined that an injury was unlikely because a combination of circumstances would have to occur before any possible injury, and he concluded that the violation was non-"S&S". Abatement was achieved by removing a block from the intake stopping at the No. 23 crosscut between the No. 5 and No. 6 entries, and he smoke tested the air after this was done and found that it was traveling through the regulator at the required volume and velocity (Tr. 45-48).

On cross-examination, Mr. Montgomery confirmed that the ventilation plan does not contain an exhaustive list of when the respondent may deviate from the plan sketches, and any deviation would depend on what is called for by good mining practices (Tr. 8). He confirmed that all of the neutral entries had check or isolation curtains across them one crosscut inby the location where he believed the required regulator should have been installed (Tr. 51). He confirmed that ventilation plan sketch No. 6, page 15, rather than sketch No. 5, page 14, applies in this case, and he explained that the direction of the air in the intake stopping line determines whether a regulator is to be provided (Tr. 53).

Mr. Montgomery confirmed that the ventilation sketch on page 14 of the plan also has check curtains across all neutral entries, and that the sketch on page 15 only has one check curtain. He explained that plan part 1, paragraph 4(c), provides for the hanging of additional curtains as necessary to control the air. He did not consider the lack of a regulator to be a minor plan deviation "because you're changing the position from where you're obtaining your air for those entries" (Tr. 55). He confirmed that he was not involved in the development or approval of the ventilation plan in question, and in terms of the approval

process, he could not speak to the intent of the sketches which are included in the plan (Tr. 55).

Mr. Montgomery stated that there is no ventilation plan provision covering the exact situation where all of the neutral entries have check curtains across them and the air is flowing in an outby direction. He confirmed that there is no specific plan sketch that is identical to the situation which caused him to issue the citation, but he denied that he overlapped the two plan sketches in question. He further explained the basis for issuing the citation as follows at (Tr. 56-57):

> Q. So you just looked at Page 15, saw there was no regulator, didn't consider the presence of absence of the check curtains, and issued the citation?
>
> A. Yes, sir.
>
> JUDGE: Let me understand that again. On Page 15, sketch No. 6, that Mr. Keltner -- you circled it on the copy you gave me. That little square with a line through it, is that the symbol for regulator?
>
> THE WITNESS: Right here, yes, sir.
>
> JUDGE: That is the symbol for regulator?
>
> THE WITNESS: Yes, sir.
>
> JUDGE: So you looked at that and then you looked at the actual scene and you saw there was no regulator there?
>
> THE WITNESS: Yes, Sir.

Mr. Montgomery stated that some leakage in check curtains can be expected as a normal part of mine ventilation. He confirmed that the respondent timely abated the violation in good faith (Tr. 63).

In response to further questions, Mr. Montgomery confirmed that he is familiar with ventilation plans and has reviewed them as part of his job. He stated that the sketches are "examples", and that the sketches showing neutral airflows outby show intake regulators, and neutral air flowing inby shows return regulators. He explained his sketch of the scene, exhibit P-2, as compared to ventilation plan sketch No. 5, including the functioning of the regulators and the direction of the air (Tr. 66-70). He confirmed that he made a smoke test to determine the direction of the air flow outby the check curtains in the No. 2 and 3 entries, but he did not measure the air velocity. He did not check the air leakage volume, and he believed that the air quantity on the

intake side was 50,000 cubic feet, and 30,000 on the return side (Tr. 72).

Respondent's Testimony and Evidence

David L. Lyon testified that he presently serves as manager of accident investigations in the mine safety department, and that at the time of the inspection he was the company representative traveling with Inspector Montgomery. He stated that he has a degree in mining engineering from the University of Missouri where he took a course in mine ventilation, and has worked 15 years for the respondent in the safety and engineering departments. He has also drafted ventilation plans, and is familiar with the mine ventilation plan in this case (Tr. 74-75). He described the section where the citation was issued, and confirmed that there were check curtains across the four neutral entries, and that coal cutting began while he and the inspector were on the section (Tr. 76). He further confirmed that he assisted the inspector in taking his air readings and that the inspector stated that the air was well balanced on the unit. The citation was abated by knocking a block out of the stopping at the No. 23 crosscut, and it had no effect on the direction of the air flow. However, air did flow through the stopping from the intake side (Tr. 78).

Mr. Lyon confirmed that the inspector released some smoke clouds to determine the direction of the airflow. The air direction in the Nos. 2 through 4 entries "was an outby movement and also towards the return stopping line" and the smoke "rose to the top and just dissipated" (Tr. 79). Mr. Lyon did not believe that there was a violation of the ventilation plan, and he explained as follows at (Tr. 80-81):

> A. Basically I told Inspector Montgomery I wanted to look at the ventilation plan first. And I looked at the ventilation plan with the section foreman and the situation we had there did not depict either one of the sketches in the plan. We had a situation that wasn't really shown on the sketches.
>
> Q. Did you feel at the time it was in violation?
>
> A. No. I didn't feel like there was a violation at the time.
>
> Q. Why is that?
>
> A. Because there wasn't -- the sketch that he was using to show the violation was not exactly the situation we had there.

Q. And even that being the case, Mr. Lyon, why did you go ahead and have the hole knocked in the stopping?

A. Well, to -- he was going to write a citation and in order to abate it, you know, the citation, we had to install a regulator in that stopping line.

On cross-examination, Mr. Lyon confirmed that he was very familiar with the mine ventilation plan, and that the situation he observed with the inspector was not identical to sketch No. 6, on page 15 of the plan. He confirmed that at the time of the inspection there were six entries, and the plan sketch shows five entries (Tr. 82-83). Mr. Lyon agreed that the sketches are only examples, and he pointed out that note No. 1 at page 2 of the plan allows for variations in the number of entries depending on ventilation requirements and mining conditions and that the plan serves as a guide for good mining practices to provide safe ventilation. He explained that a regulator directs the air from the intake into the neutral, or from the neutral into the return, and that the regulator shown on the sketch is used to draw either the intake into the neutral or the neutral into the return. The regulator shown on the sketch directs the air flow from the intake into the neutrals so that the neutrals have enough air movement to preclude any methane build-up on the belt entry. Mr. Lyon agreed that nonpermissible equipment and power points are located in the belt entries and that the neutral and return air which has passed the working faces should not be coursed into these entries (Tr. 87). He also agreed that regulators are important and conceded that there was no regulator in the stopping (Tr. 89).

In response to further questions Mr. Lyon stated that it was his position that insofar as the neutral curtains and neutral air movement is concerned, none of the sketches in the ventilation plan are applicable to the situation which was presented at the time of the inspection. Mr. Lyon further stated that sketch No. 5 does not apply, and he believed that the citation was issued in error because there was no ventilation sketch that applied to the particular situation presented (Tr. 91).

David Stritzel, respondent's director of health and safety, stated that he holds a B.S. degree in mining engineering from the University of Missouri at Rolla, and that his studies included ventilation. His responsibilities include the development of ventilation plans, and his former experience includes eleven years of service as a Federal coal mine inspector and supervisory technical specialist reviewing various mine plans (Tr. 92-97). He confirmed that he was familiar with the mine ventilation plan in effect on May 2, 1991, and that he wrote it. He confirmed that he was not present when the inspector issued the citation, and he did not dispute the facts as found by the

inspector. However, he did not believe that there was a violation (Tr. 98-99).

Mr. Stritzel stated that the only purpose for an intake regulator in the ventilation plan is in connection with the check curtains which were up across all of the neutral entries. He explained that as a result of a fatality which occurred in 1985, in an accident involving equipment passing through one of the curtains, the company decided that the best method for avoiding future incidents of this kind was to eliminate the check curtains. He submitted such a plan to MSHA, and during the discussions with MSHA which followed, the control and direction of the air became an issue, and discussions continued for a year while he resubmitted a plan to allow the removal of the check curtains (Tr. 99-102). He further explained as follows at (Tr. 102-104):

* * * * * * *

> And the stipulation that MSHA was demanding in that plan in order to approve my request to remove those curtains, they requested only two items; one, that an isolation curtain be maintained in the power entry and that a hole be knocked out in the intake stopping line.
>
> And quite frankly, I was tired of fussing with them and it dragged on already for a year and those two particular items I didn't see where it did anything or would have no effect on the ventilation or have any effect on the mining process so I just gave in and put it into the plan knowing it would have no effect simply so we could get rid of these isolation curtains and we wouldn't have to be faced with people getting killed again.

Mr. Stritzel agreed that the check curtains were up at the time of the inspection, but he did not believe that they were necessary and he could not explain why the foreman had them installed. He also agreed that what the inspector observed and sketched at the time of the inspection was similar to ventilation plan sketch No. 6, as well as No. 5. He confirmed that the plan does not clearly explain when the two sketches are to be applied, and he stated as follows at (Tr. 110-112):

* * * * * * *

> But if someone were to just pick up this plan, I'm having difficulty right at this point in time and -- I mean I haven't reviewed it carefully but it would seem to me that the plan some place in here would explain in King's English when sketch No. 5 applied and when

sketch No. 6 applied. But apparently it doesn't do it, does it?

THE WITNESS: No, sir, it doesn't. In the development of the plan both of those issues on the regulator on the intake stopping and that one isolation curtain in reference to sketch No. 6 were both issues that I objected to that was demanded by MSHA.

I merely put them in there simply because I saw where they had no effect. We haven't had any problem with the application of these sketches by any of the inspectors that inspect No. 11 mine until this incident. This is the first time we were issued a citation for this particular issue so it never was a problem.

THE WITNESS: I will tell you very frankly. It's not that it's an issue that causes us any significant economic problems or safety problems or anything else. It centers around one issue. It's part of the programs that's being developed by MSHA in Washington that puts our company in a spot.

What I'm referring to is the special emphasis program. 75.316 is one of the criteria that they've targeted. We've already been hit with one mine placed on this special emphasis program.

We have very strong feelings about that program. We feel it is illegal. Encompassing provisions like 316 is too broad. It encompasses too many different provisions of the law or particular type violations.

* * * * * * *

This is one of the particular criteria, 75.316, that MSHA has targeted. Consequently, we're looking very close at each and every one of those provisions that MSHA has targeted to be included in this special emphasis program.

Mr. Stritzel believed that the placement of the curtains determines whether or not a regulator is required, and when asked why the ventilation plan does not specifically state that this is the case, he explained that during the development of the plan "there didn't seem to be a need for it because of all of the discussions which took place and no one expressed any problems with wanting to know why that regulator was there and under what circumstances" (Tr. 117).

On cross-examination, Mr. Stritzel stated that the regulator shown "to the far right" in ventilation plan sketch No. 6 has no purpose whatsoever and that it was placed in the sketch "to satisfy MSHA's desires" (Tr. 118). He stated that the regulator would suck in intake air, but that the regulator on the intake stopping line as shown in the sketch is not necessary (Tr. 123). He confirmed that regulators are also shown on sketch No. 6, for proper ventilation of the neutral air on the return side (Tr. 124).

Mark Eslinger, MSHA ventilation engineer, who was present at the hearing, was called as the court's witness in this matter to clarify the ventilation plan. He stated as follows at (Tr. 137-139):

> MR. ESLINGER: Sir, if we approve this sketch without the regulator and that the source of the intake air that goes down the belt and other neutral entries came from a curtain as shown on a sketch, yes, that would be okay.
>
> But we don't approve that. Sir, I have not -- I'm involved in a day-to-day approval of mine plans and we have not approved a curtain regulator let's say as the means providing the neutral air to the neutral entries.
>
> * * * * * * *
>
> Q. Is there any reason why this particular ventilation plan doesn't explain when sketch 5 comes into play and when sketch 6 comes into play?
>
> A. Judge, I understand it as the way I would approve that plan is every time the belt air goes into outby direction -- every time that the belt air or the neutral air flows out that there is a regulator on intake stopping letting the air in.
>
> Q. So that would be exactly how the inspector has his sketch. The air is going in the outby direction?
>
> A. Yes, going outby direction, going out of the mine. There is a regulator to let it in. Every sketch for the air goes out, there is a regulator on the intake side. Every sketch where the air goes in the inby direction, there is a regulator on the return side to let the air out.

Mr. Eslinger confirmed that according to the inspector's smoke tests, the air used to ventilate the neutral entries was air that had not yet reached the face. The air going up the intake entry was sweeping past the curtain and shuttle car and it

was in effect performing a function similar to that of the regulator. Mr. Eslinger agreed that the inspector issued the citation after he sketched out the conditions he observed and concluded that a regulator was required pursuant to plan sketch No. 6 (Tr. 139-140). He stated as follows at (Tr. 141-142):

> Q. You also heard Mr. Stritzel's comment that this -- that Zeigler put this stopping in this sketch No. 6 grudgingly, shovingly?
>
> A. Yes.
>
> Q. And pretty much to placate MSHA if you will so they could get their plan?
>
> A. Yes.
>
> Q. Do you agree with that?
>
> A. Yes. That is an adversarial relationship, sir.
>
> Q. So there is some difference of opinion as to the usefulness of this particular stopping on sketch 6?
>
> A. No. I've never known there being a question on the regulator. I knew there was a question on the number and location of curtains but never on the location of the regulator. This is the first time I've heard that argument presented, sir.
>
> Q. But there was some difference of opinion about where to put the curtains?
>
> A. Correct.
>
> Q. But not on the regulator?
>
> A. Correct.

Petitioner's Arguments

Petitioner's counsel argued that the facts in this case are not disputed or controverted by the respondent. He stated that the inspector believed that a regulator was necessary between the No. 23 and No. 24 stoppings, as shown on the ventilation plan map because it was necessary to have intake air go over the belt line in the neutral air. Counsel conceded that intake air was flowing in that area at the time of the inspection, even without the regulator, but he took the position that the curtain propped against the shuttle car was used for this purpose and that once

mining took place, the shuttle car would be used for mining and it is not intended to be used for ventilation. Counsel asserted that the regulator shown in the sketch is there to provide intake air over the belt entry. Since it is unrebutted that nonpermissible power points are located in that entry, intake air is necessary to clear out any contaminants, particularly methane (Tr. 127-130).

Petitioner's counsel asserted further that the ventilation plan provides for the use of ventilation check curtains to regulate the flow of air, and the plan also covers the construction of regulators to help regulate the neutral air. Counsel pointed out that regulators are permanent air control devices and that curtains can be ripped down and may fall (Tr. 132-135).

Respondent's Arguments

Respondent's counsel took the position that ventilation plan sketch No. 6 does not apply in this case because the direction of the air flow is irrelevant. Counsel further asserted that sketch No. 5 is not a fair and accurate representation of the prevailing situation at the time of the inspection and that both sketches have some similarities to what the inspector found. Counsel argued that there is no specific sketch covering the situation which prevailed, and since MSHA is responsible for approving the ventilation plan, it should require the respondent to put a specific sketch in its plan. Since the plan does not cover every contingency and provides for certain exceptions, counsel concluded that MSHA has the burden of proving a violation and that it has not done so in this case (Tr. 144-146).

Findings and Conclusions

Fact of violation. Citation No. 3536731.

In this instance the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.316, for failure to follow its approved ventilation system and methane and dust control plan. It is well settled that the failure to follow an approved plan constitutes a violation of section 75.316, which provides as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the

Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The citation was issued after the inspector, who is a ventilation specialist, observed that a ventilation regulator was not installed in the intake stopping line, and that instead of a regulator, the respondent was using a check curtain pushed back by a shuttle car to supply air ventilation to the belt entry. The inspector believed that ventilation sketch No. 6, which appears at page 15 of the applicable MSHA approved ventilation plan, which is labeled a "typical 5-entry panel or room section", and which clearly shows a regulator installed in a cross-cut between two entries, applied to the six-entry section in question. He further believed that a regulator was required at the stopping location in the No. 23 crosscut between the No. 5 and No. 6 entries as shown on the sketch of the scene which he made in the course of his inspection (Exhibit P-2).

Although the inspector conceded that the air passing under the check curtain which had been propped open by the shuttle car was "clean air", he was concerned that once mining began, the shuttle car would be moved and used in the mining process and the curtain would drop and would no longer serve as a device to supply or course the air to the belt entry in question. Under the circumstances, and in order to maintain and allow an uninterrupted means of regulating the airflow through the belt entry in question, the inspector believed that the respondent should have provided a regulator as shown in ventilation sketch No. 6, which was incorporated as part of the approved plan.

The inspector conceded that the cited violative condition was on a six entry panel or section, rather than a five entry panel or section as shown on the ventilation sketch in question. However, he explained that the sketch is intended as an example of a typical basic system or method of ventilating a unit as mining is advanced, and that there is no identical or specific sketch which may apply to neutral entries, including a belt entry, which have check curtains installed across all of the entries and air is flowing in an outby direction. Under these circumstances, he believed that the use of a check curtain propped open by a shuttle car was not intended as a means of regulating the air flow over a belt entry where nonpermissible power points are located, and that a regulator was required under the particular conditions he found at the time of his inspection.

The respondent concedes that there are similarities in ventilation sketches 5 and 6, and the conditions found by the inspector at the time of his inspection and which prompted him to issue the citation. However, the respondent's defense is based

on an argument that the approved ventilation plan does not include a sketch which is identical to the situation found by the inspector. However, respondent's safety manager Lyon, who was familiar with the ventilation plan, acknowledged that the plan sketches are only examples, and he cited the first part of the plan which allows for variations in the number of entries depending on ventilation requirements and good mining practices, and provides for deviations from the plan under certain circumstances. Mr. Lyon did not believe that there was a violation because there is no identical sketch which precisely covers the ventilation system in use at the time of the inspection. However, he conceded that regulators are important ventilation devices.

Respondent's safety director Stritzel, who drafted the ventilation plan which was in effect at the time of the citation, but who was not present during the inspection, did not dispute the facts as found by the inspector at that time. He also agreed that the inspector's sketch of the prevailing conditions as he observed them were similar to ventilation sketch No. 6, as well as sketch No. 5. Even though he authored the plan, Mr. Stritzel admitted that it does not clearly explain the conditions under which the two sketches would apply. Further, Mr. Stritzel was of the opinion that an intake regulator served no useful purpose, and he indicated that the regulator provided for in the ventilation plan was included as part of the plan at the insistence of MSHA following a fatality which resulted from equipment passing through one of the ventilation check curtains which has been installed across neutral entries. Mr. Stritzel stated that in exchange for allowing him to eliminate the curtains, MSHA insisted on a regulator in the intake stopping line. However, he could not explain why the curtains were installed across the neutral entries at the time of the inspection in this case, and he did not believe they were necessary. In short, Mr. Stritzel apparently did not believe that the ventilation curtains which were in place, or the regulator which was not in place, were necessary to maintain the ventilation at the time of the inspection.

MSHA's ventilation engineer Eslinger, who agreed with Mr. Stritzel's testimony that the regulator was included as part of the ventilation plan at MSHA's insistence, testified that any prior disagreements by the respondent were in connection with the number and location of ventilation curtains, and that the respondent has never at any time prior to this case voiced any disagreement about the need for a regulator. Mr. Eslinger also agreed that under the conditions found by the inspector at the time of his inspection, a regulator, rather than a curtain, would be required in those instances where the air ventilation is traveling in an outby direction in a neutral belt entry.

Part I, paragraph 1, page 2, of the respondent's applicable ventilation plan (Exhibit R-5), provides as follows:

> The enclosed sketches numbered 5 through 13 depict all section and face ventilation systems (typical for each system of advance and retreat mining) including all regulators, check curtains, wing curtains, 9000 CFM measuring points, and stoppings.
>
> NOTE: The number of intake, neutral and return air courses, as depicted on the typical face sketches may vary due to the number of entries or rooms being mined, mining conditions, or the ventilation requirements.
>
> All plan sequences may be deviated from where conditions warrant a change conducive to good mining practices. However, ventilation as specified in the plan must be maintained.

The respondent's assertion that the citation must be vacated because the ventilation plan sketch relied on by the inspector is not identical to the conditions he found is rejected. During closing arguments at the hearing, respondent acknowledged the fact that the ventilation plan does not cover ever contingency. While it may be true that the ventilation sketch relied on by the inspector depicts a five entry system, the respondent concedes that the "typical" sketches are intended as examples of ventilation, and that the conditions found by the inspector, as noted in the sketch that he made during his inspection, were similar to those shown in the ventilation plan sketch. Further, the ventilation plan itself recognizes the fact that the number of intake entries and air courses as shown in the typical sketches may vary due to the number of entries being mined and other factors. Even though the plan provides for deviations in plan sequences, it specifically states that ventilation as specified in the plan must be maintained. I construe this to mean that all required ventilation control devices, such as intake regulators, must be in place as required by the overall plan, including any appropriate sketches incorporated as part of the plan.

After careful consideration of all of the testimony and evidence adduced in this case, including the testimony of Inspector Montgomery and ventilation engineer Eslinger, which I find credible, I conclude and find that the petitioner has established by a preponderance of the evidence that the failure of the respondent to install a regulator at the cited location in question constituted a violation of its approved ventilation and methane and dust control plan as charged in the citation. A violation of the plan constitutes a violation of the cited

mandatory safety standard 30 C.F.R. § 75.316. Under all of these circumstances, the violation IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a large mine operator. I adopt as my finding the stipulation by the parties that the payment of the full civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Based on the stipulations by the parties, and taking into account the fact that the respondent is a large mine operator, and in the absence of any further evidence to the contrary, I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalties which I have assessed for the violations which have been affirmed.

Gravity

The inspector determined that an injury was unlikely and he found that the violation of section 75.316, was not significant and substantial. I agree with these determinations and I conclude and find that in the circumstances presented, the violation was nonserious.

Negligence

The inspector found a low degree of negligence with respect to the violation of section 75.316, and I agree with his finding.

Good Faith Compliance

The record reflects that the respondent immediately took corrective action by removing a block from the intake stopping to provide an intake regulator and the citation was abated within 40 minutes of its issuance. I conclude and find that the respondent displayed rapid good faith abatement of the violation.

Civil Penalty Assessments

Section 104(a) non-"S&S" Citation No. 3842906, April 17, 1991, 30 C.F.R. § 75.1105. As noted earlier, the proposed settlement for this violation has been approved and the respondent has agreed to pay the $20 penalty assessment in full.

Section 104(a) non-"S&S" Citation No. 3536731, May 2, 1991, 30 C.F.R. § 75.316. On the basis of the foregoing findings and conclusions affirming this violation, I conclude and find that the petitioner's proposed civil penalty assessment of $20 for the violation is reasonable and appropriate, and it is affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $20, in satisfaction of the settlement for Citation No. 3842906. The respondent IS FURTHER ORDERED to pay a civil penalty assessment in the amount of $20, for Citation No. 3536731, which I have affirmed. Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Gregory S. Keltner, Esq., Zeigler Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1992

GRAY STONE MINING, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 91-1305-R
	:	Citation No. 9862026; 4/4/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Pokey No. 1 Mine 46-05054

ORDER OF DISMISSAL

Before: Judge Broderick

On January 17, 1992, the Secretary filed a motion to dismiss the above proceeding on the ground that the Contestant has not contested the penalty proposed for the contested citations, but has voluntarily submitted full payment of the proposed penalty. Thus the citation and the penalty are a final order of the Commission pursuant to section 105(a) of the Act.

Premises considered, the motion is GRANTED and this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Ora Dwaynne Tennant, Superintendent, Gray Stone Mining, Inc., Route 2, Box 284, Fairview, WV 26570 (Certified Mail)

Douglas N. White, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005 (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 28 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-283 A. C. No. 46-01452-03501 BB5
v.	:	
	:	Arkwright No. 1 Mine
ANDERSON EQUIPMENT COMPANY, Respondent	:	

DECISION

Appearances: James V. Blair, Esq., U. S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;
Hayes C. Stover, Esq., Kirkpatrick & Lockhart, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the Anderson Equipment Company (Anderson) with a violation of the mandatory standard found at 30 C.F.R. § 48.26(a) and proposing a civil penalty of $60 for that violation. The general issue before me is whether Anderson violated the cited standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Pursuant to notice, a hearing on the merits was held in this matter on August 20, 1991, in Morgantown, West Virginia. Post-hearing briefs were filed by the parties on October 18, 1991. I have considered the entire record of proceedings and the contentions of the parties in making the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. Anderson is subject to the provisions of the Act and the undersigned administrative law judge has jurisdiction over these proceedings.

2. Anderson is a small-sized operator under the Act and has committed no violations of the Act or the regulations promulgated thereunder in the 2 years prior to the inspection out of which this case arose.

3. At the time of the October 12, 1989 inspection we are concerned with herein, Mr. Timothy Drake, an Anderson employee, had not been provided with comprehensive training as that term is defined in 30 C.F.R. § 48.26, and allegedly in violation of that mandatory standard.

STATEMENT OF THE CASE

Section 104(g)(1) Withdrawal Order No. 3309624 was issued on October 12, 1989, and states as follows:

> Tim W. Drake observed performing mechanic duties on a 530 end loader in the yard at the preparation plant has not received the requisite safety training as stipulated in Section 115 of the Act. Mr. Drake has been determined to be a newly employed experienced miner who has not received the required training under a MSHA approved plan. In the absence of such training Tim Drake, mechanic, is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training. [A] Citation No. 3309625 for violation of 30 C.F.R. 48.26(a) has been issued in conjunction with this Order.

Citation No. 3309625, issued in conjunction with the above order and pursuant to section 104(a) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 48.26(a) and charges as follows:

> Tim W. Drake was observed performing mechanic duties on a 530 end loader in the yard area at the preparation plant. A discussion with Mr. Drake and Edward Wright, safety director for Anderson Equip. Co. revealed that Mr. Drake was not trained under a MSHA approved plan and was not provided with a Form 5000-23 proof of training.
>
> A 104(g)(1) Order No. 3309624 has been issued in conjunction with this citation.

The above-referenced order was not contested by the respondent and is not the subject of the instant civil penalty proceeding. It is mentioned here for the sake of completeness only. The petitioner is seeking a civil penalty assessment for the alleged violation noted in the section 104(a) citation and not the section 104(g)(1) Order.

FINDINGS OF FACT

1. On October 12, 1989, Timothy Drake was employed by the Anderson Equipment Company. That day, he was working on a front-end loader at the Arkwright Tipple of the Consolidation Coal Company, which is located at Granville, West Virginia.

2. MSHA Inspector George H. Phillips also conducted an inspection at the Consolidation Coal Company facility at Granville, West Virginia on October 12, 1989.

3. Inspector Phillips approached Mr. Drake and questioned him concerning his training. Drake informed him that the coal company had provided hazard training and his company (Anderson) had provided him with other safety-related training, but the inspector determined that this "other" training was not comprehensive training pursuant to an MSHA-approved training plan, and he did not have the Form 5000-23 as proof of training.

4. Anderson concedes that Drake had not received comprehensive training under an MSHA-approved plan pursuant to 30 C.F.R. § 48.26(a) as of October 12, 1989, nor was he in possession of a Form 5000-23.

5. Government Exhibit No. 1 demonstrates to my satisfaction that Mr. Drake frequently worked at various mine sites, sometimes on an extended basis, including the Consolidation Coal Company facilities at Granville, West Virginia, be it the Arkwright Tipple or the Komfort Tipple. For example, from March 9, 1989 through March 13, 1989, Mr. Drake worked at the Allied Mining facility at Pisgah, West Virginia, for 6 consecutive work days. And from July 27, 1989 through August 3, 1989, he worked at the Consolidation Coal Company facility at Granville, West Virginia, for 6 consecutive work days. During a 14 week period from July 23, 1989 through October 28, 1989, Mr. Drake worked at the Consolidation Coal Company facility at Granville, West Virginia, at least 1 day a week for 12 of those weeks. And in August 1989 alone, he worked at Consol's Granville facility on 12 separate days.

6. Mr. Drake credibly testified that his work place was usually physically located in a segregated repair area, away from the mining operations themselves, but he conceded that was not always possible.

7. I also accept as credible the inspector's opinion based on 19 1/2 years experience as a coal mine safety inspector that Mr. Drake was regularly and frequently exposed to mine hazards generally in the course of his employment as a maintenance worker for Anderson at the various mine sites enumerated in Government Exhibit No. 1.

DISCUSSION WITH FURTHER FINDINGS

Respondent denies that training under 30 C.F.R. § 48.26(a) was required in Mr. Drake's case and states that training under 30 C.F.R. § 48.31(a) was supplied instead and was the appropriate training in their opinion.

The question is whether Drake is a "miner" as defined in 30 C.F.R. § 48.22(a)(1) or (a)(2).

If he is an "(a)(1) miner," he is required to have comprehensive training under section 48.26. If he is an "(a)(2) miner," he is required to have only hazard training under section 48.31, which the Secretary concedes he had received.

Put another way, the question is was Drake a "maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods" (an (a)(1) miner) or was he excluded from (a)(1) coverage because he was "(iii) any person covered under paragraph (a)(2) of this section," i.e., an "occasional short-term maintenance or service worker contracted by the operator."

Program Policy Letter No. P89-III-13 entitled Independent Contractor Training Policy; 30 C.F.R. Part 48 (Respondent's Exhibit No. 3) states that:

> Independent contractors regularly exposed to mine hazards, or who are maintenance or service workers contracted by the operator to work at the mine for frequent or extended periods, must receive comprehensive training. "Regularly exposed" means either frequent exposure, that is exposure to hazards at the mine on a frequent rather than consecutive day basis (a pattern of recurring exposure) or extended exposure of 5 consecutive workdays, or both.

Also, the MSHA Program Policy Manual, Volume III, Part 48 (Respondent's Exhibit No. 2) at page 25 states:

> If the job assignment of a service or maintenance worker exceeds 5 consecutive working days at a particular mine, and they are exposed to mining hazards, comprehensive training must be given . . . .

Page 13-14 of that same manual further recites:

> If the individual . . . is a maintenance or service worker employed or contracted by the operator for frequent periods or on a regular basis and is exposed to mine hazards, the worker must be given

comprehensive training. Regular exposure is a recognizable pattern of exposure on a recurring basis. Exposure to hazards for more than 5 consecutive days is frequent exposure.

I find and conclude that Mr. Drake was as of the date of the citation at bar, October 12, 1989, a maintenance worker employed by Anderson, and contracted to work at various mine sites on both a frequent and extended basis, where he was regularly exposed to the hazards generally associated with both mining and the repair of heavy equipment. As such, he was required to have comprehensive training, in accordance with 30 C.F.R. § 48.26(a). He did not, and therefore, a violation of the cited standard existed at that time, as charged.

The Secretary also urges that I find this violation to be "significant and substantial" (S&S). However, the inspector himself stated that he did not doubt that the man was trained, but it just was not training approved by MSHA or pursuant to an MSHA-approved plan (Tr. 22). Under the circumstances, I find the record to be totally lacking in support for an "S&S" finding. Accordingly, Citation No. 3309625 will be affirmed as a "non-S&S" citation.

Having considered all the criteria for a civil penalty in section 110(i) of the Act, I find that a penalty of $50 is appropriate for the violation found herein.

ORDER

WHEREFORE, IT IS ORDERED that:

1. Citation No. 3309625 is modified to delete the "significant and substantial" finding and as so modified, affirmed.

2. Respondent shall pay the civil penalty of $50 within 30 days of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

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

Hayes C. Stover, Esq., Kirkpatrick & Lockhart, 1500 Oliver Building, Pittsburgh, PA 15222 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1992

BLUE DIAMOND COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 91-993-R KENT 91-994-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9859071; 4/4/91 9859072; 4/4/91
	:	Middle Taggart Mine 15-15022
	:	Docket No. KENT 91-995-R through KENT 91-1000-R
	:	Citation No. 9858544; 4/4/91 through 9858549; 4/4/91
	:	Scotia Mine 15-02055

ORDER APPROVING SETTLEMENT AGREEMENT AND DISMISSING CONTEST PROCEEDINGS

Before: Judge Broderick

On January 17, 1992, the Secretary and the mine operator submitted a joint settlement agreement covering the violations charged in the above contested citations. The Secretary has agreed to reduce the total proposed penalty assessment for the eight violations from $10,800 to $8,740. The operator agrees to withdraw its notices of contest and does not dispute the amount of the penalties as reduced. The operator represents that it is now subject to Chapter 11 bankruptcy proceedings, and the Secretary will not enforce its claim for penalties except through the bankruptcy court. The agreement shall not be deemed an admission for any purpose except for civil matters arising under the Mine Act. It will not be used in any criminal or private civil litigation, but the Secretary is not precluded from including the citations in the operator's history of violations and considering them in proposing civil penalties under the Act.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, IT IS ORDERED:

1. The settlement agreement submitted by the parties is APPROVED.

2. The above contest proceedings are DISMISSED.

James A. Broderick
Administrative Law Judge

Distribution:

Randall Scott May, Esq., Barret, Haynes, May, Carter & Roark, P.S.C., P.O. Box 1017, Hazard, KY 41701 (Certified Mail)

Douglas N. White, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (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 28 1992

LONNIE DARRELL ROSS, Complainant	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. KENT 91-76-D
v.	:	BARB CD 90-40
	:	
SHAMROCK COAL COMPANY, INC., Respondent	:	No. 10 Mine
CHARLES E. GILBERT, Complainant	:	Docket No. KENT 91-77-D BARB CD 90-41
v.	:	No. 10 Mine
SHAMROCK COAL COMPANY, INC., Respondent	:	

SUPPLEMENTAL DECISION AND FINAL ORDER

Before: Judge Fauver

These consolidated proceedings were brought against Shamrock Coal Company, Inc., alleging that Complainants were wrongfully discharged for protected activities, i.e., making safety complaints, in violation of § 105(c)(1) of the Federal Mine Safety Act of 1977, 30 U.S.C. § 801 et seq.

On September 18, 1991, a decision on liability was entered finding that Respondent had discriminated against Complainants on July 31, 1990, by discharging them in violation of § 105(c)(1) of the act.

Further proceedings on monetary relief through conference calls with the judge and attorneys for the parties, and the exchange of documents and positions between the attorneys, have resulted in Complainants' amended proposed order for monetary relief, filed on January 6, 1992. There has been no further reply from Respondent.

FINDINGS AND CONCLUSIONS

1. Charles E. Gilbert was employed by Respondent at an hourly rate of $14.49, working a 40-hour week with an average of 4.3 hours overtime per week. His Christmas bonus was ordinarily

$700.00. He is entitled to back pay of $38,027.36. The employer may take a credit for a two week suspension, for $1,159.20. Gilbert is therefore entitled to net back pay of $35,708.96, plus interest of $2,266.91.

2. Because of the discharge in violation of § 105(c)(1) of the Act, and financial constraints caused by the discharge, Gilbert withdrew $39,374.27 from his retirement (profit sharing) fund with Respondent. Due to this early withdrawal he had to pay $12,276.00 in taxes and penalties. The penalty portion is $3,621.00, which Respondent shall be ordered to pay as reimbursement.

3. Gilbert also suffered a lapse of health insurance that would have paid medical bills but for his wrongful discharge. The relevant bills are for $478.90, which Respondent shall be ordered to pay as reimbursement.

4. Gilbert is entitled to total individual damages as follows: (A) Back pay of $35,708.96 with lawful payroll deductions for withholdings of Social Security, $2,820.41, federal taxes, $3,692.00, and Kentucky taxes, $1,895.92, i.e., net back pay of $28,459.83; plus (B) interest of $2,266.91, and plus (C) reimbursements for medical bills of $478.90 and a tax penalty of $3,621.00, for a net total of $34,826.64.

5. Lonnie Darrell Ross was employed by Respondent at an hourly rate of $15.43, working a 40-hour week with an average of 10 hours overtime per week. His Christmas bonus was ordinarily $715.00. He is entitled to back pay of $48,242.20. The employer may take a credit for a two week suspension, for $1,234.40, and for $4,997.20 in outside earnings by Ross. Ross is therefore entitled to net back pay of $42,010.60 plus interest of $2,607.65.

6. Ross is also entitled to recover $600.00 for medical bills that would have been paid by medical insurance had he not been wrongfully discharged.

7. Because of the discharge in violation of § 105(c)(1) of the Act, and financial constraints caused by the discharge, Ross withdrew $51,173.89 from his retirement (profit sharing) fund with Respondent. Due to this early withdrawal, he had to pay a penalty of $5,117.38, which Respondent shall be ordered to pay as reimbursement.

8. Ross is entitled to total individual damages as follows: (A) Back pay of $42,010.60 with lawful payroll deductions for withholdings of Social Security, $3,596.10, federal taxes, $5,356.00, and Kentucky taxes, $2,501.20, i.e., net back pay of $30,557.30, plus (B) interest of $2,607.65, and plus (C) reimbursements for medical bills of $600.00 and a tax penalty of $5,117.38, for a net total of $38,882.33.

9. Complainants are jointly entitled to litigation costs of $2,515.63 and a reasonable attorney fee, which is awarded at $150.00 per hour for 197 hours (i.e., $29,850.00). The attorney fee includes all office overhead expenses.

ORDER

1. Within 10 days of the date of this order, Respondent shall pay Charles E. Gilbert a net of $34,826.64, as computed above, and shall make payments to the appropriate federal and state tax agencies of the withholdings specified above.

2. Within 10 days of the date of this order, Respondent shall pay Lonnie Darrell Ross a net of $38,882.33, as computed above, and shall make payments to the appropriate federal and state tax agencies of the withholdings specified above.

3. Respondent shall pay the Complainants' litigation costs including an attorney fee by a check for $32,375.63 made payable to "Phyllis L. Robinson." Upon cashing such check, Attorney Robinson shall immediately pay a refund to Complainants for any of the litigation costs or attorney fee they have previously paid to her.

4. After the above payments are made, Complainants shall promptly file a Satisfaction of Order stating the dates and amounts of the payments.

5. The decision of September 18, 1991, and this supplemental decision and order constitute the judge's final disposition of these proceedings.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Phyllis L. Robinson, Esq., P. O. Box 952, Hyden, KY 41749 (Certified Mail)

Neville Smith, Esq., P. O. Box 447, Manchester, KY 40962 (Certified Mail)

/fas

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 1992

ELMER RICHARD COUCH, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 91-1351-D
SHAMROCK COAL COMPANY, Respondent	:	BARB CD 91-25

ORDER OF DISMISSAL

Before: Judge Maurer

Having considered the joint motion to approve their settlement agreement and dismiss this action with prejudice and seeing that this matter has been settled by the parties, it is hereby **ORDERED** that the complainant may withdraw his complaint and his action is hereby **DISMISSED** with prejudice, each party is to bear his own attorneys' fees and costs.

Roy J. Maurer
Administrative Law Judge

Distribution:

Phyllis L. Robinson, Esq., P. O. Box 952, Hyden, KY 41749 (Certified Mail)

Neville Smith, Esq., Smith & Smith, 110 Lawyer Street, P. O. Box 447, Manchester, KY 40962 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 31 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. THOMAS CATES, Employed by GREEN RIVER COAL COMPANY, INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. KENT 91-303 A.C. No. 15-13469-03774 A No. 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. STEPHEN WHITLEDGE, Employed by GREEN RIVER COAL COMPANY, INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. KENT 91-352 A.C. No. 15-13469-03776 A No. 9 Mine

DECISION

Appearances: Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Teresa M. Arthur, Esq., Paxton & Kusch, P.S.C., Central City, Kentucky, for the Respondents.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary of Labor, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" charging Thomas Cates and Steven Whitledge as agents of a corporate mine operator, Green River Coal Company, Incorporated, (Green River), with knowingly authorizing, ordering, or carrying out a violation by the named mine operator of the mandatory standard at 30 C.F.R. § 75.518. [1/]

[1/] Section 110(c) of the Act reads as follows:
"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order

Neither Cates nor Whitledge dispute that they were both agents of the cited corporate mine operator nor do they dispute that a violation of the cited standard did in fact occur as alleged in section 104(d)(1) Order No. 3421152. They both dispute however, that they "knowingly authorized, ordered, or carried out" the aforesaid violation of the mine operator. The issue before me then is whether either Cates or Whitledge, or both, acting as agents of the corporate mine operator "knowingly authorized, ordering, or carried out" the violation charged in Order No. 3421152. If it is determined that either Cates or Whitledge, or both, acted in such manner then a civil penalty must also correspondingly be assessed considering the appropriate criteria under section 110(i) of the Act.

Cates and Whitledge are charged with knowingly authorizing, ordering, or carrying out the violation charged in Order No. 3421152. That order reads as follows:

> The 1.6 hp 480 volt AC pump located in the return entry of 2C headings was not provided with proper overload or short-circuit protection in that the pump was receiving power from a 225 amp breaker with instantaneous setting of 300 amps, maximum for the pump overload is .6 amp and maximum for short-circuit protection is 18.2 amps. The No. 10 awg. 5 conductor cable on the pump was not protected either. The inspection of this pump (weekly) indicated no flight [sic] box which contains the protective [illegible word] on dates 1-12-90, 1-20-90 and 1-27-90 and was countersigned by Tommy Cates (mine foreman) on 1-12-90 and 1-20-90 and apparently little or no effort was made to correct this condition. [2]/

---

fn. 1 (continued)
incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d)."

[2]/ Significant allegations in the order were admitted by the issuing inspector at hearing to be erroneous. According to the allegations, prior weekly inspections of the cited 480-volt AC pump in the return entry of the 2C heading, had been reported in previous weekly inspection reports on January 12, January 20, and January 27, 1990, as not having a "flight" [sic] box and concluded with the statement that "apparently little or no effort was made to correct this condition." As the undisputed evidence revealed at hearing and as the inspector admitted at hearing however, the particular pump at issue had never previously been reported in the

The cited standard provides as follows:

> Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads. Three-phase motors on all electric equipment shall be provided with overload protection that will deenergize all three-phases in the event that any phase is overloaded.

Since section 110(c) of the Act predicates individual liability of a corporate agent upon the finding of a violation of a mandatory health or safety standard by the corporate operator, I am strictly limited in determining whether there was individual liability under section 110(c), to evaluation of only the precise allegations in the order itself and not to allegations of other violations that may have been made elsewhere in the petitions for civil penalty or at hearing.

The Commission defined the term "knowingly," in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

There is no direct evidence in this case that either Cates or Whitledge "knowingly authorized, ordered, or carried out" the specific violation alleged in the order at bar. Moreover, there is insufficient circumstantial evidence that either had any

---

fn. 2 (continued)
weekly inspection books as having no "flight" [sic] box, and it was acknowledged at hearing that MSHA did not inspect the mine to determine whether indeed those pumps that had previously been reported in the weekly inspection books as not having "flight" [sic] boxes had in fact been repaired.

knowledge or reason to know of the violative condition. While the condition was cited and presumably discovered at 10:00 a.m., on January 31, 1990, by Inspector Haile of the Federal Mine Safety and Health Administration (MSHA), there is no evidence as to how long that condition had existed, no evidence that either of the Respondent's had any obligation or duty to have inspected such equipment or to have read the reports of weekly electrical inspections or that they were even in a position in which such a condition would ordinarily have been reported to them. Moreover, at the time of the last required electrical inspection (prior to January 31, 1991), reported on January 27, 1991, not only was no defective condition reported on the cited pump it was noted in the examination book as being "OK." In contrast, several other pumps were reported to have no Flygt box on that date. Thus, even had Cates or Whitledge reviewed the most recent report of examination of electrical equipment on January 27, 1990, they would not have been placed on notice of any defective condition regarding the pump now cited.

The Secretary nevertheless argues that it may be inferred from the existence of prior reports in the examination book of defects in other electrical equipment, most notably in those reports dated January 12, January 13, and January 20, -- those on which Mr. Cates' signature appears at the bottom of the page, that at least Cates should have known on January 31, 1990, of the violative condition of the pump in the return of the 2C headings. The Secretary also seems to be arguing that Mr. Cates should also have known of the violative condition of the pump in the return of the 2C heading on January 31, 1990, for the reason that there was no indication in the reports of examination of electrical equipment for prior dates, that any of the violative conditions on other pumps were corrected.

The Secretary acknowledges, however, that no statute or regulation requires that such corrections be noted in the examination books and that there is no requirement that any of the entries be countersigned. Mr. Cates also testified without contradiction that he reviewed the examination books only for the purpose of verifying that each of the pumps had been examined at least weekly and that as a non-electrician he did not then understand the significance of the wording "no flight box" [sic] periodically reported in the examination books. [3]/ It is also noted that those conditions were ordinarily made in the column designated as "equipment examined and/or tested" and not under the column marked "dangerous conditions."

---

[3]/ The referenced junction box is correctly designated as a Flygt box -- a brand name apparently taken from the name of its manufacturer, Flygt Corporation. (See Exhibit G-3).

Moreover, the Secretary concedes that she does not know in fact whether the conditions cited in the examination books i.e., the absence of Flygt boxes on several pumps, had in fact been corrected or merely had not been noted in the record books as having been corrected. The Secretary also acknowledged that even though she was aware of these purportedly dangerous conditions (characterized by the issuing inspector as "significant and substantial" and serious violations), she did not verify whether indeed such conditions continued to exist in the mine, even though the inspector was at that time on the mine premises.

The evidence against Mr. Whitledge is even more tenuous. The Secretary argues that it would be reasonable to infer that Whitledge knew or had reason to know of the cited violation on the basis that he was the maintenance supervisor for the No. 9 Mine. According to Whitledge's undisputed testimony, however, it is clear that not only did he not have the responsibility of reviewing the weekly reports of examinations of electrical equipment regarding the cited pump (which the Secretary concedes was not required to be done by anyone), but that the pumpmen who were all electricians themselves and who performed the weekly examinations of electrical equipment, were responsible for the repairs and that those pumpmen reported directly to the respective mine foreman for their particular shift.

Clearly, there is insufficient connection between the evidentiary facts and the ultimate facts sought by the Secretary to be inferred. See Secretary v. Garden Creek Pocahontas Co., 11 FMSHRC 2148 (1989); Secretary v. Mid-Continent Resources, 6 FMSHRC 1132 (1984). Under the circumstances, the Secretary has failed to sustain her burden of proving by a preponderance of the evidence that either Cates or Whitledge knew or had reason to know of the violation charged in Order No. 3421152. In reaching this conclusion, I have not disregarded the out-of-court statements by pumpmen Richard Walker and Michael Cates, suggesting that they had themselves operated pumps without Flygt boxes. I have also considered Walker's statement that he had reported on or about January 13, 1990, to Steve Whitledge that the "manual disconnects and/or Flygt box had been removed from the pump" which was in reference to another pump and not the one cited herein. I also note that Whitledge denied at hearing that Walker had ever informed him of the alleged absent Flygt box. This testimony directly contradicts Walker's out-of-court statement. I give Whitledge's testimony (under oath and subject to cross-examination) the greater weight. I can give but little weight to such purported out-of-court statements as those given by Walker and Cates where the witness is unavailable to explain his alleged statements under oath and under the scrutiny of cross-examination.

ORDER

The captioned cases are hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 403, Arlington, VA 22203 (Certified Mail)

B. R. Paxton, Esq., Paxton & Kusch, P.S.C., 213 E. Broad Street, P.O. Box 655, Central City, KY 42330 (Certified Mail)

Mr. Thomas Cates, Green River Coal Company, P.O. Box 1249, Henderson, KY 42420 (Certified Mail)

Mr. Stephen Whitledge, Green River Coal Company, P.O. Box 1249, Henderson, KY 42420 (Certified Mail)

/fb

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 17 1992

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS

MASTER DOCKET NO. 91-1

ORDER GRANTING IN PART AND DENYING IN PART SECRETARY'S MOTION FOR PROTECTIVE ORDER

On December 23, 1991, the Secretary of Labor filed a Motion for Protective Order to prohibit the taking of depositions of the Assistant Secretary of Labor and the former Administrator for Coal Mine Safety and Health. The motion was supported by a memorandum of law, and accompanied by an affidavit of Assistant Secretary of Labor William J. Tattersall. On January 7, 1992, Contestants represented by the law firms of Crowell & Moring, Buchanan Ingersoll, and Jackson & Kelly, filed an opposition to the motion. On January 14, 1992, the Secretary filed a reply to Contestants' opposition to the Secretary's motion. On January 16, 1992, Contestants represented by Williams & Connolly filed a motion to join the Opposition filed by the three law firms named above for the reasons set forth in the Opposition.

The Contestants notified counsel for the Secretary by letter of December 4, 1991, that they wished to depose William Tattersall, Leighton Farley, Jerry Spicer, Edward Hugler, Dennis Ryan and Willard Querry, and requested copies of telephone logs, diary entries, personal notes, calendars, memoranda and other documents dated between February 1, 1989 and April 4, 1991, relating to AWC issues. Counsel for the Secretary replied by letter dated December 16, 1991. He agreed to provide such of the requested documents which are not privileged and to make Hugler, Farley, Ryan and Querry available for depositions. He stated that a motion for a protective order would be filed to prohibit the taking of the depositions of Tattersall and Spicer.

I

Contestants state that Assistant Secretary Tattersall made the crucial decisions as to whether and when to issue the citations involved in these proceedings. Administrator Spicer was said to have been actively involved in these decisions as well as other relevant agency actions prior to the issuance of the citations. Tattersall participated in ten meetings between November, 1989 and March, 1991, "with other agency officials including Mr. Spicer" concerning dust sampling enforcement actions.

Contestants argue that the decision to void samples but not issue citations made in about March, 1990, and the decision not to issue an information notice to mine operators raise substantive issues "bearing on reasonable promptness and on other issues as well." Tattersall is said to be the primary source of information as to what matters were considered in the course of agency deliberations concerning these decisions. The agency decisions to void samples prior to March 14, 1990, and to void without citations after March 14, 1990, and finally to issue citations on April, 1991, are not explained. Assistant Secretary Tattersall should be required to explain these decisions "so that we may obtain an understanding of the citations and prepare appropriate defenses."

Finally, Tattersall must be made available for questioning about his public statements concerning AWC's which differ in significant respects from the deposition testimony of his subordinates. Contestants emphasize the extraordinary nature of the enforcement action represented by these cases - their size and scope involving as they do virtually the entire coal mining industry; the degree of the personal involvement of the Secretary and Assistant Secretary in issuing press releases, holding press conferences, testifying before Congressional Committees, etc., as distinguishing this case from those relied upon by the Secretary's counsel.

II

The Secretary argues that the Federal Courts "routinely" prohibit the taking of depositions from high-level government officials "especially where relevant information is available from lower-level agency personnel." The reasons for the rule are (1) the privilege attaching to agency deliberative processes, and (2) the disruption of the government's primary function which would result from permitting such depositions.

The rule applies not only in the case where an administrative record is involved but also where "the proposed inquiry relates to the exercise of statutory discretion."

The rule applies not only to cabinet members and heads of executive agencies but also "to lower-level but relatively highly placed decisionmakers within an agency."

Contestants have alternative sources for obtaining the requested information; in fact they have a "plethora of other avenues for obtaining any conceivably relevant information."

Tattersall and Spicer made the ultimate decisions to issue the citations involved here based on facts and recommendations from lower-level agency personnel who have already been deposed. Neither "has any specific knowledge of relevant facts which were not obtained in this manner."

III

It is important to keep in mind the nature of the present proceedings before the Review Commission. The forty seven hundred citations issued by the Secretary have been contested. Therefore, the citations are not final administrative action, and become final only when and if they are affirmed by the Commission. The penalties assessed by the Secretary, because they have been contested, are in the nature of proposals to the Commission to assess appropriate penalties for any violations charged in citations which are affirmed. For these reasons, the cases cited by both parties, such as Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) and Community for Creative Non-Violence v. Lujan, 908 F.2d 992 (D.C. Cir. 1990), holding that agency decisionmakers may be deposed only in cases where no administrative findings were made and a deposition is the only way to provide a record adequate for judicial review, are of limited precedential value, and not controlling. The Secretary in these proceedings does not make administrative findings. The findings and decisions will be made by the Review Commission after an adversary proceeding in which the Secretary has the burden of establishing the propriety of the citations and the appropriateness of the proposed penalties. In the course of that proceeding, a record will be made which we trust will be adequate for judicial review.

IV

The public statements of the Secretary and Assistant Secretary, whether to the Press or to Congress, are not matters before the Commission, and I will not consider them in deciding whether Assistant Secretary Tattersall or Administrator Spicer are subject to deposition. In an analogous situation, it is not uncommon for the Attorney General or other prosecuting authority to publicly announce criminal indictments. It could scarcely be maintained that this should subject these law enforcement officials to oral depositions in the cases covered by the indictments.

V

The general rule followed in the Federal Courts is that high-level executive department officials may not be required to give oral testimony by deposition or at trial except in extraordinary circumstances. Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985); Wirtz v. Local 30, International U. of Operating Engineers, 34 F.R.D. 13 (S.D.N.Y. 1963); United States v. Northside Realty Associates, 324 F. Supp. 287 (N.D. Ga. 1971). Extraordinary circumstances may be established where the executive sought to be deposed has relevant information not available from any other source. Sweeny v. Bond, 669 F.2d 542 (8th Cir. 1982), cert. denied, 459 U.S. 878 (1982); Community Fed. Sav. & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619 (D.D.C. 1983); Amer. Broadcasting Companies v. U.S. Info. Agency, 599 F. Supp. 765

(D.D.C. 1984). On the other hand, where the agency has or is willing to respond by answering written interrogatories, furnishing documents and making lower-level officials available for deposition, there is no justification for requiring the testimony of an agency head or high-level agency official. Sweeny v. Bond, 669 F.2d at 546; Kyle Engineering Co. v. Kleppe, 600 F.2d 226 (9th Cir 1979); Wirtz v. Local 30, 34 F.R.D. at 14. The more senior the official to be deposed, the stronger the showing which must be made to require his testimony. Community Fed. Sav. & Loan, 96 F.R.D. at 621.

VI

Contestants argue that because Assistant Secretary Tattersall made "the crucial decisions whether and when to issue" the contested citations, he should be required to testify as to "the basis for the charges." This can hardly be considered an extraordinary circumstance permitting him to be called for deposition. See Simplex Time Recorder Co., 766 F.2d at 586. Nor can the fact that "he participated in 10 meetings between November 1989 and March 1991 ... concerning various aspects of the dust sampling enforcement actions." In fact since other agency officials were present at the same meetings, this would argue against the necessity for deposing the Assistant Secretary. Section 104(a) of the Mine Act (30 U.S.C. § 814(a)) requires the Secretary or her authorized representative to issue a citation to a mine operator if upon inspection or investigation she believes that the operator has violated any mandatory health or safety standard. Absent some showing of bad faith or utterly arbitrary action, why the Secretary or the Assistant Secretary decided to issue the citations is not relevant to this proceeding. As I stated earlier, she is required to prove the basis for the citations in this proceeding before an independent adjudicatory agency. The evidence presented in such a proceeding will establish whether there was a proper basis for the citations. The taking of the deposition of a member of the Cabinet or the head of an executive department "in order to probe the mind of the official to determine why he exercised his discretion as he did in regard to a particular matter" is improper, Northside Realty Associates, 324 F. Supp at 293, and in any event not relevant to the question whether an objective basis existed for the contested citations.

VII

The most cogent reason advanced for the proposed depositions is the alleged need to inquire into the basis for the time lag between the violations and the issuance of citations. This may be an issue because section 104(a) of the Act mandates the issuance of a citation "with reasonable promptness" when the Secretary believes that a violation has occurred. The Contestants have asserted but have not shown that Assistant Secretary Tattersall is the sole source of factual information concerning the timing of the issuance

of citations. In fact they have had the opportunity to propound interrogatories and to depose lower-level officials for such factual information. The Assistant Secretary made the ultimate decisions to issue the citations but, according to his affidavit, he relied upon facts and recommendations made by lower-level agency personnel and does not have "any specific knowledge of facts related to the samples or development of the evidence supporting the citations which was not communicated to me by such lower-level persons." Given the other sources of discovery available to contestants, including the written discovery which has been had, the depositions already taken, and those which the Secretary has agreed to provide, the contestants have the opportunity to discover the factual basis for the citations and for the timing of their issuance without deposing Assistant Secretary Tattersall.

I conclude that Contestants have not established extraordinary circumstances which would justify compelling the testimony of Assistant Secretary Tattersall.

VIII

The Assistant Secretary is, of course, a Presidential appointee and a member of the sub-cabinet. He is the head of the Mine Safety and Health Administration. He is clearly a high-level government official and "precisely the type of individual that governmental immunity is intended to protect." United States v. Miracle Recreation Equipment Co., 118 F.R.D. 100, 105 (S.D. Iowa 1987). As the Secretary noted in her motion, a major reason for the rule prohibiting the taking of depositions from high-level officials is the disruption which would result to the government's important activities, and the higher the level the official, the greater the disruption. Jerry L. Spicer, who was Administrator for Coal Mine Safety and Health during the time the alleged violations occurred and the contested citations were issued, is a lower-level official than the Assistant Secretary. Moreover, he is now retired. Therefore, no disruption to the government's functions would result from subjecting him to a deposition. He may have factual information concerning the decision to void samples but not issue citations in March 1990 and the decision not to issue an informational notice which may be relevant to the timeliness of the citations. The burden on the Contestants to justify taking Mr. Spicer's deposition is considerably lower than the burden to justify taking the Assistant Secretary's. I conclude that Contestants have met that burden, and have the right to take Mr. Spicer's deposition. Therefore, I will deny the motion for protective order as related to him.

ORDER

For the foregoing reasons, the Secretary's motion for protective order to prohibit the deposition of Assistant Secretary Tattersall is GRANTED; the Secretary's motion for protective order

to prohibit the deposition of former Administrator Spicer is DENIED.

James A. Broderick
Administrative Law Judge

Distribution:

Douglas N. White, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Timothy M. Biddle, Esq., Thomas C. Means, Esq., J. Michael Klise, Esq., Crowell and Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004 (Certified Mail)

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

Laura E. Beverage, Esq., Henry Chajet, Esq., Jackson & Kelly, P. O. Box 553, Charleston, WV 25322 (Certified Mail)

Linda Homerding, Esq., Williams and Connolly, 839 17th Street, N.W., Washington, D.C. 20006 (Certified Mail)

All other counsel and parties by Regular Mail.

/fas

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 1992

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS) MASTER DOCKET NO. 91-1

ORDER DENYING MOTION TO COMPEL WRITTEN DISCOVERY

On January 7, 1992, Contestants represented by Street, Street, Street, Scott and Bowman (Contestants), filed a motion to compel answers to interrogatories and requests for production of documents served upon the Secretary of Labor (Secretary). The Secretary filed a response in opposition to the motion on January 17, 1992.

On July 26, 1991, Contestants served a First Set of Interrogatories and a Request for Production of Documents on counsel for the Secretary. According to the motion, the Secretary served her answers on counsel for the Contestants "on or around September 10, 1991."

On June 28, 1991, I issued an Amended Prehearing Order Adopting Plan and Schedule of Discovery as an order of the Review Commission. This was based on a plan and schedule of discovery submitted by counsel for the Secretary which was negotiated with counsel for some of the operators, and was revised following discussion at a Prehearing Conference on June 19, 1991. This discovery plan provided in part in II. D.1 that "(e)xcept for good cause shown, responses to requests for admissions, answers to interrogatories, ... and responses to requests for production of documents shall be completed by August 30, 1991. Motions to compel shall be filed by September 16, 1991." The Plan and Schedule of Discovery was amended, upon motion of Jackson & Kelly, by order issued September 10, 1991. Article II. D.1 was changed to provide that answers to interrogatories and requests for production of documents should be completed by September 11, 1991 and motions to compel should be filed by October 4, 1991. The discovery plan was further amended by orders issued October 4, 1991 and December 3, 1991. Each of these orders provided that answers to interrogatories and requests for production of documents should be completed by September 13, 1991 and motions to compel should be filed by October 4, 1991.

Contestants' motion to compel is clearly filed out of time under the provisions of the Plan and Schedule of Discovery. For this reason, the motion is DENIED.

James A. Broderick
Administrative Law Judge

Distribution:

Douglas N. White, Esq., Carl Charneski, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Thomas R. Scott, Jr., Esq., Street, Street, Street, Scott & Bowman, P. O. Box 2100, Grundy, VA 24614 (Certified Mail)

All other counsel and parties by Regular Mail

/fas