

JANUARY 1996

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JANUARY 1996

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

Secretary of Labor, MSHA v. Cyprus Emerald Resources Corporation, Docket No. PENN 94-23, etc. (Judge Fauver, November 29, 1995)

Secretary of Labor, MSHA v. Thunder Basin Coal Company, Docket No. WEST 94-370. (Judge Amchan, December 12, 1995)

Secretary of Labor, MSHA v. L & J Energy Company, Inc., Docket No. PENN 93-15. Reconsideration - (Judge Weisberger, November 30, 1995)

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

Secretary of Labor, MSHA v. Brown Brothers Sand Co., Docket No. SE 95-331-M. (Judge Feldman, November 30, 1995)

Southern Minerals, et al. v. Secretary of Labor, MSHA, Docket No. WEVA 92-15-R, et al. (Judge Barbour, December 13, 1995 partial decision)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 1996

SOUTHERN MINERALS, INC., :
TRUE ENERGY COAL SALES, INC., :
and FIRE CREEK, INC., :

v. :

Docket Nos. WEVA 92-15-R, etc.

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

ORDER

On January 11, 1996, the Secretary of Labor filed with the Commission a petition for discretionary review seeking review of Administrative Law Judge David F. Barbour's December 13, 1995 Partial Decision dismissing True Energy Coal Sales, Inc., ("True Energy") from the proceedings.

The judge based the dismissal on his conclusion that True Energy is not an operator, as defined in section 3(d) the Mine Act, 30 U.S.C. § 803(d). In dismissing True Energy, the judge did not expressly direct that his dismissal "be entered as a final decision, nor did he find, pursuant to Rule 54(b)¹ [of the Federal Rules of Civil Procedure,] that there is no just reason for delay."

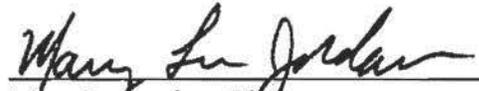
¹ Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure shall apply "so far as practicable" in the absence of applicable Commission rules. 29 C.F.R. § 2700.1(b).

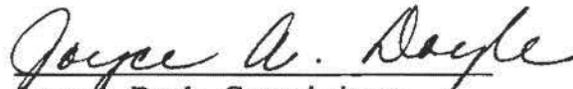
Rule 54(b) states in part:

[W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which

Pontiki Coal Corp., 17 FMSHRC 263, 264 (March 1995).

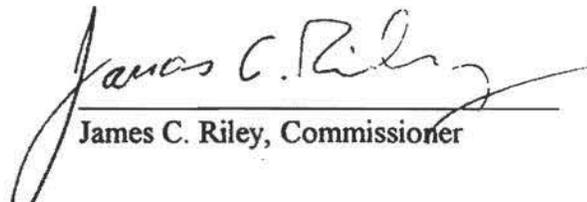
Accordingly, we conclude that the order dismissing True Energy is not final, and that therefore the Secretary's petition for discretionary review is premature. The secretary's petition is denied without prejudice.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner

adjudicates . . . the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating . . . the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 25, 1996

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

:
:
: Docket No. PENN 93-15
:
:
:

v.

L&J ENERGY COMPANY, INC.

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

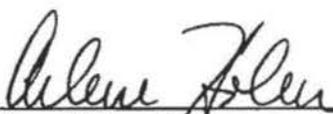
ORDER

BY THE COMMISSION:

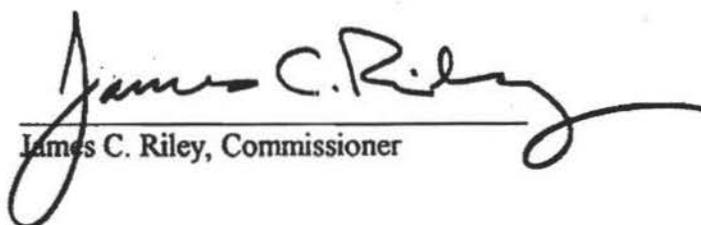
The Secretary of Labor has filed a motion for reconsideration of the Commission's January 11, 1996, denial of the petition for discretionary review previously filed by L&J Energy Company, Inc. ("L&J"). L&J supports the Secretary's motion and requests oral argument. Upon review of the parties' submissions, the Secretary's motion is granted in part. Review is directed only as to issue IV set forth in L&J's petition. Briefing is stayed pending further order of the Commission and the request for oral argument is denied.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 25, 1996

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

v.

STEELE BRANCH MINING

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Docket No. WEVA 92-953

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners¹

DECISION

BY: Jordan, Chairman and Marks, Commissioner²

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Steele Branch

¹ Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

² Chairman Jordan and Commissioner Marks vote to affirm the judge's decision. Commissioner Doyle and Commissioner Holen would remand this matter to the judge. In *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the Commission determined that the effect of an evenly split vote, in which at least two Commissioners would affirm a judge's decision, is to leave the decision standing as if affirmed. Accordingly, the vote of Chairman Jordan and Commissioner Marks to affirm the judge's decision is the Commission's disposition.

Mining ("Steele Branch") alleging a violation of 30 C.F.R. § 77.404(a).³ Following an evidentiary hearing, Administrative Law Judge George A. Koutras determined that Steele Branch violated the cited standard and that the violation was significant and substantial ("S&S"),⁴ and assessed a civil penalty of \$4,500. 15 FMSHRC 1667 (August 1993) (ALJ). Steele Branch timely filed a petition for discretionary review challenging the judge's finding of violation, his conclusion that the violation was S&S, and the penalty assessed. For the reasons set forth below, we affirm.

I.

Factual and Procedural Background

Steele Branch, owned by the Geupel Construction Company ("Geupel"), operated the No. 927 surface coal mine, in Logan County, West Virginia. On April 23, 1991, while Rayburn Browning operated the No. 9 road grader (Caterpillar Model 16) used to maintain the haulage road, the grader's engine stalled on a hill and the grader rolled backwards. Apparently unable to control the vehicle, Browning jumped off and the grader ran over him. Browning sustained fatal injuries.

On April 24, MSHA Inspector Donald Mills directed the inspection and testing of the grader. The grader was equipped with a hydraulic service braking system and a mechanically applied parking brake which was also intended to function as an emergency brake. Tr. 184. The service braking system is the primary system for stopping and holding the machine. 15 FMSHRC 1695.

The inspector caused the brakes to be tested on approximately a 9.5% grade with the participation of mechanics employed by the C. I. Walker Machinery Co. ("Walker"), a Caterpillar dealer. Tr. 215. With the grader engine running, the service brakes and the parking brake functioned properly. Because the investigation revealed that the engine had stalled, the grader's service brakes were also tested on level ground with the engine turned off. Tr. 31, 212, 215. The

³ Section 77.404(a) provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. § 77.404(a).

⁴ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . ."

tests revealed that, with the engine turned off, only the first brake application produced sufficient pressure to stop the grader. Tr. 217. All successive brake applications produced zero pressure. Tr. 32, 75, 217-19, G. Ex. 5, R. Ex.5. The inspector concluded that a component of the braking system, the "accumulator," was not functioning properly and caused the defective condition.⁵ Tr. 32-33, 41-42.

In addition, the tests showed that the parking brake was able to hold the grader in place on a grade once the grader had been brought to a stop. 15 FMSHRC at 1695. However, the tests did not establish that the parking brake was capable of bringing the grader to a stop if the grader were rolling free on a grade. *Id.* The inspector also determined that the brake pressure gauge was defective. Tr. 55. On April 29, Inspector Mills issued Steele Branch a citation alleging an S&S violation of 30 C.F.R. § 77.404(a)⁶ involving a moderate degree of negligence.

The judge found that the grader engine quit for an unknown reason while Browning was operating it. 15 FMSHRC at 1689. He determined that the accumulator was defective and, applying the Commission's "reasonably prudent person" test, concluded that the grader was unsafe to operate within the meaning of section 77.404(a). *Id.* at 1696. The judge also concluded that the violation was S&S and that moderate negligence was involved, and assessed a civil penalty of \$4,500. *Id.* at 1701.

⁵ The accumulator is described in the service manual as:

the pressure source for brake actuation. Its accumulation of oil, under nitrogen pressure, is released to apply the brakes whenever the brake pedal is depressed Fully charged, the accumulator provides for approximately five brake applications after the diesel engine has been shut off.

G. Ex. 3, R. Ex. 9.

⁶ The citation stated:

The investigation of a fatal surface machinery (grader) accident at this mine revealed that the Caterpillar Grader involved, Model No. 16, serial No. 49G915, was not maintained in a safe operating condition, in that based on the specifications of the manufacturer (sic) the fully charged accumulator provides for approximately five brake applications after the diesel engine has been shut off. The investigation revealed through testing that only one brake application was provided after the diesel engine was shut off. Also, the brake pressure gauge, located on the instrument panel in the cab of the grader (Company No. 03009) was found to be inoperative. . . .

G. Ex. 2.

II.

Disposition

A. The Violation

Steele Branch contends that the grader's braking system as a whole was functioning in compliance with industry standards and that, even if the accumulator was not functioning in accordance with the manufacturer's specifications, that fact alone did not render the grader unsafe within the meaning of the cited standard, because under the circumstances of this case "a reasonably prudent person" would not have recognized "a hazard warranting corrective action." S. B. Br. at 10.

The Secretary responds that substantial evidence supports the judge's determination of violation. Sec. Br. at 4-9. The Secretary maintains that the judge correctly applied the "reasonably prudent person" test in concluding that the grader was unsafe. *Id.*

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

1. The condition of the grader

The Caterpillar service manual called for the accumulator to provide approximately five brake applications after engine shutoff. A Walker mechanic's report indicated that "the number of brake applications that is normally supplied by the accumulator with the engine off is five applications." R. Ex. 5, attachment dated April 25, 1991. Steele Branch's brake expert appeared to concede that the accumulator should have been repaired if it provided for only one braking application. 15 FMSHRC 1692. Inspector Mills indicated that an accumulator that provides for only three braking applications should be repaired. *Id.* at 1696.⁷ Steele Branch does not dispute

⁷ Respondent argued that MSHA's post-accident investigation did not reveal the condition of the grader at the time of the fatality since the braking system might have been damaged in the accident. 15 FMSHRC at 1693. The judge considered but rejected this argument, concluding that "[t]he credible and un rebutted testimony of Inspector Mills reflects that there was no collision damage to the loader braking system as a result of the accident" *Id.* The judge pointed out

the results of MSHA's test of the grader's brakes showing that only one application of brakes was possible with the engine off. We therefore conclude that substantial evidence supports the judge's finding that the grader's braking system only provided one service brake application after engine stoppage because the brake accumulator, a "critical and integral component" of the braking system, was defective. 15 FMSHRC at 1693, 1696.

2. Application of the "reasonably prudent person" test

In *Alabama By-Products*, 4 FMSHRC 2128 (December 1982), the Commission held:

[I]n deciding whether equipment or machinery is in safe or unsafe operating condition, . . . the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action.

4 FMSHRC at 2129.⁸ In *Ideal Cement Co.*, 12 FMSHRC 2409 (November 1990), the Commission elaborated on the test described in *Alabama By-Products*:

[I]n interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibitions or requirement of the standard.

Id. at 2416. See also *Dolese Brothers Co.*, 16 FMSHRC 689, 694 (April 1994).

In concluding that Steele Branch violated the standard, the judge expressly relied on the decisions which set forth the reasonably prudent person test. *Alabama By-Products, supra; Ideal Cement Co., supra; Southern Ohio Coal Co.*, 13 FMSHRC 912 (June 1991). 15 FMSHRC at 1687-88. To support his conclusion that the grader was unsafe within the meaning of section 75.404(a), the judge relied on the evidence indicating that a fully charged accumulator should

that "respondent's accident report reflected that the only damage to the grader was a cracked rear cab glass and two broken engine mounts." *Id.* Substantial evidence supports the judge's finding that the accident itself did not render the accumulator faulty.

⁸ The underground coal standard addressed in *Alabama By-Products*, 30 C.F.R. § 75.1725(a), contains the same text found in section 77.404(a), the surface coal standard involved here.

have provided the grader with approximately five braking applications after the engine was shut off, and that the accumulator in this case, which provided for only a single braking application after engine shutoff, needed repair. 15 FMSHRC at 1696. The judge, determining that the record did not support respondent's claim that the parking brake could also perform as an emergency brake, rejected Steele Branch's claim that the parking brake rendered the grader safe. *Id.* at 1695.

Invoking *Alabama By-Products*, Steele Branch argues on review that it should be relieved of liability because a reasonably prudent person would not have recognized that the grader was hazardous. S. B. Br. at 10-21. Steele Branch bases this contention on the presence of an operable parking brake. *Id.* at 14-19. Steele Branch maintains that the parking brake in this case was also designed to serve as the emergency brake, and that therefore the grader was in conformance with industry requirements and may not be considered unsafe. *Id.* The Secretary agrees that the *Alabama By-Products* test applies, and contends that the judge's decision is faithful to it. Sec. Br. at 4-9.

Contrary to the view of the dissent, the question on review is not whether Steele Branch should have recognized that a grader's service brakes must provide for five braking applications after engine shutoff (slip op. at 13-14). Rather, we examine whether substantial evidence supports the judge's determination that a reasonably prudent person would have recognized that a grader that provided only one braking application after engine shutoff was unsafe within the prohibition of the standard. See *Alabama By-Products, supra; Ideal Cement Co., supra.*⁹

Substantial evidence supports the judge's conclusion that the parking brake did not render the grader safe to operate notwithstanding the condition of the accumulator. As the judge pointed out, while the grader service manual refers to the parking brake and the wheel brakes, "it does not use the term 'emergency' brake." 15 FMSHRC at 1690. Similarly, the grader operation maintenance guide "contains detailed information concerning the parking brake but does not use the term 'emergency' brake." *Id.* The Society of Automotive Engineers' ground vehicle standards for braking performance for graders describe the parking brake system as "the system to hold stopped machinery stationary." 15 FMSHRC at 1695 (emphasis omitted). Although respondent's expert witness offered the opinion that the grader's parking brake was capable of stopping the grader in an emergency, the judge found "no evidence that the testing included allowing the grader to roll

⁹ Our colleagues also suggest that, in applying the reasonably prudent person test, the judge should have examined whether the reasonably prudent person would have recognized the existence of a hazard "despite having a grader accumulator that was properly charged in accordance with the service manual." Slip op. at 13-14. Although the operator's purported reliance on the service manual is a factor that may be considered in determining the level of negligence for purposes of assessing the penalty, see section C.2. *infra*, it has no bearing on whether the operator violated the standard. As we have frequently had occasion to observe, the Mine Act imposes liability without regard to fault. *E.g., Fort Scott Fertilizer - Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995).

free on a grade and then bringing it to a stop while it was rolling by activating the park brake.”
Id.

We agree with the judge that the reasonably prudent person would recognize the grader to be unsafe because “one can reasonably conclude that in the event of unexpected engine failure, the first instinct of the operator would be to attempt to stop the grader by depressing the foot service brakes, the primary braking system designed to stop the loader under operating conditions.” 15 FMSHRC at 1696. In the event of an engine failure, the ability of the equipment operator to stop the grader safely is significantly impaired if only a single brake application is possible. This conclusion is supported by respondent's own expert witness, who confirmed that applying the foot service brakes would also be his first reaction if a grader were rolling downhill with the engine off. 15 FMSHRC at 1679.

We conclude that substantial evidence supports the judge's conclusion that the grader was in an unsafe condition and, therefore, in violation of the standard. Accordingly, we affirm the judge's determination of violation.

B. Significant and Substantial

Steele Branch challenges the judge's affirmance of the S&S finding, arguing in part that a serious injury was not a reasonably foreseeable outcome of the violation here. S. B. Br. at 21-23. The Secretary responds that substantial evidence supports the judge's conclusion that, under the specific conditions at the mine, a reasonably serious injury was reasonably likely to result from the violation. Sec. Br. at 9-11.

A violation is S&S if, based on 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, 825-26 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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.

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

Steele Branch's challenge relates to the third element of the *Mathies* test, "a reasonable likelihood that the hazard contributed to will result in an injury." *Id.* at 3-4. In relevant part, the judge determined that:

the discrete hazard created by the failure of the accumulator to provide for more than one braking application with the engine off, particularly where the grader is operated over an inclined roadway with many curves, presented a reasonable likelihood that the hazard created would result in an injury . . . of a reasonable [sic] serious nature.

15 FMSHRC at 1698.

We base our resolution of this issue "on the particular facts surrounding the violation" *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). We agree with the judge that, given the condition of the grader, it was reasonably likely that a reasonably serious injury would occur. The record establishes that the grader service brakes provided only one brake application after engine shutoff although the manufacturer's specifications call for approximately five brake applications after shutoff. The grader was operated on a hilly, curved road, thereby increasing the hazards associated with brake failure. In fact, the equipment operator unsuccessfully attempted to stop the grader after the engine stopped and sustained fatal injuries. Thus, substantial evidence supports the judge's conclusion that the violation was S&S, and we accordingly affirm.¹⁰

C. Civil Penalty

In challenging the civil penalty of \$4,500, Steele Branch asserts that the Secretary's delay in proposing the penalty was unreasonable and prejudicial, that the judge's conclusion of moderate negligence was erroneous, and that, since it is now out of business, no penalty should be assessed.

1. Delayed proposal

Under section 105(a) of the Mine Act, the Secretary must notify the operator of a proposed civil penalty "within a reasonable time after the termination of such inspection or investigation" giving rise to the citation or order. 30 U.S.C. § 815(a). Here, the citation was issued on April 29, 1991 and terminated on June 19, 1991, but notification of the proposed assessment was not forthcoming until May 19, 1992. The operator alleges that this delay was prejudicial because it was unable to call as a witness MSHA Inspector James Davis, who had been

¹⁰ We reject Steele Branch's argument that its violation was not S&S because it ceased mining operations subsequent to the violation at issue here.

indicted and tried for a criminal offense subsequent to the investigation of the fatality. S. B. Br. at 24.¹¹

Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. See *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee, on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

The investigation report¹² is undated and there is no indication whether the preparation of that report accounted for some of the 11 months that elapsed between termination of citation and issuance of the proposed assessment. The Secretary has not offered any explanation for his delay but does challenge the operator's claim of prejudice. Sec. Br. at 13-15.

Concerning the reason for delay, we take official notice, as we did in *Rhone-Poulenc*, of the Secretary's unusually high case load in 1992, and the resultant delay it caused in the penalty proposal process. See 15 FMSHRC at 2094. The civil penalty involved here was prepared in 1992, and we view that consideration as constituting adequate reason for the delay. However, we caution the Secretary that our disposition of this challenge is not an endorsement of unbridled Secretarial delay in notifying operators of proposed penalties.

We further conclude, in agreement with the judge,¹³ that Steele Branch has failed to demonstrate that it was prejudiced by the delay in notification. At no time has Steele Branch identified how or why Inspector Davis's testimony would affect its case beyond claiming that his unrelated criminal conviction "goes to his credibility." Tr. 104. Inspector Davis was not a witness at the hearing, and nothing prevented Steele Branch from calling witnesses to testify. We accordingly affirm the judge's rejection of the operator's arguments concerning delay.

¹¹ Steele Branch mistakenly refers to section 105(d) of the Mine Act, 30 U.S.C. § 815(d).

¹² G. Ex. 5.

¹³ 15 FMSHRC at 1701.

2. Negligence

Steele Branch challenges the judge's finding of moderate negligence. The operator argues that the accumulator was adequately charged at the time of the accident and points out the manual's statement that an accumulator which is fully charged will provide approximately five braking applications. S. B. Br. at 24-25. According to Steele Branch, the accumulator's failure was therefore not due to any fault of the operator. *Id.* The operator further contends that the accumulator may not have been defective, since its replacement did not solve the problem, which required changing all four brake assemblies. *Id.*

The operator's asserted reliance on the manual might have some persuasive force if the record had disclosed that the persons responsible for maintaining and repairing the grader were even aware of the provision in question. In fact, the record discloses just the opposite. In finding moderate negligence, the judge relied on the admission of respondent's master mechanic that "he was unaware of the service manual recommendation that the accumulator should provide approximately five brake applications with the grader engine off[.]" 15 FMSHRC at 1700. Although William Roberts, the equipment manager for Geupel pointed out that none of the manuals directed the user to test the brake accumulator system for five applications after the engine has been shut off, he described how such a test should be conducted and admitted he had performed such tests in the past. 15 FMSHRC at 1674-75, 1693. The operator's failure to make sure its mechanics understood both the manufacturer's specifications for the grader's brakes, as well as the need to conduct the kind of test that would verify whether the grader was performing according to these standards, indicates a lack of reasonable care consistent with the judge's finding of moderate negligence.

The judge's negligence determination was also based on the admission of equipment manager Roberts "that he was unaware of any accumulator pressure checks ever being made for the grader, and had no knowledge that the grader accumulator had ever been tested." 15 FMSHRC at 1700. Roberts's testimony provides support for the judge's conclusion that the operator "had no method of prevention maintenance which could have detected the condition prior to the accident." *Id.*

Accordingly, we conclude that substantial evidence supports the judge's finding of moderate negligence and affirm that determination.

3. Effect of going out of business

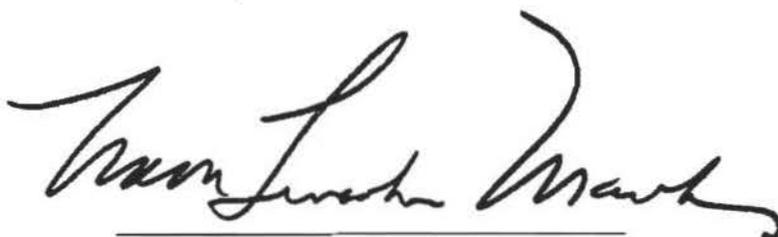
We reject as unsupported Steele Branch's assertion that it should be relieved of its civil penalty liability because it is no longer in business. S. B. Br. 25-26. Beyond this bald statement, it has provided neither the judge nor the Commission with any evidence on this claim. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697 (April 1994). Accordingly, we affirm the judge's rejection of this argument.

III.

Conclusion

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


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner

Commissioners Doyle and Holen, concurring in part and dissenting in part:

We agree that substantial evidence supports the judge's determination that the parking brake alone did not render the grader safe to operate. 15 FMSHRC 1667, 1695 (August 1993)(ALJ); slip op. at 6. We dissent, however, from the affirming Commissioners' opinion that the administrative law judge appropriately applied the reasonably prudent person test in determining whether Steele Branch had violated 30 C.F.R. § 77.404(a)¹ and would remand for further analysis of that issue.

The citation issued to Steele Branch alleged as follows:

The investigation of a fatal surface machinery (grader) accident at this mine revealed that the Caterpillar Grader . . . was not maintained in a safe operating condition, in that *based on the specifications of the [manufacturer's manual,] the fully charged accumulator provides for approximately five brake applications after the diesel engine has been shut off.* The investigation revealed through testing that only one brake application was provided after the diesel engine was shut off.

G. Ex. 2 (emphasis added). The inspector testified that he had relied on the manual provision in reaching his conclusion that the grader was unsafe. 15 FMSHRC at 1691.

The judge, also relying on the service manual to the effect that "a fully charged accumulator should provide approximately five brake applications after the engine is shut off," concluded that the grader's brake accumulator was defective, thereby rendering the grader unsafe to operate. 15 FMSHRC at 1696. Accordingly, he found a violation of 30 C.F.R. 77.404(a). *Id.*

On review, the operator challenges the judge's finding of violation, asserting that, under the circumstances surrounding the violation, the reasonably prudent person would not have recognized a hazard warranting corrective action. PDR at 6.

The facts are largely undisputed. MSHA learned in its investigation that Mr. Browning was an experienced and safe grader operator, who conducted daily checks of his equipment and reported all problems to the company mechanics. 15 FMSHRC at 1673; Tr. 98. On the day of the accident, Mr. Browning had shut down the grader he usually operated because of a problem and was operating the No. 9 grader in its place. 15 FMSHRC at 1673, Tr. 99-100. Apparently,

¹ 30 C.F.R. § 77.404(a) provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

during operation, the engine stalled, the brakes failed, and Mr. Browning jumped from the vehicle and was run over by the grader. R.Ex. 4 at 2-3; R.Ex. 5 at 1. The grader came to a stop in an upright position, against the highwall. 15 FMSHRC at 1668.

There are three manuals for the No. 9 Grader (Caterpillar Grader Model No. 16, serial No. 49G915). The first is an operation and maintenance manual (R.Ex. 6), which directs that the accumulator precharge pressure be checked every 500 service meter hours. *Id.* at 92. The second is a lubrication and maintenance guide (R.Ex. 8), which directs that the accumulator's nitrogen precharge pressure be checked "when required." *Id.* at 9. The third is a service manual (R.Ex. 9), which is used by mechanics who are making major repairs on the machine (Tr.147) and which indicates that, at 70 degrees Fahrenheit, the accumulator is fully charged at 600 pounds per square inch ("psi") and that "[f]ully charged, the accumulator provides for approximately five brake applications after the diesel engine has been shut off." R.Ex. 9 at Group 70, p. 1 (issued 3-65). The service manual also contains detailed instructions for checking the pressure in the accumulator by using a shutoff valve, gauge, hose and chuck. *Id.* at Group 100, p.1. It contains no indication that the pressure in the accumulator is to be tested by repeated brake application after engine shutoff or that brake applications are part of the test procedure of the braking system. *See* R.Ex. 9. Nor do the other manuals contain such information. *See* R.Ex. 6, 8.

On the basis of the service manual provision stating the expected performance of the brakes after engine shutoff, MSHA charged that Steele Branch violated section 77.404(a), despite the fact that the accumulator, when tested after the accident, was fully charged with a nitrogen precharge reading of 600 psi, as required by the service manual. 15 FMSHRC at 1672, 1675; Tr. 75-76, 151; R.Ex. 5 at 5, 8; R. Ex. 9 at Group 40, p. 1 (issued 4-65).²

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citation omitted). The Commission has determined that adequate notice of the requirements of a standard is provided if a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Energy West Mining Co.*, 17 FMSHRC 1313, 1318 (August 1995).

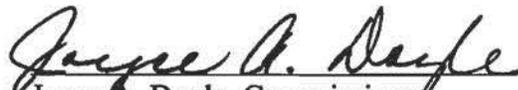
The affirming Commissioners assert that the judge determined that a reasonably prudent person would have recognized that the grader had been rendered unsafe. Slip op. at 6. We disagree. In his decision, the judge referred to the Commission's reasonably prudent person test.

² In fact, even after a new, fully charged accumulator was installed on the grader, the service brakes still provided only one application. 15 FMSHRC at 1675; Tr. 151-53.

15 FMSHRC at 1687. In our opinion, however, he failed to apply that test to ascertain whether Steele Branch, despite having a grader accumulator that was properly charged in accordance with the service manual, nevertheless should have recognized a “hazard warranting corrective action,” *Alabama By-Products*, 4 FMSHRC at 2129, and should have recognized that it was also required to assure that it had approximately five brake applications after engine shutoff.

We note that the affirming Commissioners, in stating that the service manual may be considered only in determining the level of negligence but not in determining the violation, slip op. at 6 n.9, have overlooked the fact that the citation in this case was expressly based on the service manual’s representation of five brake applications. G.Ex. 2. Moreover, the scheme of liability without fault set forth in the Mine Act does not override the due process protections of the Constitution. “Laws must ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.’” *Energy West*, 17 FMSHRC at 1318, quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The case relied on by the affirming Commissioners, *Fort Scott Fertilizer - Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995), involved a challenge by the Secretary of Labor to a judge’s determination that employee misconduct was a defense to a violation. No notice issues were raised.

For the foregoing reasons, we would remand the proceeding for application of the Commission’s reasonably prudent person test.


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner

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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 16 1996

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Respondent :
v. : Docket No. SE 94-667-R
: Order No. 3184043
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : No. 5 Mine
ADMINISTRATION (MSHA), :
Petitioner :
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 95-131
Petitioner : A. C. No. 01-01322-03989
v. :
: Mine No. 5
JIM WALTER RESOURCES, INC., :
Respondent : Docket No. SE 95-140
: A. C. No. 01-01401-04058
: :
: Docket No. SE 95-141
: A. C. No. 01-01401-04059
: :
: Mine No. 7

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor. Birmingham, Alabama, for
Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources,
Inc., Brookwood, Alabama, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on a notice of
contest and petitions for assessment of civil penalty filed by

Jim Walter Resources, Inc., against the Secretary of Labor, and by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Jim Walters, respectively, pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30. U.S.C. § 815. The company contests the issuance to it of Order No. 3184043 on September 1, 1994. The Secretary's petitions seek \$26,462.00 in penalties for eight violations of his mandatory health and safety standards. For the reasons set forth below, I approve the agreement of the parties settling all but two orders in Docket No. SE 95-140, affirm the two contested orders and assess civil penalties of \$19,224.00.

A hearing was held on July 20, 1995, in Hoover, Alabama. MSHA Coal Mine Inspector Kirby G. Smith, MSHA Supervisory Safety and Health Specialist Kenneth Ely and miner Keith Plylar testified for the Secretary. Longwall Face Foreman Henry M. Thomas was a witness on behalf of Jim Walters. The parties also submitted briefs which I have considered in my disposition of these cases.

SETTLED ORDERS AND CITATIONS

At the beginning of the hearing, counsel for the Secretary stated that Docket Nos. SE 94-667-R, SE 95-131, SE 95-141 and two citations in Docket No. SE 95-140 had been settled. With respect to Docket No. SE 95-131, the parties agreed to reduce the proposed penalty for Order No. 3184043 from \$5,000.00 to \$2,500.00 and Jim Walters agreed to withdraw its contest of the order (Docket No. SE 95-667-R). For Docket No. SE 95-141, the parties agreed to modify Order Nos. 3182603 and 3182618 by deleting the "significant and substantial" designations and to reduce the proposed penalty for each from \$903.00 to \$309.00, and to reduce the proposed penalty for Order No. 3183771 from \$7,500.00 to \$4,000.00. In Docket No. SE 95-140, the parties have moved to vacate Citation No. 3189887 and the Respondent has agreed to pay the proposed penalty of \$506.00 for Citation No. 3183885 in full.

After considering the parties' representations, I concluded that the settlements were appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would approve the agreement. (Tr.

364-72.) The provisions of the agreement will be carried out in the order at the end of this decision.

ORDERS NO. 3189434 AND 3189435

The parties contested Orders No. 3189434 and 3189435 in Docket No. SE 95-140. The orders were issued by Inspector Kirby Smith on August 25, 1994, during his inspection of Jim Walter's No. 7 Mine. While inspecting the No. 2 longwall, the inspector observed that plastic line curtains had been placed on the mine floor, from the longwall chain line, across the longwall pontoons, to the place where the longwall shield jacklegs joined the pontoons. He also saw line curtains hanging from where the jacklegs joined the shield down to the pontoons. The curtains extended for 20 or 25 shields, past shield 184, and, consequently, past the methane monitor located at the tailgate.

Smith was accompanied on his inspection by Paul Phillips, assistant mine foreman, Barry Hurst, longwall coordinator, and Stan Odom, union representative. Near the midway point of the longwall, the inspector took some methane readings. He detected .4 percent methane 12 inches from the mine roof and 1.1 percent methane 12 inches from the mine floor. Inspector Smith took another reading behind the curtains hanging from shield No. 184 and detected 2.2 percent methane.

As a result of these readings, the inspector issued the orders in question. Order No. 3189434 alleges a violation of Section 75.323 of the Regulations, 30 C.F.R. § 75.323, because

[m]ethane was allowed to accumulate along the Number Two Longwall face in excess of 1.4% due to mine ventilation plastic curtain being placed on the mine floor and supported as a line curtain by the shields jack legs. This method was utilized to trap and divert the methane bleeders that were encountered in the mine floor to the Longwall gob and tailgate entry.

(Govt. Ex. 2.) The order was issued under Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2).¹

Order No. 3189435 sets out a violation of Section 75.342 of the Regulations, 30 C.F.R. § 75.342, in that "[l]ine curtain was installed on the shield jack legs on the Number Two Longwall so as to divert accumulations outby the tailgate methane sensor. This action rendered the methane monitor's response to methane along the longwall face to be inaccurate." (Govt. Ex. 5.) This order was also issued under Section 104(d)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The No. 7 mine is located in the Mary Lee Coalbed which, as of a 1985 report by the Bureau of Mines, had the highest average liberation of methane per mine of any coalbed in the United States. (Govt. Ex. 7.) In that same report, the No. 7 mine was shown to have the highest methane liberation of any mine in the U.S. Methane liberation continues to be a problem at the mine. As Mr. Thomas, the longwall face foreman stated, "I deal with it every day." (Tr. 262.) In 1993, 15 methane ignitions occurred in the mine. Fifteen more occurred in 1994, eight of those on longwall sections.

Order No. 3189435

To avoid repeating the same evidence, the second order will be discussed first. Section 75.342 requires that "MSHA approved methane monitors shall be installed on all . . . longwall face equipment," among other places, "at the return air end of the

¹ Section 104(d)(2) provides:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

longwall face." It further requires that the monitors "shall be maintained in permissible and proper operating condition," so that "[w]hen the methane concentration . . . reaches 1.0 percent the monitor shall give a warning signal" that is "visible to a person who can deenergize the equipment." Finally, it requires that the monitor "shall automatically deenergize the machine" when the methane concentration "reaches 2.0 percent" or the "monitor is not operating properly."

The Respondent argues that there was no violation of this regulation. At first blush, this argument appears to have some merit. It is true that Jim Walter had a methane monitor located in the proper place and there is no evidence that it was not calibrated or in permissible condition or that it did not give a visual warning signal at 1.0 percent methane or deenergize the equipment at 2.0 percent methane. Indeed, there is no evidence that the monitor was not in proper operating condition, *if it had been permitted to operate properly.*

That it was not, however, is the difficulty. By placing a line curtain on the floor and hanging it from the jacklegs of the longwall shields so that the methane seeping from the "bleeder" in the mine floor would be directed away from methane monitor, Jim Walter did not "maintain" the monitor in "proper operating condition."

Jim Walter clearly had a problem with methane seeping from a bleeder in the floor. Even though there was 131,000 cfm of air coursing from the headgate to the tailgate of the longwall, it was not sufficient to reduce the concentration of methane below 1.0 percent. Since the velocity of the air could not be increased further and could not be redirected, Jim Walter's only alternative, according to ventilation specialist Kenneth Ely, was to stop production until the methane bled off. Instead, the Respondent elected to direct the methane along the floor and behind the curtains hung from the shields. That way, it would not be sensed by the monitor and production could be continued.

By directing the methane away from the monitor, the company precluded the monitor from performing its function. The net effect of this, as suggested by the Secretary's witnesses, was the same as placing a plastic bag over the monitor so that it

could not sense the air passing around it. The deliberate directing of the methane out of the flow of air which was supposed to "dilute, render harmless, and carry [it] away," 30 C.F.R. § 75.321, and past the tailgate methane monitor was the equivalent of rendering the monitor inoperable. Accordingly, I conclude that Jim Walter did not maintain the monitor in proper operating condition and, therefore, violated Section 75.342.

Order No. 3189434

Section 75.323 requires that when "1.0 percent or more methane is present in a working place . . . electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off," that "[c]hanges or adjustments shall be made to the ventilation system to reduce the concentration of methane to less than 1.0 percent" and that "[n]o other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent." The section further requires that when "1.5 percent or more methane is present in a working place . . . [e]veryone except those persons referred to in section 104(c) of the Act shall be withdrawn from the affected area; and . . . electrically powered equipment in the affected area shall be disconnected at the power source."

The Secretary argues that Jim Walter violated this section by not deenergizing the longwall equipment until after Inspector Smith advised the longwall coordinator that he was going to issue the orders in this case. On the other hand, Jim Walter alleges that they did not become aware that methane in excess of 1.0 percent was present until the inspector informed them that he was issuing the orders and that then they deenergized the machinery.² I find that Jim Walter should have known that methane of 1.0

² Jim Walter also questions whether the equipment was energized at the time the orders were issued. Inspector Smith said that it was. Mr. Thomas said he thought that it was not, but that he could not be sure. Based on the Longwall Section Report, (Govt. Ex. 12), which indicates that the power was on between 8:50 a.m. and 9:19 a.m., and Mr. Thomas's testimony that the shutdown occurred at 9:19 a.m., (Tr. 327), I find that the equipment was energized when the inspector took his methane readings and issued the orders.

percent or more was present in the working area and, therefore, did not comply with the regulation.

There were two ways that the miners at the longwall could have determined that 1.0 percent or more of methane was present: (1) someone with a methane detector could have taken a reading, or (2) one of the monitors on the longwall could have sensed it. However, Jim Walter had rendered its tailgate monitor inoperable by directing the methane away from it. But for this action, the tailgate monitor would have detected the methane, just as Inspector Smith's detector did, would have given a warning signal to alert the crew, if between 1.0 and 1.9 percent methane was detected, or would have deenergized the machinery, if 2.0 percent methane was detected.

Having taken steps to make the methane monitor not operate properly, Jim Walter cannot now claim that it did not comply with Section 75.323 because it did not know that methane was present. The fact is that it would have but for its actions to avoid knowing. Consequently, I conclude that the company violated the regulation.

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal

mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Applying the *Mathies* criteria, I have already found, (1) that the company violated two mandatory safety standards. I further find: (2) That these violations contributed to a measure of danger to safety, *i.e.* a methane ignition, or in the worst case, a methane explosion; (3) That there is a reasonable likelihood that an ignition or an explosion would result in an injury; and (4) That there is a reasonable likelihood that the injury would be reasonably serious in nature, *i.e.* burns or death. Accordingly, I conclude that the violations were "significant and substantial."

Unwarrantable Failure

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

Mr. Thomas testified that curtains were put on the floor and hung from the shields because "we'd had it [methane] every day, it wasn't just that day. You know, you can look back on the reports and see where we'd wrote [*sic*] it up. But on this date we had some and we'd pulled the power, knocked the power off and hung curtain and did whatever we could do to get the power back on." (Tr. 271, emphasis added.) Plainly, this was an intentional act. The velocity of the air could not be increased

to render the methane harmless, so the methane was routed past the monitor so the longwall could be kept running.

While Mr. Thomas stated that he had frequently placed curtains on the floor and hung them from the longwall shields to deal with methane problems, I find it significant that neither of the MSHA officials had ever heard of such a practice. Nor had Mr. Plylar, a miner who had worked on the No. 2 longwall and was a member of the safety committee, the last four years as chairman. Perhaps Mr. Thomas was exaggerating to try to justify what appears to be a very dangerous practice evidencing, at best, an indifference to the safety of miners.

Whether this was the first time or not, I find that the Respondent acted intentionally and with a serious lack of reasonable care. Accordingly, I conclude that the violations were the result of Jim Walter's unwarrantable failure to follow the regulations.

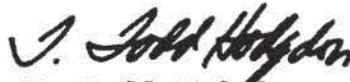
CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of \$11,600.00 for these two violations. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, the parties have stipulated that Jim Walter is a large mine operator and that any penalty imposed in this case will not affect its ability to continue in business. (Tr. 8.) I further note that the No. 7 mine is a large mine with a fairly large number of violations for the two years preceding the violations. (Govt. Ex. 10.) The evidence in the case demonstrates that the Respondent was highly negligent and that the gravity of the violations is very serious. The citations indicate that the company demonstrated good faith in abating the violations. Considering all of this, I conclude that the proposed penalty of \$11,600.00 is appropriate.

ORDER

Order No. 3184043 in Docket No. SE 95-131 is **AFFIRMED** and the Respondent's notice of contest in Docket No. SE 94-667-R concerning that order is **DISMISSED**; Order Nos. 3189434 and 3189435 and Citation No. 3183885 are **AFFIRMED** and Citation No. 3189887 is **VACATED** and **DISMISSED** in Docket No. SE 95-140; Order No. 3183771 is **AFFIRMED** and Order Nos. 3182603 and 3182618 are **MODIFIED** by deleting the "significant and substantial" designations and **AFFIRMED** as modified in Docket No. SE 95-141. Jim Walter Resources, Inc., is **ORDERED TO PAY** civil penalties of **\$19,224.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 17 1996

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
On behalf of WILLIAM DELONG,	:	Docket No. KENT 95-769-D
Complainant	:	MSHA Case No. PIKE CD 95-16
v.	:	
	:	Martiki Surface Mine
BRUCE YOUNG, d/b/a BNA	:	Mine I.D. No. 24-01490
TRUCKING AND YOGO, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-770-D
On behalf of WILLIAM DELONG,	:	MSHA Case No. PIKE CD 95-16
Complainant	:	
v.	:	Martiki Surface Mine
	:	Mine I.D. No. 24-01490
BRUCE YOUNG, d/b/a BNA	:	
TRUCKING AND YOGO, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT:
ASSESSMENT OF CIVIL PENALTY

The parties have submitted an executed settlement agreement in this matter which includes the following items:

1. Complainant, William DeLong, agrees not to institute any further legal action arising from his alleged discharge of February 23, 1995;
2. Respondents agree to reinstate Mr. DeLong as of October 10, 1995, as a truck driver for Yogo, Inc., at a rate of \$7.00 per hour;
3. Respondents agree that DeLong shall have seniority as a truck driver for Yogo from the date of his first employment with Respondent Bruce Young d/b/a BNA Trucking in August, 1994;

4. Respondents agree to provide to Mr. DeLong and the Secretary of Labor a seniority list of all truck drivers employed by Yogo, Inc., as of October 10, 1995;

5. Respondents agree that layoffs, if they occur, will be based on the aforementioned seniority list;

6. Respondents agree to pay Mr. DeLong \$5,000 for alleged mental and emotional distress in accordance with a schedule set forth in the agreement;

7. Respondents deny any violations of section 105(c) of the Act.

I have considered the representations set forth in settlement agreement and have determined that they are consistent with section 105(c) of the Act. I do note that regardless of Respondents' denial of any violation of the Act, the order approving the settlement in this matter is enforceable to the same extent as any other order of the Commission under section 106(b) of the Act.

ASSESSMENT OF CIVIL PENALTY

The parties have left assessment of the civil penalty to the undersigned judge. Applying the penalty criteria set forth in section 110(i) of the Act, and particularly noting the good faith demonstrated by Respondents in reinstating Mr. DeLong, I conclude that a civil penalty of \$500 is appropriate.

ORDER

The parties motion for approval of the settlement agreement is **GRANTED**. Since the parties have informed the undersigned that BNA Trucking is no longer in business, Respondents Bruce Young and/or Yogo, Inc. are ordered to pay to the Secretary of Labor a civil penalty of \$500 within 30 days of this decision.



Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 17 1996

STILLWATER MINING COMPANY : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 95-158-M
: Citation 4423435; 12/6/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Stillwater Mine
ADMINISTRATION (MSHA) : Mine I.D. No. 24-01490
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 95-352-M
Petitioner, : A.C. No. 24-01490-05572
v. :
STILLWATER MINING COMPANY, : Stillwater Mine
Respondent :

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado;
Barbara J. Renowden, Conference and
Litigation Representative, U.S. Department of
Labor, Mine Safety and Health Administration,
Denver, Colorado, for the Secretary of Labor;
James J. Gonzalez, Esq., Holland & Hart,
Denver, Colorado; Jeanne M. Bender,
Holland & Hart, Billings, Montana, for
Stillwater Mining Company.

Before: Judge Amchan

Summary of Decision

At issue in this case is a citation alleging that Stillwater Mining Company (Stillwater) violated 30 C.F.R. §57.9310, which requires that persons attempting to free chute hangups be experienced, be familiar with their tasks and the hazards involved, and use the proper tools. A \$220 civil penalty was proposed for this alleged violation. For the reasons stated below, I affirm the citation only with regard to the failure of Respondent's miner to use proper tools and assess a civil penalty of \$50.

Findings of Fact

The accident

On November 23, 1994, an accident occurred at Stillwater's underground platinum mine near Nye, Montana. Two large rocks had lodged in a chute through which ore is dropped into haul trucks. Miners Arlen Cook and Eldron Arthun worked unsuccessfully to free the jam for about ten or fifteen minutes. Then they decided to blast the rocks free with dynamite (Tr. 50-54).

Arthun, a miner with 22 years of experience, told Cook, a miner with only 5 months experience, to open the gate at the bottom of the chute (Tr. 14, 54, 89, Exh. R-11, pp. 6, 22). Then, contrary to Stillwater's safety rules, Arthun climbed into the chute. He manually placed the dynamite near the jam¹. When he climbed out of the chute Arthun noticed that he had lost a brace that he had been wearing on an injured finger (Tr. 54-59, Exh. R-11, pp. 41-43).

Both miners looked for Arthun's brace in the back of a truck parked at the bottom of the chute. Arthun first told Cook to close the gate to the chute (Tr. 56, Exh. R-11, pp. 43-45). Then

¹It is not a violation of Stillwater's safety rules to manually place dynamite in a chute if this can be done without violating other rules, such as the prohibition against entering the chute (Exh. R-1, Rules 21 and 22). This may be the case when the jam is within a couple of feet of the bottom of the chute (Tr. 284-88).

he changed his mind and told Cook to leave the chute open so he could light the explosive charge (Exh. R-11, pg. 45). Cook either did not hear Arthun, or misunderstood him. He closed the gate without looking at the mouth of the chute. Arthun was standing at the mouth of the chute and was caught by the closing gate. He fractured his pelvis in three places and was off of work until August 1995 (Tr. 59-60, 293, Exh. R-11, pp. 48, 71-72).

The MSHA Citation

MSHA Inspector Fran Maulding learned of the accident through a newspaper report. She visited the mine on December 6, 1994, to investigate the accident and issued Citation No. 4423435. The citation describes the violative condition as follows:

An employee was seriously injured when he placed himself inside chute 4460 at 4800 EW with gate up to free chute hang-up. He relied on another employee to shut chute gate when he finished completing his task. For some reason he reentered chute as other employee activated the air cylinder to close chute gate. Chute gate closed on employee causing pelvis injuries. This happened 11-23-94.

According to the citation this condition or event violated 30 C.F.R. §57.9310(b). This regulation provides that:

Persons attempting to free chute hangups shall be experienced and familiar with the task, know the hazards involved, and use the proper tools to free material.

The condition described by the citation is not a violation of the standard. The fact that an accident occurred does not establish a violation of this regulation. There is no allegation that persons attempting to free chute hazards were not experienced or familiar with the task, that they did not know the hazards involved or that they did not use the proper tools. The only suggestion in the citation of a violation of any MSHA requirement is the description of the "Action to Terminate" (Block 18). That section relates that "the company has trained miners of hazards and proper way to handle chute hang-ups."

Did the Secretary allege a violation of the cited standard?

In issuing the citation, Inspector Maulding was primarily concerned with the conduct of Eldon Arthun in standing in front of the mouth of the chute (Tr. 129). While he violated Respondent's safety rules in this regard, a violation of company safety rules does not necessarily establish that a miner is inexperienced, or unfamiliar with his task or the hazards involved. Experienced persons on occasion perform tasks in an unsafe manner, even when they know better, see e.g., Midwest Materials Co., 17 FMSHRC 636 (ALJ April 1995-review pending); Whayne Supply Co., 17 FMSHRC ____ (ALJ September 1995-review pending).

Use of the proper tools

Although the standard requires the use of proper tools, nothing in the citation indicates that proper tools were not used. Citations are drafted by non-legal personnel and the Commission is liberal in allowing amendments to citations and conforming the pleadings to the evidence. Nevertheless, section 104(a) of the Act requires that a citation describe with particularity the nature of the violation. The purpose of this requirement is to allow the operator to discern what conditions require abatement and adequately prepare for hearing, Cyprus Tonopah Mining, 15 FMSHRC 367, 379 (March 1993).

In the instant case it is a close question as to whether the particularity requirement was satisfied with respect to the use of proper tools. That Respondent violated section 57.9310(b) in failing to use the proper tools was not alleged until the middle of the hearing (Tr. 133-38). While, it is incumbent on the Secretary to articulate its theory of a case sufficiently in advance of trial, I conclude that Respondent was not prejudiced by his failure to do so with regard to the tools issue.

Respondent offered the testimony of the only eyewitnesses to the accident, Cook and Arthun, and foreman Ike Bassett, who has expertise as to the proper tools to be used to free jammed chutes. Their testimony establishes that no tools are required to place an explosive charge if the jam is within the first

couple of feet of the mouth of the chute (Tr. 284-85). If that is the case, the charge can be placed by hand through an opening in the top of the chute gate (Tr. 284-88).

Arthun testified the jam was "right at the mouth of the chute," and "roughly ... six feet" from the mouth of the chute (R-11, pp. 38-40). He also testified that he knew he had made a mistake, that he should have put the explosives on a powder pole and put it in between the jammed boulders (R-11, pg. 40). Cook would also have used a pole to place the explosives (Tr. 55).

From this evidence, I infer that the jam was too far from the mouth of the chute for the explosives to be safely placed by hand. I therefore conclude that Respondent violated §57.9310(b) by virtue of Arthun's failure to use the proper tools in placing the explosive, A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983).

The training of Arlen Cook

The pleadings with respect to Stillwater miners' familiarity with tasks, experience and knowledge of hazards, should also have been amended before trial to describe the alleged violation with sufficient particularity. At hearing, over the objection of Respondent's counsel, the Secretary litigated the theory that the standard was violated because Arlen Cook had not been properly trained and thus did not know the hazards involved in chute pulling.

The first suggestion in the record that Mr. Cook's training was at issue appears in the Secretary's Supplemental Response to the Prehearing Order, dated September 27, 1995 (14 days before the hearing). It states that MSHA witness Robert Koenig would discuss the MSHA certificates of training for Cook and Arthun. At hearing, I concluded that the citation, in describing the abatement measure as training for "miners," was broad enough to alert Respondent that Mr. Cook's training, as well as Mr. Arthun's, might be an issue.

I reiterate this ruling because I conclude Stillwater has not been prejudiced by litigation of the issue as to whether Cook had been adequately trained prior to the accident. It anticipated litigation of this issue by subpoenaing Mr. Cook and

also by presenting the testimony of his supervisor, Ike Bassett. Through these witnesses, Stillwater has established that Mr. Cook was sufficiently experienced and familiar with the task of unjamming chutes. He was also knowledgeable of potential hazards². Thus, Stillwater is not prejudiced because it disproved any violation of the standard with regard to Mr. Cook.

The Secretary did not establish a violation of the cited regulation with regard to Mr. Cook's training.

The Secretary's theory of this case is that Stillwater violated section 57.9310 because the certificates of training for Arlen Cook, MSHA Form 5000-23 (Exhibits R-3 and R-4), do not reflect training in the tasks and hazards of chute pulling prior to the accident. A certificate of training signed by Mr. Cook on June 30, 1994, shortly after he began working for Stillwater, indicates that he received "Newly Employed Inexperienced Miner" training. The certificate does not specify the subjects covered in that training (Exh. R-3).

Another certificate signed by Mr. Cook on December 6, 1994, after the accident, indicates that he received "New Task" training in a number of areas, including chute pulling and chute blasting (Exh. R-4). From this certificate, the Secretary concludes that Cook was not familiar with the tasks and hazards of freeing chute hang-ups on November 23, 1994.

Stillwater has rebutted whatever inference may be drawn from the training certificates. Cook was trained on how to safely free chute jams after about three weeks of employment at Stillwater. This training was given by Stillwater's safety department, his foreman Ike Bassett and his partner, Gary Everhardt, an experienced miner (Tr. 15-29, 41, 49, 89-97, 262-73, 277-78).

²Section 48.2(b) defines "experienced miner" to include one who has received the training for a new miner within the preceding 12 months as prescribed in §48.5. I need not reach the issue as to whether an "experienced miner" satisfies the requirements of §57.9310(b), for the record establishes that Cook and Arthun were experienced in the task of freeing chute hang-ups.

Bassett and Everhardt told him to stand by the side of the chute and use a bar to free jams. They also explained that slamming the chute gate or running water on the jam will sometimes free the chute, if this cannot be done with a bar. Cook was also told that as a last resort jams must be freed with explosives. He was taught to place the explosives with a PVC pipe. These instructions are consistent with Stillwater's safety rules which Cook was given on June 27, 1994 (Ibid., Exh. R-2)³.

Within a few weeks of Cook's hiring, Bassett and/or Everhardt demonstrated to Cook how to operate the controls for the chute gate and how to load a truck with ore from the chute. They then observed him performing these tasks (Tr. 262-73). Thus, Stillwater has established that Cook was sufficiently experienced, familiar with the tasks of chute pulling and freeing chute hang-ups, and knowledgeable of the hazards involved to satisfy section 57.9310 by November 23, 1994. There is no evidence in the record suggesting that the same was not true for Mr. Arthun⁴.

³Cook was not allowed to do blasting by himself. Stillwater requires that two employees be present when blasting is performed (Tr. 273).

⁴Stillwater may have violated 30 C.F.R. §48.9 with regard to the certificates of training for Mr. Cook, however that is not certain, and the operator was not cited for such a violation. Stillwater's training program for new miners includes "Health & Safety aspects of the task to which the new miner will be assigned (Exh R-9, fourth page)." Thus, it may be true that the certificate of training signed by Cook on June 30, 1994, accurately reflects his training and encompasses the task training which he received.

Moreover, in proposing section 57.9310, MSHA stated that this rule was not intended to duplicate the Part 48 training requirements. The Agency said that specific training was not an element of the proposed rule, BNA Mine Safety and Health Reporter, December 26, 1984 at page 298.

The violation established was "Significant and Substantial"

Citation No. 44223435 was cited as a "Significant and Substantial (S&S)" violation of the Act. The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is 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.

I conclude that the failure to use proper tools in freeing chute jams was "S&S." Given the fact that proper tools were not used at a time when Mr. Arthun was standing in front of the jammed chute, it was reasonably likely that the failure to use proper tools would result in injury. It was also likely that the injury would be serious. Ironically, the scenario of a likely serious injury in this matter was not the accident that occurred. Rather, it was the likelihood that in the normal course of mining operations a miner engaged in such activity would be seriously injured by material suddenly coming out of the chute.

Assessment of a Civil Penalty

With regard to the penalty criteria in section 110(i) of the Act, the parties have stipulated that Respondent demonstrated good faith in abating the alleged violation, that the proposed penalty of \$220 will not affect Respondent's ability to stay in business, and that the mine had 711,691 hours of production in 1993. Nothing in Respondent's history of violations would cause me to either raise or lower the penalty.

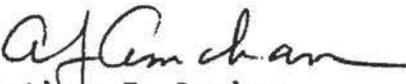
The failure to use proper tools, in this case the PVC pipe, is of fairly high gravity due to the relationship with Arthun's decision to enter the chute. However, I assess a civil penalty

of \$50, because Arthun's negligence cannot be imputed to the Respondent for purposes of assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982).

I find nothing in the record regarding Respondent's supervision, training and discipling of Arthun, who is a rank-and-file miner, that would lead me to the assess a greater penalty. The Commission assesses civil penalties without regard to the penalty proposed by the Secretary. Nevertheless, it strikes me as unjust to assess a higher penalty in this case where the Secretary proposed a \$220 penalty largely on theories it failed to prove.

ORDER

Citation No. 4423435 is affirmed insofar as it alleges a failure of Respondent's miner Eldon Arthun to use proper tools in freeing the chute hang-up of November 23, 1994. It is vacated in all other respects. A \$50 civil penalty is assessed. This penalty shall be paid within 30 days of this decision.


Arthur J. Amchan
Administrative Law Judge

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JAN 17 1996

SOMERSET MINING COMPANY, : CONTEST PROCEEDING
Contestant :
 :
v. : Docket No. WEST 95-267-R
 : Citation 3584806; 3/16/95
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Sanborn Creek Mine
ADMINISTRATION (MSHA), : Mine ID 05-04452
Respondent :

DECISION

Appearances: Charles W. Newcom, Esq., Sherman & Howard,
Denver, Colorado,
for Contestant;
Robert Cohen, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent.

Before: Judge Cetti

This case is before me pursuant to section 105(d) of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 801, et seq., the "Mine Act". Somerset Mining Company (Somerset) challenges a citation issued to it by the Secretary of Labor (Secretary) for an alleged violation of 30 C.F.R. § 75.220(a)(1). The cited standard requires a mine operator to develop and follow a suitable roof control plan, approved by the MSHA District Manager.¹

¹ Section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological condition, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

I

The Sanborn Creek Mine is an underground mine located near Somerset, Colorado. The surface topography is mountainous. An advance and retreat panel and pillar method is used for mining the underground coal in the "B" seam of the mine. From April 1994 to January 1995 Somerset mined under an MSHA approved mine plan which provided, on retreat mining, for the double splitting of pillars which have between 1,500 and 2,000 feet of ground cover (overburden).

In January 1995 an "outburst" or "bounce" of coal along the down-dip side of the barrier pillar resulted in an injury to a section foreman. The injury was immediately reported to MSHA and in due course MSHA was made aware that in August 1994 there had been a prior bounce (a non-reportable one) not involving any injury. That first bounce was also located on the down-dip side of the barrier pillar. As a result of these two bounces or outbursts the operator, as well as MSHA, had safety concerns. MSHA withdrew its approval of the pillar splitting provisions of the mine's roof control plan in January 1995 and issued a citation concerning the adequacy of the roof control plan to protect miners and equipment from coal bursts. (Tr. 94-95). After some discussions and negotiations between MSHA and Somerset, that citation was withdrawn. It was agreed that the operator would hire an outside consultant to "study things further" rather than litigate the citation at that time. As a result of this agreement, Somerset asked Dr. John Abel, an expert mining consultant and Professor Emeritus at the Colorado School of Mines, to study the coal "outburst" problem and the suitability of resuming double splitting of the pillars in question in the "B" seam of the mine.

II

It is undisputed that "coal outburst" was the specific safety hazard that MSHA was concerned with (Secretary's brief, page 5). Dr. Abel visited the mine and prepared a comprehensive report based upon his analysis of the mine and the testing of coal samples taken from the Sanborn Creek Mine. Dr. Abel's solution for the coal outburst problem was to drive a series of short stub rooms, 10 feet long and 20 feet wide, into the down-dip barrier pillars at every crosscut or stub rooms 10 feet long and at least 14 feet wide on 50-foot centers. In his March 10, 1995, comprehensive twenty-five page report Dr. Abel recommended the following:

Softening of the down-dip barrier pillar ribside is recommended to alleviate bounces in the down-dip entry. This can probably be accomplished by mining a short, at least 10-foot long, 20-foot wide, stub room into the

down-dip barrier pillar at each breakthrough (crosscut) during panel advance. Alternatively, a series of short, at least 10-foot long and at least 14-foot wide, stub rooms driven down-dip on 50-foot centers into the down-dip barrier pillar ribside should alleviate the bounce problem. Either of the recommended stub room configurations will move the shear stress concentration from the edge of the approximately 1720-foot long straight-sided barrier pillar ribside to a position back into the barrier pillar. Either of the recommended modifications of the panel retreat mining method should eliminate bounces in the down-dip entry, without inducing a roof failure. If down-dip bounces continue to develop after the modification, the bounces should be located at the face of the unused stub rooms.

Robbing of panel pillars upon retreat is essential to the safe application of room and pillar mining method used at depths of about 1500 to 2500 feet in the Sanborn Creek Mine. Pillar robbing on the retreat results in yielding of the stump pillars remaining after splitting the advance coal pillars, preventing roof or floor pillar failure. The three 30-foot wide by 80-foot long by 7-foot high panel advance pillars in the 170-foot side, four entry, advance panel are graded to a height of 12 feet before being robbed on the retreat. The panel width is increased to 270 feet by driving 100-foot long rooms on 50-foot centers in the up-dip barrier pillar during the retreat. The up-dip rooms perform the same function of pushing the abutment stresses back into the barrier pillar that is proposed for the down-dip stub rooms recommended for the down-dip barrier pillar.

It is clear from Dr. Abel's report and testimony at the hearing that Dr. Abel's solution to the coal outburst problem was a series of stub rooms into the barrier pillar. This recommendation was approved and adopted. It is undisputed in the record before me that there were no more outbursts of coal after the series of stub rooms recommended by Dr. Abel were driven into the barrier pillar.

Dr. Abel, in his analysis, also determined that on retreat mining, double splitting of pillars located between 1,500 and 2,000 feet of cover in the "B" seam was safer than single

splitting because the double split pillars yield at a safer more controlled rate than single split pillars. Dr. Abel opined that double splitting of pillars in the "B" seam located between 1,500 and 2,000 feet of cover was safer and more suitable for the Sanborn Creek Mine than single splitting.

Dr. Abel's report dated March 10, 1995, along with Somerset's request to resume double splitting, was sent to MSHA before a March 1995 meeting between MSHA and Somerset. The report was submitted to MSHA mining engineer Ted Hansen who believed that the double splitting of pillars caused the bounces. Mr. Hansen disagreed with Dr. Abel's conclusion that double splitting was safe and suitable for the mine. Hansen and his supervisors prepared their own reports, recommending that Somerset not be permitted to resume double splitting of the pillars in question. (Gov't. Ex. 5-7).

The March 1995 meeting between MSHA and the operator did not result in an agreement to permit double splitting of the pillars in question. Dr. Abel attended this meeting and following the meeting prepared a follow-up report on the single versus double splitting of the pillars in question. (Resp. Ex. 3). In order to obtain Commission jurisdiction to resolve the dispute, Somerset mine manager Walt Wright signed a letter (which had been drafted by MSHA) advising MSHA that Somerset would not adopt the revised roof control plan and that it intended to double split pillars. (Tr. 121-122; Gov't. Ex. 3 at p. 1). MSHA responded by issuing the present contested Citation No. 3584806, alleging a 104(a) violation of 30 C.F.R. § 75.220(a)(1), which requires operators to develop and follow an approved roof control plan. Thus, the citation was issued as part of an agreed plan between the operator and MSHA so Somerset could request a hearing on the disputed issue.

As stated by counsel for the Secretary in his post-hearing brief "The important facts in this case are not in dispute." Specifically, there is no dispute between Somerset and MSHA concerning the history of the mine, how the mining panels were developed, the advance and retreat room and pillar method of mining and the fact that two above-mentioned coal outbursts occurred in the down-dip side of the barrier pillar before the 5th west panel of the "B" seam was retreated.

III

Applicable Law and Discussion

The citation alleges a violation of safety standard 30 C.F.R. § 95.220(a)(1) which, in relevant part, requires each mine operator to "develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

Section 302(a) of the Mine Act requires each operator to carry out on a continuing basis a program to improve the roof control system of each mine. It reads in pertinent part as follows:

Sec. 302. (a) Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system.

In Dole, 870 F.2d 662 at 667 the court stated "[t]he specific contents of any individual mine [roof control] plan are determined through consultation between the mine operator and the [MSHA] district manager." In Peabody Cole Company, 15 FMSHRC 389 (March 1993) the Commission held that "both the Secretary and the operator are required to enter into good faith discussions and consultation over mine plans." The Commission in Peabody, supra, further explained this process and quoted their decision in Carlson County, 7 FMSHRC 137 as follows:

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission.

In this case it appears from the face of the citation, as well as the undisputed evidence, that the citation was issued when Somerset with the assistance of MSHA staff wrote a letter stating that Somerset intended to resume the double split partial recovery plan without MSHA's approval. The letter was sent to MSHA and MSHA, in response, issued the citation so Somerset could have a hearing and Commission decision on the operator's request that MSHA approve the provision which would allow the mine to resume double splitting of the pillars in question.

Somerset and MSHA agreed that both of the parties negotiated in good faith over the disputed provisions of the operator's roof control plan before an impasse was reached and the citation in

question was issued. I accept the stipulation and find that the parties negotiated in good faith and for a reasonable period concerning the disputed pillar splitting provisions.

It is undisputed that financial gain is not motivating Somerset's desire to double split rather than single split the pillars in question. The undisputed evidence established that Somerset is motivated by safety concerns. About the same amount of coal is produced using either double or single splitting of pillars. It is also undisputed that because of the additional timber required for double splitting it's more expensive per ton of coal mined than single splitting. (Tr. 106-108).

IV

The Secretary's post-hearing brief lists three burden of proof issues for decision in this case as follows:

1. Whether the MSHA District Manager acted correctly in denying approval of Somerset roof control plan for the 5th west panel of the Sanborn Creek Mine.
2. Whether the evidence established that double split retreat mining method for the 5th west panel of the mine was unsuitable and unsafe for the mining conditions.
3. Whether the District Manager's decision to deny approval to Somerset's double split retreat mining method for the 5th west panel is entitled to be affirmed as long as the decision is not arbitrary, capricious or an abuse of discretion.

With respect to the issue MSHA listed above as No. 1, I find this is a non-issue. There is no allegation or contention in this case that the District Manager did not act "correctly" in carrying out his administrative duties. I am mindful that in the Dole, supra, footnote 10, the court states "MSHA always retains final responsibility for deciding what had to be included in the plan." However, the court was surely referring only to the District Manager's administrative duties. The court was not addressing in any way MSHA's burden of proof when the suitability of the mine's roof plan provisions are in litigation before the Commission and its judges.

The burden of proof suggested by MSHA in the issue listed above as number "3", is rejected. The Commission in Peabody Coal Co., 15 FMSHRC 381 at 388 (1993), clearly held, with respect to the merits of a disputed provision in the mine plan, the Secre-

tary bears the burden of proving that the plan provision at issue was suitable to the mine in question. See JWR, 9 FMSHRC at 907 (involving ventilation plans), and SOCCO, 14 FMSHRC at 13 (involving safeguards).

V

Further Discussion and Findings

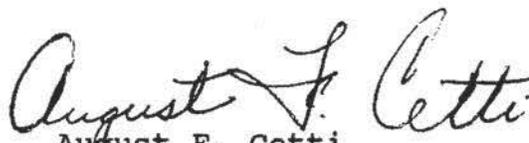
Dr. Abel in responding to MSHA's criticism of his report, testified his report and analysis (unlike MSHA's) was based on coal samples that were taken from the Sanborn Creek Mine. He also responded to MSHA's criticism of his assumption that the overburden horizontal pressure was equivalent to the vertical pressure in the mine. Dr. Abel convincingly showed that the assumption he used in analyzing and resolving the outburst problem was more realistic than the alternate assumption suggested by MSHA.

I conclude that Dr. Abel's superior qualifications, extensive experience and logical analysis of the problems are entitled to considerable weight and are persuasive.

On the record before me I find that MSHA has not established by a preponderance of the evidence that the double splitting of the pillars in question is not suitable for the Sanborn Creek Mine or that single splitting of said pillars is suitable to the mine's prevailing geological condition and the mining system used at the mine.

ORDER

In view of the foregoing, Citation No. 3584806 is **VACATED** and Somerset's contest is **GRANTED**.


August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 22 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 93-9
Petitioner : A.C. No. 40-03011-03534
v. :
: Docket No. SE 93-10
S & H MINING, INC., : A.C. No. 40-03011-03535
Respondent :
: Docket No. SE 93-98
: A.C. No. 40-03011-03540
:
: S & H Mine No. 7

DECISION ON REMAND

Before: Judge Feldman

These civil penalty proceedings initially concerned 11 alleged violations of mandatory safety standards contained in Part 75 of the Secretary's regulations, 30 C.F.R. Part 75. These matters were disposed of in a decision dated October 22, 1993, wherein the parties' settlement terms for seven of the alleged violations were approved and the remaining four violations were adjudicated on the record in a bench decision. 15 FMSHRC 2196.

These cases were remanded by the Commission for further analysis in light of the record evidence with respect to two alleged violations of section 75.220, 30 C.F.R. § 75.220, for failure to comply with the Mine Safety and Health Administration's (MSHA's) approved roof control plan. 17 FMSHRC 1918 (November 1995). The Commission directed that I revisit my conclusions that the first violation was not properly designated as significant and substantial, and that the second violation was not attributable to the respondent's unwarrantable failure.

A. Order No. 3382962

On July 22, 1992, MSHA Inspector Don McDaniel, accompanied by Charles White, S&H's Mine Superintendent, observed a coal pillar that had not been mined in conformity with the provisions

of the approved roof control plan that limited initial pillar cuts to 13 feet wide. The initial cut observed by McDaniel was 20 feet wide.¹ Tr. II 67-68.² The uncontradicted evidence reflected the initial pillar cut was enlarged, without MSHA's approval, because, given the dimension of the entry, the continuous mining machine was too large to maneuver to cut the pillar according to the plan's sequence. Tr. I 187, 192-93. Following the issuance of Order No. 3382962, S&H's roof control plan was revised to permit it to round off a corner of the pillar and then make an initial pillar cut of 15 feet wide. Tr. II 77-78.

Regardless of the necessity for increasing the size of the initial cut, I concluded that S&H's unilateral decision to disregard its roof control plan was inexcusable conduct justifying the unwarrantable failure charge. However, I also concluded that the violation was not significant and substantial in that S&H's action did not compromise structural support because the roof control plan "was ultimately modified to essentially conform to the respondent's method of initial pillar cut." 15 FMSHRC at 2199.

In its remand decision, the Commission noted that the 20 foot cut cited by McDaniel did not conform with the revised plan permitting 15 foot cuts. Consequently, the Commission concluded the record fails to support my initial decision that the unauthorized 20 foot cut did not compromise roof support.

A violation is properly characterized as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in serious injury. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981); *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984). The likelihood of injury must be evaluated in the context of continued mining

¹ The pillars are approximately 35 feet square. Tr. I 182, 205.

² The hearing was conducted on September 28 and 29, 1993. "Tr. I" refers to the September 28 hearing and "Tr. II" refers to the September 29 hearing.

operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

Upon further reflection, it is clear that the respondent's 20 foot initial cut significantly exceeded the 15 foot cut permitted by the revised roof control plan. Although McDaniel testified he did not observe anyone under unsupported roof at the time he issued the order, when viewed in the context of continued operations, McDaniel's testimony that over cutting posed a continuing hazard to miners traversing the affected travelway supports the significant and substantial designation in Order No. 3382962.

Accordingly, the significant and substantial designation deleted in my initial decision is hereby reinstated. I initially assessed a civil penalty of \$2,100 for Order No. 3382962. Given the civil penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), that contemplates higher penalties for violations involving increased gravity, the assessed civil penalty in this matter shall be increased to \$3,000.

B. Order No. 3382964

On the second day of the inspection, on July 23, 1992, McDaniel, again accompanied by White, was standing two crosscuts from section foreman Steve Phillips who was operating a continuous miner to clean up loose waste material (gob) in an entry. Tr. I 199. McDaniel conceded that S&H's continuous miner was too big to maneuver and operate in compliance with its roof control plan given the configuration of the crosscuts, the location of the pillars and the size of the entries. Tr. II 11-13. McDaniel observed Phillips load a shuttle car with gob and, as another shuttle car arrived, positioned the miner against the side of the pillar, penetrating the pillar,³ without having first installed roof support timbers as required by the roof control plan. Tr I 199-200. McDaniel, with White, approached Phillips

³ As discussed *infra*, McDaniel repeatedly referred to Phillip's penetration of the pillar as "mining." Counsel for the Secretary correctly acknowledged that "cutting" into the pillar was the appropriate term as the question of "mining" is the dispositive issue to be resolved. Tr. I 200.

after he had made a 12-foot-wide, 38-inch-deep wedged shaped cut in the pillar.⁴ Tr. I 200. Phillips told McDaniel that he was still cleaning up gob and had cut the pillar unintentionally. Tr. I 205-06.

Although I concluded this violation was significant and substantial, I declined to credit the Secretary's unwarrantable failure assertion because the evidence did not establish that Phillips' alleged mining was intentional given the angle of the cut and the other evidence of record. 15 FMSHRC at 2198. The Commission's remand noted that I did not adequately indicate why I rejected McDaniel's conclusion that Phillip's action could not have been accidental given the 12 foot distance cut into the pillar. 17 FMSHRC at 1923.

McDaniel issued the subject Order No. 3382964 for an alleged roof control plan violation of section 75.220 for S&H's failure to set timbers before mining a pillar. Order No. 3382964 stated:

The approved roof control plan was not being complied with on the working section where pillars was (sic) being mined. The first cut out of the pillar was started and the A Timbers in the outby crosscut had not been installed. The miner cut started on a angle for 12 feet and penetrated the coal bed 38" inches deep (emphasis added).

In my initial decision I rejected the unwarrantable failure charge because the Secretary had failed to establish that this violation was "a willful rather than a negligent act." 17 FMSHRC at 1922. The Secretary argues that I erred when I concluded that this violation can be found to be unwarrantable only if it is "intentional." The corollary is that the Secretary can prevail even if Phillips' act was unintentional. However, here S&H has been charged for its failure to set timbers before mining a pillar. Try as I might, I do not understand the Secretary's

⁴ As discussed *infra*, the dimensions of this wedged shape cut are crucial. McDaniel repeatedly gave the impression that the cut was essentially 12 feet wide by 38 inches deep, when in fact, it was a wedge shaped cut penetrating the pillar at approximately 15 degrees. Tr. I 200, 204, 205, 207.

assertion that Phillips' actions constituted mining even if his contact with the pillar was inadvertent.

Of course, a willful act is not ordinarily a prerequisite to an unwarrantable failure. Significantly, S&H was not charged with aggravated carelessness, reckless disregard or other unintentional unjustifiable conduct. On the contrary, Phillips' maneuvering of a large continuous miner, in entries too small to permit compliance with its roof control plan, mitigates negligence if the pillar was penetrated accidentally. Thus, the negligence associated with an accidental penetration is inadequate to support an unwarrantable failure in this case. Moreover, it would require extremely aggravated, unintentional conduct under these circumstances to warrant unwarrantable failure as an operator is under no obligation to set timbers prior to an unanticipated encounter with a pillar.

Rather, the Secretary's unwarrantable failure case is only sustainable if Phillips was (intentionally) mining. There are several reasons why the Secretary has not met his burden of proving Phillips was mining. As noted in my initial decision, the shape of the wedge fails to convince me that Phillips' act was intentional. McDaniel's testimony and the exhibits reflect Phillips cut into the pillar at a 15 degree angle removing a wedge in the shape of a right triangle. See Gov. Ex. 12-C, Resp. Ex. 17; Tr. I 208-10, Tr. II 49, 53-54. One side of the wedge (triangle) is 144 inches (12 feet) long. At the end of this side is a side 38 inches deep. These two sides constitute the right angle. The remaining side (the hypotenuse) is approximately 149 inches long. The remaining angles of the removed wedge, depicted in Gov. Ex. 12-C and Resp. Ex. 17, are 15 degrees and 75 degrees.⁵

Thus, it is inappropriate to consider the maximum penetration of 38 inches to have occurred along the entire 12 foot length of the cut. Rather, the first few feet of the cut constituted a 15 degree glancing blow only inches in depth.

⁵ I take judicial notice of the Pythagorean Theorem and trigonometric functions that calculate the length of the remaining side of the wedge and the remaining two angles of the right triangle formed by the wedge.

Moreover, the Secretary failed to present any evidence concerning how long it took to make this cut or whether the continuous miner was clearly positioned by Phillips to cut into the coal seam.⁶ Therefore, on balance, the weight of the evidence concerning the dimensions and circumstances of the cut does not support the Secretary's position that Phillips was mining.

There are additional facts that do not support the Secretary's assertion that Phillips' act was intentional. McDaniel has admitted that the entry was narrow, and, the continuous miner was comparatively large which made maneuvering difficult. Moreover, Phillips' asserted operation of the continuous miner for non-mining purposes is supported by McDaniel's observations of Phillips loading gob in shuttle cars.

While exculpatory statements must be viewed cautiously, such statements are entitled to greater weight when they are made spontaneously. For example, Phillips' assertion to McDaniel at the time of the inspection, during a period when he had been cleaning gob, that his contact with the pillar was inadvertent is of more evidentiary value than if such a position was initially taken at trial.

Additionally, it is uncontroverted that Phillips knew McDaniel, who was accompanied by superintendent White for a second day, was in the vicinity inspecting the mine. Such knowledge, while not alone dispositive, supports Phillips' spontaneous, albeit exculpatory, statement to McDaniel that his penetration into the crib was accidental. I place no evidentiary value on the fact that there is no evidence that Phillips knew McDaniel was watching him at the time he committed the violation. As one who travels to work on streets where a 30 mile per hour speed limit is frequently enforced by radar "speed traps," my conduct is not dictated by whether I am certain the police are actually watching me as I crawl along the street on my way to the

⁶ McDaniel's testimony that the miner head could cut into the pillar a few feet, "but you couldn't travel 12 feet and say it was an accident," reflects the position of the continuous miner could have been accidental. Tr. I 207. As noted, it is misleading to say the miner head traveled 12 feet given the angle of entry into the pillar.

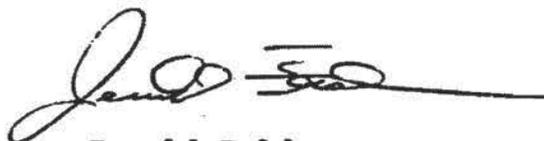
office. On the contrary, the mere possibility that a radar unit may be in the area is an extremely effective deterrent that governs my behavior. Similarly, Phillips' assertion that his act was unintentional is consistent with his knowledge of McDaniels' presence in the mine.

Finally, the Commission, citing *Youghiogheny & Ohio*, 9 FMSHRC at 2011 (in overseeing compliance with the roof control plan, the section foreman is held to a demanding standard of care) notes that a higher standard of care is required of mine management such as superintendent White and foreman Phillips. 17 FMSHRC at 1923. However, surely *Youghiogheny* does not support the proposition that accidents (as distinguished from cases involving supervisory responsibility) by mine management through ordinary negligence are attributable to an unwarrantable failure.

The Secretary has the burden of proving every element of a citation. While Phillips' conduct may have evidenced mining if he had not been quickly interrupted by McDaniel, based on the record before me, the Secretary has failed to rebut S&H's affirmative defense that Phillips' action was inadvertent rather than intentional. Having concluded that Phillips' action was accidental, there is insufficient evidence to attribute Phillips' actions to more than moderate negligence given the narrow entries and large mining machine. Consequently, I adhere to my initial decision that modified Order No. 3382964 to a 104(a) citation and assessed a civil penalty of \$400.

ORDER

In view of the above, **IT IS ORDERED** that the significant and substantial designation for Order No. 3382962 **IS REINSTATED**. The civil penalty for Order No. 3382962 is increased from \$2,100 to \$3,000. Payment of this additional \$900 penalty is to be made within 30 days of the date of this decision.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 23 1996

BRAD LEHTO, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 95-355-DM
: MSHA Case No. NC MD 95-03
COPPER RANGE COMPANY, :
Respondent : White Pine Mine
: Mine I.D. # 20-00371
:
DALE S. ALLEN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 95-356-DM
: MSHA Case No. NC MD 95-06
COPPER RANGE COMPANY, :
Respondent : White Pine Mine
: Mine I.D. # 20-00371

DECISION

Appearances: Dale S. Allen, Ironwood, Michigan, Pro Se;
Brad Lehto, Bruce Crossing, Michigan, Pro Se;
Mark D. Pilon, Esq., Hanft, Fride, O'Brien,
Harries, Swelbar & Burns, P. A., Duluth,
Minnesota, for Respondent.

Before: Judge Amchan

Findings of Fact
Procedural History

On January 29, 1995, the fire suppression system on a powder wagon was accidentally discharged at Respondent's underground copper mine when Complainant Dale Allen brushed it with his leg (Tr. 7-8). A pin, whose function is to prevent such accidents, was not in place (Tr. 14-15). The wagon was moved to a location directly in front of a large fan (Tr. 49-50). This caused the dust from the fire suppression system to be blown throughout the working area (Tr. 50).

Foreman Lee Cummings arrived on the scene and instructed his crew of 11 miners to stand behind the fan until he obtained a material safety data sheet (MSDS) for the fire suppression system (Tr. 50-51). When several miners indicated they were not feeling well, Cummings called for an ambulance to take the entire crew to a local hospital for examination (Tr. 51, Exh. R-6)¹.

Due to this accident an entire production unit was shut down. This unit normally produces 7,000 tons of ore each day. On January 29, 1995, it produced nothing (Tr. 54). After being examined at the hospital, the entire crew refused to return to work on January 29 (Tr. 60-61). A disciplinary letter was placed in each miner's personnel file as a result of this refusal (Tr. 61). Following the filing of one or more MSHA discrimination complaints, Respondent removed these letters from the personnel files (Tr. 62-64).

Complainant Allen was also given a "decision day" on March 1, 1995, as a result of the incident. This is a step in Respondent's disciplinary program whereby a miner is paid, but is not allowed to work. He is supposed to reflect upon his mistake.

Mr. Lehto, who was Allen's partner in operating the powder wagon, received a disciplinary letter that was placed in his personnel file and not withdrawn. Respondent believes that Complainants were at fault in the incident for not conducting an adequate preshift examination of the powder wagon. If the wagon was adequately inspected, it contends, the missing pin on the fire suppression system would have been noted and replaced.

Lehto filed a discrimination complaint with MSHA on March 14, 1995. He sought to have the disciplinary letter removed from his file and that "all harassment [be] stopped."

¹ Complainant Allen testified that Foreman Cummings resisted the first requests from employees to be taken to fresh air (Tr. 8, 13). This allegation was also made by Complainant Lehto in his original complaint to MSHA. Cummings indicated that when employees requested medical attention he made the arrangements willingly (Tr. 51). I find that Cummings arranged for medical examinations for the crew begrudgingly.

He alleged that his foreman, Lee Cummings, failed to bring the miners to fresh air and also made Lehto clean the dust by himself when he should have been receiving medical attention.

Allen filed his discrimination complaint on March 24, 1995. He alleged that Cummings would not cooperate in moving the miners to fresh air after the January 29, 1995 accident. He also seeks removal of the disciplinary letter from his file and "no further harassment."

On June 6, 1995, MSHA notified each complainant that it determined that no violation of section 105(c), the anti-discrimination/retaliation provision of the Act, had occurred. Allen and Lehto timely filed complaints with the Commission on their own behalf.

During June, 1995, Complainant Lehto was discharged by Respondent as the result of another incident in which the company believes he was at fault. He was able to find a new job seven days later (Tr. 31, 34). Allen was suspended at about the same time. He lost five days pay but resumed working until the mine closed on October 1, 1995 (Tr. 5-6).

The June disciplinary measures are outside the scope of the complaints before me. However, they are relevant to the issue of the appropriate remedy if Respondent violated section 105(c) in January 1995. The disciplinary action taken by Respondent as a result of the January incident made Complainants subject to more severe discipline for future misconduct. If the action taken for the January incident violated the Act, Respondent would have to discipline Complainants for later incidents as if the January incident had not occurred.

Nevertheless, as explained below, I conclude that Respondent did not violate section 105(c) in giving Complainant Lehto a written warning and Complainant Allen, a "decision day" as a result of the January incident.

Complainants were not disciplined in retaliation for activities protected by the Act

Section 105(c) (1) of the Federal Mine Safety and Health Act provides that:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing (1) that he engaged in protected activity and (2) that an adverse action was motivated in part by the protected activity.

The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Complainants believe that Respondent unfairly held them responsible for the January 29, 1995, accidental discharge of the fire suppression system. Allen contends that it was a common practice to operate equipment at the mine with the pin to the fire suppression system missing (Tr. 16).

Allen further contends that when he was suspended in June 1995, his partner was not disciplined. Allen believes he was singled out for disparate treatment because of the January incident.

Even if Allen is correct, causing the fire suppression to discharge is not an activity protected by section 105(c) of the Federal Mine Safety and Health Act. The Act prohibits mine operators from retaliating against miners for such activities as co-operating with MSHA, making a complaint to MSHA, making good faith safety complaints to the operator and for refusing to work under hazardous conditions. The Act does not prohibit disciplinary measures taken for causing an accident, regardless of whether imposition of such measures are justified.

Complainant Lehto says that he did perform a pre-shift examination of the powder wagon before the January incident. He alleges that he thought the pin was in place and that it is very difficult to determine this fact because Respondent often uses improper pins which are difficult to see. Lehto states that two weeks after the January accident Respondent began putting tags on the pins to prevent a recurrence of the incident (Tr. 31-32).

Even if Lehto was unfairly held responsible for the January accident, Respondent's conduct does not constitute a violation of section 105(c) of the Act. However, there is one other aspect of this case that requires further discussion.

Although Complainants allege they were unfairly discharged for setting off the fire suppression system, they also allege that foreman Lee Cummings initially would not let them seek medical attention. Moreover, Respondent has conceded that all employees in complainants' crew received disciplinary letters for refusing to return to work after being treated at the hospital.

The employees' demand for medical attention following the discharge of the fire suppression system was activity protected by section 105(c). I reach this conclusion on the basis of the information in the Material Safety Data Sheet (Lehto Exhibit 1) and the symptoms described by the miners to foreman Cummings (Tr. 51). However, I conclude that Complainants have not established directly or inferentially that the disciplinary steps taken against them were in any way motivated by these requests.

The refusal of all the employees of complainants' crew to return to work requires a different analysis. Respondent displayed a great deal of animus to this refusal as evidenced by the disciplinary letters given to the entire crew. One certainly could infer that this refusal was part of the reason for the disciplinary action taken against complainants. However, there is insufficient evidence in the record to establish that this refusal constituted activity protected by section 105(c).

In order for a refusal to work to be protected by the Act it must be the result of a reasonable and good faith belief on the part of the miner(s) that continuing to work would be hazardous, Pasula, supra. That has not been established in this case.

Foreman Cummings testified that the doctor who examined crew members indicated that they could return to work (Tr. 61). The Material Safety Data Sheet (Lehto Exhibit 1) indicates that the Ansul fire suppression dust is regarded as a "nuisance dust" by OSHA. It indicates that the appropriate precautions are to remove an exposed individual to fresh air and to seek medical attention if discomfort continues. There is insufficient information in the record to establish that miners had a reasonable, good faith belief that returning to work after being examined by the doctor was hazardous. I cannot therefore conclude that this refusal was protected by the Act.

In conclusion, I find that Respondents have failed to make a prima facie case that they were disciplined for protected activities. Therefore, I dismiss their complaints.

ORDER

The discrimination complaints filed by Dale Allen and Brad Lehto in this matter are hereby DISMISSED.



Arthur J. Amchan
Administrative Law Judge

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JAN 24 1996

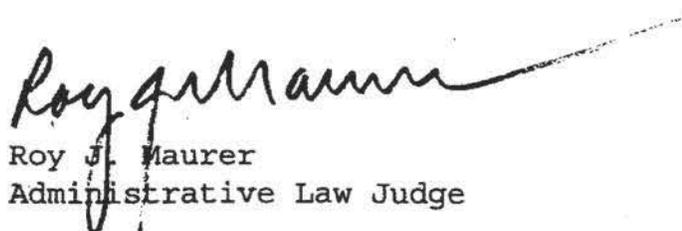
ORVILLE E. MOORE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 95-134-D
: :
AMAX COAL WEST, INC, : DENV CD-95-02
Respondent :
: Eagle Butte Mine

ORDER OF DISMISSAL

Appearances: Mr. Orville E. Moore, Alexandria, Louisiana,
Pro Se;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Maurer

At hearing, Complainant, Orville E. Moore, in effect, requested approval to withdraw his complaint in the captioned case, on procedural grounds. He has a parallel case pending with the Equal Employment Opportunity Commission (EEOC) and intends to pursue his remedies under that statute in that forum. Permission to withdraw was accordingly granted at hearing and is herein confirmed. 29 C.F.R. § 2700.11. This case is therefore **DISMISSED**, with prejudice.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 26 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. CENT 95-214-M
Petitioner, : A.C. No. 23-02072-05512-A
v. :
: Gallatin Quarry Mine
HAROLD G. MOODY, Employed by :
GRAND RIVER QUARRY, INC. :
Respondent :
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-215-M
Petitioner : A.C. No. 23-02072-05511-A
v. :
: Gallatin Quarry Mine
ROBERT G. FLINT, :
formerly Employed by :
GRAND RIVER QUARRY, INC., :
Respondent :

DECISION

Appearances: Keith E. Bell, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Harold L. Moody, Kearney, Missouri, Pro Se;
Robert G. Flint, Sedalia, Missouri, Pro Se.

Before: Judge Amchan

Summary

Before me are two cases alleging that two supervisory employees of Grand River Quarry, Inc. (Grand River Quarry), Harold L. Moody and Robert G. Flint knowingly violated 30 C.F.R. §56.9300(b) in failing to provide a berm of adequate height on

the side of an elevated roadway. Pursuant to section 110(c) of the Act, Petitioner has proposed a \$1,000 penalty for Mr. Moody, a general manager of Grand River Quarry and \$750 for Mr. Flint, a foreman. For the reasons stated below, I conclude that the Secretary has failed to establish that Respondent Moody knowingly violated the standard. I therefore assess no civil penalty in his case. On the other hand, I find that Mr. Flint knowingly violated the standard and assess a civil penalty of \$300.

Findings of Fact

On July 21, 1994, MSHA Inspector Michael Marler was conducting a multi-day inspection of Grand River's Gallatin Quarry in Davies County, Missouri (Tr. 18, 25-26). At about 2:55 that afternoon, a large vehicle slid off an elevated roadway into a drainage ditch, apparently without injury to the driver (Tr. 27, 56, Exh. A). The vehicle, originally a Caterpillar Model 631 scrapper had been modified to serve as a haul truck (Tr. 102).

This "631 haul truck" was normally used to move shot rock from the blasting area to a crusher (Tr. 103). When it did so, it used a different roadway from the one involved in the July 21 accident (Tr. 108-09).

To transport finished product to the stockpiles, Grand River Quarry normally used a stockpile truck. However, approximately once or twice a month the stockpile truck would break down and Grand River Quarry would use the 631 haul truck to carry the finished product to its stockpile. On these occasions only, the 631 would travel the "accident roadway" (Tr. 108-09).

On the morning of July 21, 1994, the stockpile truck broke down. At about 9:00 or 9:30 a.m., Grand River Quarry started using the 631 to move the finished product (Tr. 108). The front tires of the 631 are 84" high. The rear tires are 76" tall (Tr. 31-32). The berm on the side of the roadway from the plant to the stockpile, the "accident roadway," was about 24" in height (Tr. 31).

After determining the size of the tires and height of the berm, Inspector Marler issued Citation No. 4322450 to Grand River Quarry. It was handed to Robert G. Flint, the foreman in charge

of the Gallatin Quarry on a daily basis. The citation alleged a violation of 30 C.F.R. §56.9300(b) in that the berm was not at least half the height of the 631 haul truck's front tires.

Afterwards, Dale St. Laurent conducted an MSHA special investigation of the circumstances surrounding the citation. Based on his report, penalties were proposed for Harold Moody, the General Manager of Grand River Quarry, and Mr. Flint, the on-site foreman, in the amounts of \$1,000 and \$750, respectively.

Petitioner has established that Respondent Flint knowingly violated the Act, but has not established a knowing violation on the part of Mr. Moody.

Section 110(c) of the Federal Mine Safety and Health Act provides:

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 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 subsections (a) and (d).

Section 110(a) referred to above provides that civil penalties of up to \$50,000 may be imposed for violations of the Act. Section 110(d) provides for criminal penalties in certain situations. Penalties, if contested, are assessed by the Commission after considering a mine operator's history of previous violations, the size of the operator's business, the negligence of the operator, the effect of the penalty on the operator's ability to stay in business, the gravity of the violation and the good faith of the operator in abating the violation.

The Commission has held that a corporate officer or agent knowingly violates an MSHA standard if he or she knew or had reason to know of the violative condition, Prabhu Deshetty,

16 FMSHRC 1046 (May 1994). To establish a knowing violation, the Secretary need not prove that the agent knew he or she was violating the law, Warren Steen, 14 FMSHRC 1125 (July 1992).

Applying these principles to Mr. Moody's case, I find that the Secretary has not established that he knew or had reason to know that a violative condition existed on July 21, 1994, prior to the issuance of the citation. Section 56.9300(b) provides that:

Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment **which usually travels the roadway** (emphasis added).

The Secretary failed to show that Moody knew or had reason to know that the 631 haul truck would be driven on the accident roadway at times when the berms were less than 42 inches high. Moody was not on-site on July 21. Normally, the 631 haul truck was not used on this roadway. The evidence does not establish that Moody knew, or had reason to know, that it would be used on July 21. The record indicates that the berm was sufficient for at least some other vehicles (Tr. 53).

Although Moody had reason to know that the 631 would be used on this roadway periodically, there is no basis on which I could conclude that he knew it would be used at times when the berm was not mid-axle height. The berm on this roadway had been higher than 24 inches on occasions prior to July 21, but had been eroded by rainfall (Tr. 67, 73, 76, 104). The record does not show that Moody knew its height on July 21. Indeed, on July 19 the road was not used due to bad weather, and it is quite possible that the berm was substantially smaller on July 21 than it had been the last time Moody had observed it (Tr. 52).

Mr. Flint's situation is distinguishable by the fact that he was on-site on July 21, 1994, and was aware that his miners had started using the 631 haul truck on the accident roadway. Since this vehicle used the roadway repeatedly on July 21, I find that it was the largest piece of self-propelled mobile equipment which usually traveled the roadway.

Foreman Flint knew the 631 was being used on the roadway and knew, or had reason to know, that the berm on the side of the roadway did not approach mid-axle height of either its front or rear tires. Therefore, I find he knowingly violated §56.9300(b) in failing to increase the height of the berm.

A \$300 civil penalty is assessed against Foreman Robert Flint

Applying the criteria set forth in section 110(i), I conclude that \$300 is an appropriate civil penalty for Robert Flint's "knowing" violation of §56.9300(b). My assessment of the criteria is as follows:

Gravity of the Violation: I conclude that the gravity of the violation is high. If a heavy vehicle leaves an elevated roadway, there is a reasonable likelihood that it will flip over killing or injuring the driver. It could also conceivably kill or injure others on the mine site. On the other hand, the slope from the roadway to the drainage ditch was apparently gradual and the 631 appears from photographs to be a very heavy vehicle with a low center of gravity. These factors substantially decrease the likelihood of death or serious injury.

Negligence: Mr. Flint was negligent in not complying with the standard. He not only knew, or had reason to know, of the violative condition, he was familiar with the requirements of the standard (Tr. 114). On the other hand, I have given consideration to the fact that the violation was of fairly short duration and that, so far as this record shows, the berm was sufficient for the vehicles that usually traveled the roadway on other days.

Prior History of Violations: Mr. Flint received a citation on behalf of Grand River Quarry for failure to have a berm on another elevated roadway only two days prior to the instant citation (Exhibit G). Although that citation had nothing to do with the height requirement for berms, it should have made him more attentive to all MSHA requirements in this regard.

Good Faith in Abating the Violation: Blocks 17 and 18 of the citation indicate that the violation was abated within 95 minutes by the construction of a six-foot berm.

Size of the Operator and Effect of the Penalty on
its Ability to Stay in Business

These factors are difficult to apply in assessing a penalty against an individual. By analogy, I have considered the fact that Mr. Flint was a foreman earning approximately \$23,000 a year when he worked for Grand River Quarry (Tr. 20, 116). A substantially lower penalty is generally appropriate for a low level supervisor than for a higher and better paid agent of an operator.

ORDER

The petition for assessment of a civil penalty against Harold L. Moody is **DISMISSED**.

A \$300 civil penalty is assessed against Robert G. Flint. This penalty shall be paid within 30 days of this decision.



Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 29 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 95-70-M
Petitioner : A.C. No. 30-00611-05561
v. :
 : No. 1 Mine
GOUVERNEUR TALC COMPANY, :
Respondent :

DECISION

Appearances: James A. Magenheimer, Esq., U.S. Department of Labor, Office of the Solicitor, 201 Varick Street, Room 707, New York, New York, for the Petitioner; Sanders D. Heller, Esq., Gouverneur, New York, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Proposal for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations by Gouverneur Talc Company (Gouverneur) of 30 C.F.R. § 57.4362 and 30 C.F.R. § 57.12001. Pursuant to notice, the case was heard in Watertown, New York, on September 6 and 7, 1995. Subsequent to the hearing, Respondent filed a brief on March 30, 1995. On the same date, Petitioner filed a post-hearing memorandum. Respondent filed a Reply brief on December 26, 1995.

I. Introduction

Gouverneur Talc Company (Gouverneur) operates the No. 1 Mine, an underground Talc Mine located in St. Lawrence County, York. Talc was mined primarily using an open stope method.

A production shaft was used to transport men and/or supplies into the mine. There were openings at the 300 foot, 500 foot, 700 foot, 900 foot and 1100 foot levels into the ore veins.

At approximately 11:00 a.m. on June 21, 1994, William L. Korbelt Jr., an MSHA Electrical Mine Inspector, received a telephone call from Roger McClintock, advising him that there was an underground fire at Gouverneur, and to proceed there. Korbelt went to the mine, and talked to Terry Jacobs (Gouverneur's Safety Director), Craig Woodard (Gouverneur's Foreman), Steven Smith (an electrician), Sheldon Maine (an apprentice electrician), Mark Trombley and Vincent Woods (welders), and Donald Fuller (General Mine Foreman), regarding an incident that had occurred at about 11:00 a.m. on June 21, at the 19-A stope on the 500 level, in the area of a Miller welder wherein smoke had been observed. At 2:40 p.m., Korbelt went underground to the area in question and observed that a 225 amp circuit breaker was hooked to the welder. He testified that the name-plate on the welder "... listed thirty-eight amps full load current" (Tr. 43). Korbelt examined the welder and observed that a fist-size section of the secondary coil had been blown out, a part of the primary coil was missing, and there were pieces of metal and soot at the bottom of the welder. He also observed that varnish had melted off the wires feeding the transformer coil. Korbelt issued a Section 104(a) citation (subsequently amended to a section 104(d)(1) order) alleging, in essence, that subsequent to the occurrence of the an underground fire and a decision to evacuate underground employees, two employees who were not using SCBA protection went underground and did not sample for standard gases. Korbelt cited Gouverneur with violating 30 C.F.R. § 57.18002(a), which was subsequently modified to allege a violation of 30 C.F.R. § 57.4362.

Korbelt also issued a Section 104(a) citation, subsequently modified to a Section 104(d)(1) order, which alleges that the welder was not provided with proper circuit overload protection, and that a 225 amp circuit breaker provided power to the welder cable. The order alleges a violation of 30 C.F.R. § 57.12001.

II. Findings of Fact and Discussion

Korbelt testified as to a series of events and actions of Gouverneur's employees prior to, and subsequent to, the incident

that had occurred on the morning of June 21, 1995, on the 500 level at the 19-A stope. However, only his testimony relating to his observations of the condition of the welder was based upon his personal knowledge. The balance of his factual testimony was based upon information provided to him by Jacobs, Fuller, Woodward, Smith, Trombley and Maine. Petitioner did not offer the testimony of any these individual as part of its case-in-chief. Thus, my findings of fact in this case, with the exception of the condition of the welder, are based primarily upon the testimony of Gouverneur's witnesses, who have personal knowledge of the events and conditions at issue, rather than Korbel's testimony as to what these individuals told him.

A. The Miller Welder

For approximately 8 years, the welder at issue had been protected by a 60 amp disconnect switch hooked to the welder plug (disconnect box). Sometime prior to June 17, 1994, the disconnect box was removed. There is no evidence when this occurred, nor is there any evidence that the welder had been put in operation after the disconnect box was removed.

Steven Smith, an electrician, testified that on June 17, 1994, Sheldon Maine, an apprentice electrician, whom he does not supervise, told him that he was instructed to install a welder disconnect on the welder in issue. According to Smith, he told Ward Bacon, the mine foreman, that the welder disconnect box had previously been removed. Smith indicated that Bacon told him that he wanted to know if a welder whip (a cord with a plug that does not provide overload protection), could be installed.

On June 20, 1994, Maine hooked up the welder to a breaker. Maine testified that he did not know whether Smith or Bacon told him to do this. On June 21, 1994, the welder was connected to a 225 amp breaker. The welder had a rated full load current of 38 amps. According to the uncontradicted testimony of Korbel, the National Electric Code provides that proper protection is at 200 percent of the rated amps.

B. The June 21 Incident

On June 21, 1994, Mark Trombley, a repairman, and Vincent Woods were assigned to operate the Miller welder at issue to

repair a bucket blade. Trombley indicated that as Woods was welding a washer, the welder was "sparking", "growling", "sizzling", and "popping" (Tr. 285). Trombley testified that the welder started "lighting up the drift" (Tr. 285). His testimony continues as follows: "[s]o we just dropped everything that we had and stepped off the steel ramp, because it was lighting up the drift where you walk up onto the ramp where we were working" (Tr.285). According to Woods, the noise from the welder started getting louder and "smoke started rolling ... [s]o Vinney and I decided that we'd better go to the second exit" (Tr. 285). Trombley and Woods then walked up the stope, spoke to Bob Lucas and Robert Church, and went up the 300 level with them. The group attempted to call the hoist man, Gary Hopper, but the telephone did not work. According to Trombley, they decided to walk out of the mine, and "... just tell them to go shut the main off" (Tr. 287). They then reported the situation to Donald Fuller, who at that time was the General Mine Foreman on a temporary basis. Smith, who was present, told Fuller that he thought that they should shut off power to the 500 level. Fuller indicated that he went with Smith to investigate. Smith and Fuller went underground to the 500 level, but did not take any self contained breathing apparatus (SCBA). Fuller told the cageman, Lenny Zeller, to take Herb Simmons and Tom McDonald out of the shaft, as they were working near the fan, and he and Smith intended to turn the fan on. At the shaft, which was approximately 1500 feet from the 19-A stope, Smith turned off the disconnect, shutting off power to the 19-A stope. Smith noted that the air was flowing toward the 19-A stope, whereas normally the air goes in the opposite direction from the 19-A stope to the shaft. Smith and Fuller proceeded to the 19-A stope where Smith turned off the disconnect to the welder, and unplugged the welder. Smith felt the cables from the main power source to the disconnect and the cable to the welder, and all were cold. He felt the outside of the welder and it too was cold. Fuller and Smith then exited the 500 level, along with Dick Card, Jerry MacIntosh, Zeller, and Woodward, all of whom had been working at the 500 level. In response to a leading question on direct-examination, Fuller indicated that he and Woodward discussed bringing the men up because it was lunchtime, and "... we said as long as it is this close to noon, lets bring them up and see whats going on" (Tr. 272). Fuller indicated that he and Jacobs are the managers who have the responsibility of calling for an evacuation of miners from the mine, but that on June 21, no

decision was made to evacuate. Appendix B to the MSHA Accident Investigation Report, (Exhibit P-3), contains a statement that at 11:00 a.m., "the decision was made to remove all personnel and activate their mine rescue team." Petitioner did not adduce any direct testimony or documentary evidence to support this statement. On the other hand, Respondent's witnesses testified that no evacuation order had been given.

Woodward indicated that he, Zeller, Card, and Macintosh, all went up to the surface for lunch at 11:45 a.m. . At approximately 12:35 p.m., the official rescue team was sent underground.

C. Violation of Section 57.4362, supra

Section 57.4362, supra, provides as follows:" Following evacuation of a mine in a fire or emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and fire fighting operations in advance of the fresh air base."

According to the clear language of Section 57.4362, supra, a violation occurs only in the event of (1) an evacuation of a mine in a fire emergency, and 2) persons participating in rescue and fire fighting operations did not wear mine rescue apparatus.

Title 30 of the Code of Federal Regulations does not define the term "fire emergency." No evidence was adduced by either party as to the common meaning of this term in the mining industry. I find that, due to the presence of sparking and rolling smoke in the area of the welder, there was a fire emergency. The regulations do not define the term evacuation. Neither Fuller nor Jacobs, who had the responsibility of calling for an evacuation, ordered miners to evacuate; nor did any other of Gouverneur's agents. Gouverneur's Disaster Directory for Mine Evacuation and Rescue Only (Exh. P-4) provides a disaster and emergency plan, including evacuation, "in the event of disaster (major fire or flooding)" (Exh. P-4, page 2). I find that this provision in Gouverneur's emergency plan is not controlling on the issue of the scope to be accorded the terms in Section 57.4362, supra.

Webster's Third New International Dictionary (1986 Ed.) defines the term evacuation as follows: "... b: any organized withdrawal or removal (as of persons or things) from a place or area esp. as a protective measure."

Trombley, and Woods, who were present when the incident at issue occurred and observed sparking and rolling smoke, left the area along with Lucas and Church, after having spoken to the latter. According to Trombley, the group decided to go to the surface as the telephone did not work, and they wanted to tell management to shut the power off. However, this task could have been accomplished by one person. Since they all left together after Trombley and Woods had observed sparking and smoke, I find that they did evacuate in a fire emergency. However, the evacuation was not total, as Card, MacIntosh and Woodward were still at the 500 level.

I observed the demeanor of Fuller and Smith and find their testimony credible that they went to the 500 level to shut off the power to the 19-A stope. Petitioner has failed to adduce sufficient evidence to establish that Fuller and Smith were participating in rescuing and fire fighting operations. Fuller and Smith subjected themselves to the hazards of smoke and gas inhalation in not being equipped with SCBA apparatus. However, there was no violation of section 57.4362 supra, as they were not participating in rescuing and fire fighting operations. By its terms, Section 57.4362, supra, does not prohibit persons not participating in rescuing and fire fighting operations from entering the mine when not wearing SCBA equipment. Since Section 57.4362, supra, has not been violated, Order No. 4086984 shall be dismissed.

D. Violation of 30 C.F.R. § 57.12001.

30 C.F.R. § 57.12001 provides as follows: "Circuits shall be protected against excessive overloads by fuses or circuit breakers of the correct type and capacity."

There is no dispute that the welder at issue was connected to a 225 amp circuit breaker, or that the welder was rated at 38 amps. Gouverneur did not dispute Korbel's testimony that according to the National Electric Code, proper protection is provided at 200 percent of the rated amps. Hence, proper

protection of this welder was at a maximum of 76 amps. As explained by Korbelt, in the event of a short circuit and a current flow of up to 220 amps, the circuit breaker that was attached to the welder would not trip. As a consequence, current would continue to flow and cause overheating. This explanation is consistent with the intended purpose of Section 57.12001, supra, ie, the requirement of the correct capacity of circuit breaker in order to protect against excessive "overloads." In this connection, I note that 30 C.F.R. § 57.2 defines an "overload" as follows: "Overload means that current which will cause an excessive or dangerous temperature in the conductor or conductor insulation." It appears to be Gouverneur's position, based upon the testimony of its expert witness, Art Thompson, a Professional Engineer, that a circuit breaker would not protect against a overload if the duty cycle of the welder, 40 percent, would be exceeded. Thompson opined, in essence, that the overheating that had occurred in the welder was caused by the transformer overheating, and would not have been prevented by a circuit breaker whose amperage was 200 percent of the maximum rated amperage for the welder (38 amps). It appears that the gravamen of Gouverneur's position is that there was little, if any, hazard created by the lack of the proper capacity of the circuit breaker that had been installed. However, this argument does not negate the fact that the welder was not connected to a circuit breaker of the correct capacity, nor was it protected by a fuse of the correct capacity. Accordingly, I find that it has been established that Gouverneur did violate Section 57.12001, supra.

1. Significant and Substantial

Korbelt, on cross examination, was asked the criteria for a significant and substantial finding. He responded as follows: "It has to be at least reasonably likely, and lost work days or greater" (Tr. 139). It should be noted initially that Korbelt did not utilize the proper test in evaluating whether the violation was significant and substantial. In analyzing whether the facts herein establish that the violation is significant and substantial, I take note of the decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

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

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury' (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). (Southern Ohio, supra, at 916-917).

According to Thompson's testimony, due to the lack of evidence of a fire within the welder, and the absence of any observed short in the welder, it is likely that what had occurred on June 21 was as a result of the transformer overheating and failing. According to Thompson, a likely cause was the stinger of the welder being in contact with a return path or ground "for

a long period of time" (Tr. 436). He further indicated that this contact would have produced heat, and would not have been prevented by having the welder connected to a breaker with the correct amperage. However, the issue presented is not whether the violative condition cited caused the incident that had occurred on June 21, but rather whether, in the continuation of normal operations, the violative condition contributed to a safety hazard, and whether there was a reasonable likelihood that the hazard, contributed to will result in an injury of a reasonable serious nature. (See, Mathies, supra). Thompson indicated that the welder was equipped with a fan inside the welder housing which, in the event of overheating caused by the violative condition, would dissipate the heat. However, there is no evidence in the record to base a conclusion that, in the event an overload as a result of the incorrect breaker protection, the fan would continue to operate. Indeed, in the overheating incident that had occurred on June 21, sparking and smoke were still observed. Thompson also opined that should a short circuit occur in the electric flow going to the housing of the welder, a person touching the housing would probably not be injured, as his resistance would be higher than the path to the ground through the metal housing. However, Thompson did not support this conclusion with any empirical data comparing the differences in resistance. Thompson did not contradict or impeach the testimony of Korbelt that, in the event of an overload, given the incorrect amperage of the breaker in question, the breaker would not trip quickly, and the fault would continue and lead to an electric fire or smoldering which would produce gases and toxic fumes. I therefore accept Korbelt's testimony. Given the gross disparity between the amperage of the breaker in question, and the correct amperage for a breaker as indicated in the National Electric Code, I find that the violation was significant and substantial.

2. Unwarrantable Failure

The order at issue was issued as a Section 104(d)(1) order. Hence, the Secretary must establish that the violation herein constitutes an "unwarrantable failure" to comply with the provisions of Section 57.12001, supra. The Commission, in Emery Mining Corp., 9 FMSHRC 1997 (1987), held that in order to establish that a violation results from an operator's

unwarrantable failure, it must be established that an operator has engaged in aggravated conduct which is more than ordinary negligence.

According to Korbelt, on June 22, 1994, he talked to Sheldon Maine, an electrician, who told him that he had been directed by Steven Smith, an electrician, to hook the leads of the welder to a 225 amp breaker. According to Korbelt, Smith told him the same thing. Korbelt further testified that he asked Smith why he wired the welder without additional circuit or overload circuit protection and Smith said, "... that they had been doing it this way for over a year" (Tr. 64). Korbelt indicated that Smith had also told him that two years prior to June 19, 1994, a box with additional protection had been removed.

In contrast, Smith testified that Maine is an apprentice electrician and that he (Smith) is not responsible for supervising Maine, or giving him assignments. Further, according to Smith, he did not direct Maine to connect the welder to a 225 amp breaker. He stated that he was not present when the connection was made. Smith indicated that prior to June 21, he was not aware that the welder had been hooked up to a 225 amp breaker and did not have overload protection. According to Smith, a 60 amp disconnect box that had been in use for eight years had previously been removed. Maine testified that the welder was hooked up to the 225 amp breaker the day prior to the date of the incident. He said that he was ordered to do so by either Smith or Ward Bacon, the mine foreman, but he did not know whether Smith or Bacon told him to perform that task. He indicated that prior to that time the welder had not been in use on the 500 level.

Neither Smith, nor Maine, who testified subsequent to Korbelt, contradicted or rebutted the testimony of Korbelt regarding conversations he had with them. I find that Maine had been instructed by either Smith or Bacon to connect the welder to the 225 amp breaker. It is not necessary to reach a determination as to which of these individual required Maine to perform that task. Due to the gross disparity between the correct breaker amperage, and the amperage of the breaker that was installed, and the fact that either an electrician or a mine foreman directed Maine to make that installation, I find that the conduct of Gouverneur,

acting through its agents, can be characterized as aggravated conduct. Hence, I conclude that the violation was the result of its unwarrantable failure.

Considering the high level of Gouverneur's negligence, and the remaining factors set forth in section 110(i) of the Act as stipulated to by the parties, I find that a penalty of \$1,500 is appropriate.

ORDER

It is ORDERED that Order No. 4086984 be DISMISSED. It is further ORDERED that Order No. 4686982 be affirmed as written, and that Gouverneur pay a penalty of \$1,500 within 30 days of this decision.



Avram Weisberger
Administrative Law Judge

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JAN 30 1996

CHRIS SCHULTZ, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 95-513-DM
: RM MD 95-14
STILLWATER MINING COMPANY, :
Respondent : Stillwater Mine
: Mine ID 24-01490

DECISION

Appearances: Scot Schermerhorn, Esq., Freeman & Schermerhorn,
P.C., Billings, Montana, for the Complainant;
Jeanne M. Bender, Beth Nedrow, Esqs., Holland &
Hart, Billings, Montana, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by Chris Schultz on August 30, 1995, alleging that Stillwater Mining Company (Stillwater) terminated him in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). An Answer was filed by Stillwater on September 25, 1995. Pursuant to notice, the case was heard in Billings, Montana, on October 31, 1995. Chris Schultz testified on his own behalf. Louis Meyers and Larry James Jaudon testified for Stillwater. Each of the parties filed a Brief and Proposed Findings of Fact on December 4, 1995. On December 8, 1995, Complainant filed a Response Brief. On December 13, 1995, Respondent filed a reply to this brief.

Findings of Fact

On July 11, 1994, Chris Schultz was hired by Stillwater to work as a laborer at its Stillwater Mine, an underground platinum group materials mining operation. Schultz underwent

40 hours newly employed inexperienced miner training. At that time, he received a copy of Stillwater's Employee Handbook and its Safety Rules and Practices. In the course of the training, there was no discussion regarding any possible disciplinary action that would be meted out to an employee for reporting an attack by another employee.

Prior to March 23, 1995, Schultz had been evaluated two times by his Supervisor, Tom Goldsmith, and was rated on his ability to get along with other employees. Schultz indicated that there did not seem to be anything bad in the evaluations. Prior to March 23, 1995, Schultz never made any safety complaints.

In January 1995, Schultz was assigned to work in the east side of the mine, and to train another laborer, Larry Riddle, who had just been hired. Schultz continued to work with Riddle through March 23, 1995. Schultz indicated that he did not have any personality conflicts with Riddle, and was not aware of any hard feelings that Riddle had towards him. Riddle did not complain to mine management about any personality problems with Schultz. Schultz was never disciplined for any personality conflict with any other miner.

On March 23, 1995, Schultz did not work with Riddle. Schultz indicated that during the workday he borrowed a cigarette from Riddle, and engaged in small talk. According to Schultz, Riddle did not exhibit any hint of any hostile feelings.

At the end of the shift,¹ Schultz was in the process of descending a flight of stairs down to the parking lot. He saw Riddle at the bottom of the stairs. According to Schultz, Riddle said to him, "... well, do you have something smart to say now" (Tr. 21). Schultz said that he said, "what?" (Tr. 21), and then Riddle hit him. Schultz then dropped the clothes and lunch box that he had been carrying, and hit Riddle. According to Schultz,

¹When Schultz left the mine at the end of the shift on March 23, 1995, he was not scheduled to work for 5 days, due to the normal rotation of his work shift.

Riddle then hit him a few times and then he (Schultz) backed off. Schultz said that he then asked Riddle, "what's going on?" and Riddle said, "meet me at Carter's Camp in ten minutes" (Tr. 22).

Schultz then drove home and called Louis Myers, Stillwater's Superintendent, and told him that Riddle had attacked him in the parking lot. Myers then told Schultz to return to the mine to talk about the incident.

Schultz indicated that he initially reported the incident to Myers, because he was afraid that Riddle would have retaliated. Schultz indicated that he had been working with Riddle 40 to 50 percent of the time underground, mostly in isolated areas, and it would have been easy for Riddle to hurt or kill him.

Schultz returned to the mine and met with Myers, Allen Buell another superintendent, and Larry Jaudon, Stillwater's Safety Coordinator. Myers took Schultz's statement and told him that his job was in jeopardy as he thought it was a violation of federal law to fight on mine property. Myers told Schultz to go home, and that he would be in touch with him.

On March 27, Schultz called Myers, who asked him to return to the mine to talk to him. Schultz returned to the mine at approximately 1:00 p.m., and met with Myers and Ralph McKenzie, Stillwater's Safety Coordinator. Myers indicated that he had talked to Riddle, and informed him that Riddle had said that he and Schultz had a problem getting along. Myers asked Schultz if there were any problems, and Schultz said that there were not any that he was aware of. Myers told Schultz that he had to talk to John Thompson the mine manager. Myers recommended to Thompson that both Riddle and Schultz be terminated for fighting and unacceptable behavior, and Thompson agreed.

On March 28, Schultz called Myers, who told him to return to the mine to meet with him. Myers informed him that he had to terminate him, and that it was Thompson's decision. Schultz said that he asked why he was being terminated, and Myers did not give any response to the question, but said that it was Thompson's decision. Schultz then wrote to McKenzie 2 or 3 days later. On April 11, Schultz received a form entitled Record of Discussion With Employee which indicates that the action taken was "discharge" (Complainant's Exh. 2). This form, signed by Myers,

dated April 10, further states as follows: "Termination for (1) disregard for the rights of fellow employees. (2) disregard or violation of accepted behavioral standards."

Thompson did not testify; however, he was deposed on October 24, 1995, and his deposition was admitted in evidence without objection. He was asked a series of questions regarding his role in various personnel actions, and then specifically about "discharge from employment." His answer, as pertinent, is as follows: "Generally speaking I would be the final say-so," (Complainant's Exh. 19, p. 5). Thompson indicated that he concurred in Myers' recommendation to discharge Schultz. He indicated specifically that the discharge had nothing to do with job performance and that the ultimate reason was "fighting on company property" (Complainant's Exh. 19, p. 11).

Riddle did not testify. Myers indicated that he spoke to Riddle, who indicated that he did throw the first punch, but that he had been provoked by Schultz who had been harassing him for some time. Myers indicated that he could not find anyone who had witnessed the fight, nor did anyone corroborate Riddle's allegation that he had been provoked and harassed by Schultz. Myers terminated Riddle for fighting, and also because he had not yet completed his initial probationary period.

Stillwater's Safety Rules and Practices which was in effect when Schultz was hired (Complainant's Exh. 8) indicates that "scuffling and all forms of horseplay are prohibited." (Id., P. 8). The General Safety Rules, revised on September 19, 1994, and in effect at the date of the incident in issue, deleted the prohibition against scuffling and horseplay. Stillwater's Policies/Procedures/Benefits does not contain any prohibition against fighting.

Myers indicated that in terminating Schultz, he relied on the fact that fighting is not an acceptable behavior. However, he indicated on cross-examination that fighting does not include being attacked or defending yourself.

Discussion

The Commission, in Braithwaite v. Tri-Star Mining, 15 FMSHRC 2460 (December 1993), reiterated the legal standards

to be applied in a case where a miner has alleged acts of discrimination. The Commission, Tri-Star, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

In essence, it appears to be Schultz's position that he was fired as a result of his communicating to management the attack on him by Riddle. Schultz argues that this communication constitutes a safety complaint, as he was afraid that Riddle would have retaliated and injured him. He also asserts, in essence, that he was not fighting, as he hit Riddle back in order to protect himself after he had been hit by Riddle.

I find that hitting another miner, even where one was hit first, is not the type of activity that is protected under the Act. See, Bruno v. Cyprus Plato Mining Corp., 10 FMSHRC 1649, 1651, (1988) (Judge Morris); Dickey v. United States Steel, 5 FMSHRC 519, 582 (1983) (Judge Koutras); Burgan v. Harlan Cumberland Coal Company, 15 FMSHRC, 889, 900 (1993)

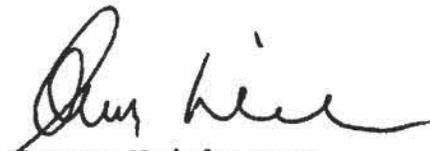
(Judge Feldman). I agree with the following statement of the law as set forth in Bryant v. Clinchfield Coal Company, 4 FMSHRC 1380, 1421 (1982) (Judge Kennedy): "Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute." (See also, Hastings v. Cotter Corporation, 5 FMSHRC 1047 (1983) (Judge Carlson)).

I further find that Stillwater's action in terminating Schultz was based solely upon his participation in the altercation of March 25. There was no disparate treatment of Schultz, since Riddle, who was involved in the altercation, was also fired for this incident. Any argument that the termination of Schultz was not proper as he was engaged in self defense, and that such activity is not precluded by any of Stillwater's rules or policies, is not for this forum to decide, as it is not the basis of any violation under the Act.

For all the above reasons, I conclude that Schultz has not established that Stillwater violated Section 105 of the Act. Therefore his Complaint is dismissed.

ORDER

IT IS ORDERED that this case be DISMISSED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 30 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 94-3-M
Petitioner	:	A. C. No. 06-00022-05509
v.	:	
	:	New Britain Quarry & Mill
TILCON CONNECTICUT, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 95-17-M
Petitioner	:	A. C. No. 06-00022-05512 A
v.	:	
	:	New Britain Quarry & Mill
EDWARD SAKL	:	
Employed by TILCON	:	
CONNECTICUT, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 95-18-M
Petitioner	:	A. C. No. 06-00022-05511 A
v.	:	
	:	New Britain Quarry & Mill
JOSEPH DONAROMA	:	
Employed by TILCON	:	
CONNECTICUT, INC.,	:	
Respondent	:	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
Michael T. Heenan, Esq., Smith, Heenan and Althen,
Washington, D.C. and Carl R. Ficks, Esq.,
Eisenberg, Anderson, Michalik & Lynch, New
Britain, Connecticut, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Tilcon Connecticut, Inc., Edward Sakl and Joseph DonAroma pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated Sections 56.14105 and 56.14201(b), 30 C.F.R. §§ 56.14105 and 56.14201(b), of the Secretary's regulations and that Messrs. Sakl and DonAroma, as agents of the company, knowingly authorized, ordered or carried out the violations. For the reasons set forth below, I find that the company violated Section 56.14201(b), although not as the result of an "unwarrantable failure," and that the two agents did not knowingly authorize, order or carry out the violation.¹ I assess a civil penalty against the company of \$400.00.

A hearing was held on August 1 and 2, 1995, in Hartford, Connecticut. Richard Moreno, MSHA Inspector Richard R. Sabourin and MSHA Special Investigator John S. Patterson testified for the Secretary. Joseph P. DonAroma, Edward M. Sakl, Jr., Raymond Petke, Stephen Scarpa, Darrell F. Hotham and Joseph A. Abate gave evidence on behalf of the Respondents. The parties also

¹ In the cover letter to his brief, counsel for the Secretary stated that "the Secretary has decided that the evidence does not support a violation of 30 CFR 56.14105 . . . and will vacate Section 104(d)(1) Citation No. 4079378." Therefore, that citation is no longer before me. The civil penalty petitions concerning it will be dismissed in the order at the close of this decision.

submitted briefs which I have considered in my disposition of these cases.

FACTUAL SETTING

Tilcon's New Britain Quarry and Mill is a surface rock quarry and crushing plant. It uses a large, multiple belt conveyor system to transport materials within the site property. The system is operated by a switch house operator located in the switch house. Not all of the conveyor belts are visible to the switch house operator. When the entire system is first started in the morning, a siren alarm is activated by the operator before starting the belts.

On the morning of June 23, 1993, the No. 18 unit conveyor belt was stopped by Joseph DonAroma, the quarry superintendent, so that the rock chute feeding the belt could be unblocked. DonAroma removed the material blocking the chute and placed it on the catwalk next to the belt where Richard Moreno and Steve Scarpa threw it off onto the ground.

When DonAroma finished unblocking the chute, he stepped onto the catwalk near the ladder leading to the ground and stated "we're all set here." (Tr. 191.) He then told Moreno to put the door back on the chute. At the same time, Edward Sakl, a supervisor at the quarry, signaled with his hands to Raymond Petke, the recrusher plant operator, who was located in a building near the top of the conveyor belt, to start the belt. Petke called by telephone to Darrell Hotham, the switch house operator, and told him to start the belt.

In the meantime, Moreno had picked up the chute door and was standing on the conveyor belt to place the door on the chute. The siren alarm was not activated before the belt started. When the belt started, Moreno was thrown off of his feet and carried by the belt into the discharge chute. He suffered a broken shoulder, sprained ankle and multiple abrasions on his back and legs.

Inspector Sabourin was called to investigate the accident. As a result of his investigation, he issued Citation No. 4079379

on June 25, 1993.² The citation was issued pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1),³ and alleges that Section 56.14201(b) of the Regulations was violated because: "A nonfatal accident occurred [sic] on 6/23/93. An employee was injured when the unit 18 conveyor he was working from was started. The audible warning device to sound startup was not operated. This is an unwarrantable failure." (Govt. Ex. 2.)

² The citation was an order when issued, however, because the citation preceding it has been vacated by the Secretary it becomes a citation. See *infra* n.3 for the chain of 104(d)(1) citations and orders.

³ Section 104(d)(1) provides:

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 56.14201(b) of the Regulations requires that:

When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

The parties disagree as to what this regulation requires.

In his brief, the Secretary argues that "[t]his language must be read to require some type of automatic or manual device, which has to be operated as part of the belt system and is capable of giving the same identical warning each and every time the belt is started." (Sec. Br. at 6.) On the other hand, the Respondents maintain that the regulation does not require a "device" and submit that "[a]n administrative system can lend itself to the requirements of the standard just as well as might a piece of hardware." (Resp. Br. at 42.)

Although Tilcon has a warning siren which it sounds when first starting all of the belts in the morning, it is undisputed that the siren was not used prior to Moreno's accident and that it is not "company policy or practice . . . to sound the plant wide siren" to restart an individual conveyor belt that has shut down during the day. (Resp. Br. at 40.) However, the Respondents assert that there is a "system installed" at the quarry that complies with the regulation. That system is that an

individual belt start up is under the specific control of a particular person on scene who personally examines the entire length of the belt for safety and then alerts everyone that the belt will start [by saying "we're all set here" or similar words], at which time the signal is relayed to the switch house and the belt is started immediately.

(Resp. Br. at 41.)

I conclude that a mechanical warning system is required by the regulation. Since the regulation does not specifically state that a mechanical warning system is required, this conclusion is reached by evaluating it "in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990) (citations omitted).

Clearly, the purpose of the standard is to warn persons on or around the conveyor that the belt is going to be started within 30 seconds. Tilcon's "system" does not carry out this purpose. While the supervisor's statement "we're all set here" may warn those within the sound of his voice, it would not alert anyone on or around the belt, but not within the sound of his voice, that the belt was about to start up. In addition, the rule requires a second warning to be given before start up, if the belt is not started within 30 seconds. Since hand signals, telephone calls and three separate people are involved in the Tilcon "system," there would be no way to comply with this requirement.

Furthermore, the use of the word "installed" implies the use of a mechanical device. "Installed" is not defined in the Regulations, however, *Webster's Third New International Dictionary* 1171 (1986) defines it as:

"**1a** : to place in possession of an office or dignity by seating in a stall or official seat **b** : to place in an office, rank or order : INDUCT . . . **2** : to introduce and establish (oneself or another) in an indicated place, condition or status . . . **3** : to set up for use or service."

Obviously, only the third definition would apply in this case.⁴ As to what that means, the dictionary gives the following

⁴ The Respondents argue that the second definition covers its "system," however, the examples of the second meaning given in the dictionary, "installing himself in the big chair before the fire" and "installed his sister as secretary," refute that suggestion.

examples: "the electrician installed the new fixtures" and "had gas heating installed." *Id.* Plainly, "installed" used in this context applies to inanimate objects rather than people.

Finally, the *MSHA Program Policy Manual*, Vol. IV, Part 56/57, 55d-55e (04/01/92), in discussing the requirements of this section, states that the standard "has been uniformly interpreted by MSHA, and its predecessor organizations, to include both automatic and manual conveyor alarm systems."⁵ An automatic system is one "designed to first activate a start-up horn before the start-up system of the conveyor." *Id.* "A manual conveyor alarm system is one which actuates an audible alarm by an independent switch and uses a separate switch to actuate the conveyor." *Id.* Nowhere is a non-mechanical system discussed.

Taking all of these factors into consideration, I conclude that a reasonably prudent person, familiar with the mining industry, would conclude that Section 56.14201(b) requires a mechanical warning system to achieve its purpose. Tilcon did not have such a system. Consequently, I conclude that the company violated the regulation.

Significant and Substantial

The parties stipulated at the hearing that the violation was "significant and substantial." (Tr. 5-6.) Even if they had not, it is evident from the injuries suffered by Mr. Moreno that the violation was "significant and substantial." Therefore, I so conclude.

Unwarrantable Failure

The violation was alleged to be an "unwarrantable failure." The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by

⁵ The *Program Policy Manual* was not offered at the hearing. Counsel for the Secretary has attached it to his brief and requested that judicial notice be taken of it. The Respondents have not objected, nor does there appear to be any reason why it should not be taken. Accordingly, I will take judicial notice of the manual and consider it.

a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987).

"Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The evidence does not support a finding of "unwarrantable failure" in this case. Tilcon's conduct with regard to this violation was not aggravated. On the contrary, the evidence shows that the quarry and plant had been in existence for almost 30 years and no question had been raised about the alarm system. The company's Assessed Violation History Report for the period January 1, 1982, through May 26, 1994, indicates only 15 violations, including the two involved in this case. (Resp. Ex. R.) None of the remaining violations involve the belt system. This evidence corroborates Joseph Abate's, president of Tilcon, testimony that the company strives to comply with MSHA policy as well as any matter brought to its attention by MSHA inspectors.

When examined in view of Tilcon's excellent prior enforcement history and the fact that its alarm system had apparently not been questioned, I conclude that the company reasonably believed in good faith that its procedure for starting individual belts was the safest method of complying with Section 56.14201(b). There is no evidence that it acted with "reckless disregard," intentionally violated the regulation, was indifferent or exhibited "a serious lack of reasonable care." Accordingly, I conclude that although its belief was in error, Tilcon did not unwarrantably fail to comply with the rule. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994); *Utah Power and Light Co.*, 12 FMSHRC 965, 972 (May 1990); *Florence Mining Co.*, 11 FMSHRC 747, 752-54 (May 1989). In view of this, I also conclude that the degree of negligence for this violation should be reduced from "high" to "moderate."

Joseph DonAroma and Edward Sakl

The Secretary has alleged that DonAroma and Sakl "knowingly" violated Section 56.14201(b) and are personally liable under

Section 110(c) of the Act, 30 U.S.C. § 820(c).⁶ Based on the evidence, I find that they did not "knowingly" carry out the violation within the meaning of the Act.

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate Section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

Just as the evidence indicates that Tilcon did not engage in aggravated conduct, I conclude that neither DonAroma nor Sakl engaged in aggravated conduct. They were following a long standing company procedure. There is no evidence that they directed the belt start-up knowing that Moreno was on the belt, or even had reason to believe that he might climb onto the belt to replace the chute door.⁷ The two supervisors had a reasonable belief that they were operating in a safe manner in compliance with the regulation. Consequently, I conclude that they did not "knowingly" violate Section 56.14201(b). *Wyoming Fuel, supra*.

⁶ Section 110(c) provides that "[w]hen a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d)."

⁷ Every witness, except Moreno, testified that the chute door was commonly replaced while standing on the catwalk, frequently while the belt was running. In view of this and Moreno's lawsuit against the company for his injuries, I find that his self-serving testimony on this point is not credible.

CIVIL PENALTY ASSESSMENT

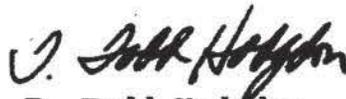
The Secretary has proposed a civil penalty of \$1,200.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, the parties have stipulated that the company has a low history of previous violations and that the company demonstrated good faith in abating the violation. (Tr. 5-6.) I note from the pleadings that the New Britain Quarry and Mill is a small to medium size operation and that Tilcon is a medium size company. Since no evidence has been presented to show that payment of a civil penalty would adversely affect Tilcon's ability to stay in business, I find that payment of a penalty will not so affect the company. *Id.* at 1153 n.14. Finally, while the violation had serious consequences, the negligence on the part of the company was no more than moderate. Taking all of this into consideration, I conclude that a penalty of \$400.00 is appropriate.

ORDER

The civil penalty petition concerning Citation No. 4079378 and the civil penalty petitions against Edward Sakl and Joseph DonAroma are **DISMISSED**. Citation No. 4079379 is **MODIFIED** to a Section 104(a), 30 U.S.C. § 814(a), citation by deleting the "unwarrantable failure" designation and reducing the degree of negligence to "moderate" and is **AFFIRMED** as modified.

Tilcon Connecticut, Inc. is **ORDERED TO PAY** a civil penalty of **\$400.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 2, 1996

IN RE: CONTESTS OF RESPIRABLE : Master Docket No. 91-1
DUST SAMPLE ALTERATION :
CITATIONS :
KEYSTONE COAL MINING CORPORATION : Docket Nos. PENN 91-451-R
 : through
 : PENN 91-503-R
v. :
 : Docket Nos. PENN 91-1176-R
 : through
SECRETARY OF LABOR, : PENN 91-1197-R
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
SECRETARY OF LABOR, : Docket Nos. PENN 91-1264
MINE SAFETY AND HEALTH : through
ADMINISTRATION (MSHA) : PENN 91-1266
 : and
v. :
 : Docket No. PENN 92-182
KEYSTONE COAL MINING CORPORATION : Docket No. PENN 92-183
 :
JIM WALTER RESOURCES, :
INC., et al., :
Intervenors :
UNITED MINE WORKERS :
OF AMERICA (UMWA), :
Representative of Miners :

ORDER

This matter is before me pursuant to the Commission's decision dated November 29, 1995.

On December 28, 1995, the Secretary filed with the Court of Appeals for the District of Columbia a petition for review and a motion to hold the above captioned actions in abeyance until the Secretary decides whether or not to pursue an appeal. The Secretary's motion states that he will not be able make a decision on an appeal until sometime after the Government shutdown ends.

Until a decision is made regarding appeal, the parties will not be in a position to determine how they wish to proceed with respect to cases in the Master docket. In order not to put the parties to unnecessary expense with respect to the more than 3700 cases involved, I will not require submissions until the question of appeal is resolved.

In light of the foregoing, it is **ORDERED** that the Solicitor advise me as soon as a decision is made regarding appeal.



Paul Merlin
Chief Administrative Law Judge

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JAN 17 1996

DONALD S. WALLACE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 95-282-DM
: MSHA Case No. WE MD 95-01
BARRICK GOLDSTRIKE MINES, :
Respondent : Mine I. D. # 26-01089
: Barrick Goldstrike Mine

ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION:
ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION:
NOTICE OF HEARING

Procedural History

On October 21, 1994, Donald Wallace filed a complaint with the Mine Safety and Health Administration (MSHA) alleging that he had been fired from his job at Barrick Goldstrike Mines in retaliation for activities protected by section 105(c) of the Federal Mine Safety and Health Act. On February 17, 1995, MSHA notified Mr. Wallace that it had determined that no violation of the Act had occurred. Mr. Wallace filed a complaint on his own behalf with the Commission.

This case was originally set for hearing on October 24-25, 1995, in Elko, Nevada. Then at the parties' request, the hearing was rescheduled for November 7-8, 1995. However, pursuant to a discussion with counsel for both parties, this hearing was canceled to allow the parties to file cross-motions for summary decision. These motions were filed with supporting affidavits, exhibits and the transcript of a deposition of Mr. Wallace taken by Respondent.

Undisputed Facts

Donald S. Wallace worked for Respondent at its mine near Carlin, Nevada, from September 1990 until September 27, 1994, when he was terminated. Mr. Wallace worked as a haul truck driver, normally on the night shift. At the time of his discharge this was a 12-hour shift, beginning at 7:00 p.m.

In November, 1993, Wallace made comments over the radio in his truck, which Respondent deemed inappropriate (Affidavit of Ron Sled, p. 7, Para. 29; Tr. II: 28-32¹). Comments made over the radio were broadcast to all vehicle operators working Wallace's shift.

In January, 1994, Complainant was given "decision-making leave" as the result of another comment he made over the radio in his truck. Mr. Wallace was essentially on a 1-year probation as the result of this incident (Tr. II: 9). At the time of this incident Respondent was in the process of changing its lunch-break system for the night shift.

Previously, miners on the night shift took their lunch break together. Respondent was in the process of implementing an assigned lunch-break system, whereby miners would eat at different times so that equipment continued to operate throughout the shift. Apparently, a number of miners did not like the change (Sled affidavit p. 3, paragraphs 10-11).

On January 12, 1994, Respondent communicated its desire that some or all miners take their lunch breaks early. Mr. Wallace asked over his radio, "Why don't you give us our breaks at the beginning of the shift and just work us the rest of the night." (Sled affidavit p. 6, paragraphs 22-24; Tr. II: 16 - 27).

At about midnight on September 27, 1994, miner David Paules was notified by a computer message that he had been scheduled for a midnight lunch break. Paules complained to the dispatcher over

¹References to the transcript of the Wallace deposition are referred as Tr. I (the portion of the deposition conducted on August 22, 1995) and Tr. II -- the portion conducted on August 23.

his radio that this was the second or third night in a row that he had been assigned an "early" lunch break (Sled affidavit p. 5, para. 18; Tr. I: 158 - 161).

Complainant Wallace then got on his radio and said to Paules, "Dave, why don't you punch through lunch and take two or three Delay-80s later when needed to help you make it through the night²." (Sled affidavit p. 5, para. 19, Tr. I: 131-32).

At the conclusion of the night shift on the morning of September 27, 1994, Complainant was suspended from his employment. On September 28, he had a meeting with Jeff Marrott and Glenn Wyman from Respondent's Mine Operations Department (Tr. I: 150-151). They discussed with him his comment over the radio to Mr. Paules (Tr. I: 151).

On October 3, 1994, the Mine Operations Department recommended that Mr. Wallace be terminated (Exhibit 7 to Wallace Affidavit). On October 10, 1994, Wallace met with Charles Geary, Vice-President and General Manager of the mine, to appeal his termination. At this meeting, Wallace told Geary that he believed that he was being terminated because he had inquired about a "miners' representative" at the mine and because he had contacted MSHA about safety and health concerns at the mine (Geary affidavit, Tr. I: 124-25, 139-40). Mr. Geary ratified Complainant's termination (Exh. 8 to Wallace Affidavit).

Evidence that is uncontroverted at the present time,
but not necessarily undisputed: Evidence that is disputed

Complainant alleges that the comments for which he was counseled in November 1993, concerned safety. He asserts that Respondent left one operator to run a large electric shovel by

²A "delay-80" is an unscheduled 15-minute break to be taken at a driver's discretion. To take more than two delay-80s, a driver needed supervisory approval (Sled affidavit p. 4, paras. 14-16). The purpose of the "delay-80" is to combat fatigue. Drivers are also allowed to take unscheduled bathroom breaks by entering "delay-40" into the computer onboard their trucks (Sled affidavit para. 14).

himself. Wallace says his comments over the radio were intended to raise concerns over the safety of this decision (Tr. II: 28)

On July 28, 1994, Complainant contacted State of Nevada Mine Safety officials to complain of a lack of air conditioning in his haul truck (Tr. I: 68). The air conditioning had not been working for 5-½ shifts prior to this telephone call (Tr. I: 70). Wallace had brought this to Respondent's attention without result (Tr. I: 69). The day after his call the air conditioning was repaired (Tr. I: 73).

Wallace never informed management of this phone call and has no direct evidence that Respondent knew of this call. He infers that Respondent's management was aware of his complaint to the State by virtue of the fact that the truck was repaired immediately after the call and the fact that he informed many fellow miners that he made the call. Respondent may have surmised that he made the call if State officials contacted it and mentioned the number of the truck Wallace operated (Tr. I: 72-75). Wallace also believes that comments made by a supervisor indicate management's awareness of the call (Tr. I: 91-98). I conclude that this call constitutes protected activity under section 105(c) of the Act. Wallace was required to keep the windows and doors of his truck closed to minimize exposure to smoke and dust (Tr. I: 77). This may also have been necessary to maintain his noise exposure within permissible limits.

Between September 1 and September 10, 1994, Wallace contacted State mine inspector Norman Pickett on at least two occasions (Tr. I: 47-50). He asked Pickett about the procedures for designating a "miners' representative"³ at Respondent's mine (Tr. I: 51). He had a similar discussion with Federal MSHA Inspector James Watson during this period (Tr. I: 61-62). There is no evidence that Respondent was aware of either inquiry.

³A "miners' representative" is a person designated by two or more miners to represent them during MSHA inspections and to file formal safety and health complaints with MSHA, 30 C.F.R. Part 40.

Wallace also discussed the procedure and need for a "miners' representative" with two fellow miners (Tr. I: 47-49, 63). He also claims to have had a discussion about "miners representatives" with Glenn Wyman, a member of Barrick management on September 17, 1994 (Tr. 78-79). That Wallace discussed "miners' representatives" with Wyman is disputed by Respondent (Sled affidavit, page 10-11, paragraphs 38 and 39).

On September 26, 1994, Wallace left a message with Federal MSHA that the air conditioning in his truck was not operating again (Tr. I: 75). He has no information indicating that Respondent knew of this call (Tr. I: 75).

Analysis of Complainant's motion for summary decision

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case

of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in part by the protected activity.

The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Pursuant to the Commission's Rules of Procedure at 29 C.F.R. §2700.67(b), a motion for summary decision shall be granted only if the record shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

Wallace's motion alleges that his termination resulted from his oral expressions of acute health and safety concerns and his expression of interest in the appointment of a miners' representative. Complainant has not established that there is no genuine issue as to whether there was a relationship between his inquiry as to the miners' representatives, or his calls to state and federal mine safety officials and his termination.

What is beyond dispute is that Complainant's termination would not have occurred but for his radio comment of September 27, 1994. If I were to conclude that the comment was protected activity under section 105(c) I would grant Complainant's motion for summary decision. However, I reach the opposite conclusion and thus deny the motion.

A good faith safety or health complaint made to management is protected by section 105(c). However, Mr. Wallace has not established that his comment was a safety and health complaint. Wallace contends that he thought Respondent's new system for assigning lunch breaks was dangerous because it left some equipment operators with seven hours until the end of the shift

with only one 15-minute break (Tr I: 166-68, Sled affidavit page 3, para. 8; page 4, para. 13).

I find, however, on the basis of the evidence before me, that Wallace's radio communication was not a good faith safety complaint. First of all, it was not directed to management, but instead was directed to fellow-miner David Paules and was calculated to encourage Paules to disregard company policy with regard to lunch breaks. Second of all, as Wallace concedes in his deposition testimony, he had no grounds for concluding that Paules' objection to an early lunch-break was made for safety reasons (Tr. II: 48).

The evidence before me is insufficient to indicate that there was anything inherently hazardous about Respondent's new lunch break policy for its night shift. In this regard, I note that the Mine Communication Sheet mentioned in paragraph 3(b) of Mr. Wallace's affidavit and attached to that affidavit, appears to allow for more than a 15-minute break if deemed necessary by a supervisor. More than two "delay 80" breaks in one shift also can be taken with the approval of a supervisor (Sled affidavit page 4, para. 16).

In conclusion, I find that Mr. Wallace's comment of September 27, 1994, was not protected activity and that he has not established that Respondent would not have fired him but for any other protected activities. Therefore, his motion is denied.

Analysis of Respondent's motion for summary decision

Complainant, in the record before me, has not made a prima facie case of discrimination. He has shown that he engaged in protected activities. These are his calls to state and federal MSHA, and his inquiries regarding miners' representatives. He has not shown that his discharge was motivated in part by these activities.

In this regard, there are unresolved issues of fact regarding Respondent's knowledge of some of these activities. The evidence of Respondent's animus regarding these activities, even as alleged, is very weak. Further, with the exception of his alleged conversation with Mr. Wyman on September 17, 1994,

I would not infer any relationship between the protected activities and his discharge from their timing.

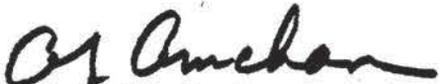
Wallace contends that he told Wyman on September 17, that he would like to talk to him about having a miners' representative at the mine. According to Wallace, Wyman's response was, "[t]here is no need for a Miners' Representative at Barrick. We have the Open-Door Policy." (Tr. I: 82-83). Even accepting Wallace's version of this conversation, it would be difficult to infer from it that he was terminated in part because of this encounter. Nevertheless, I am inclined to offer Complainant the opportunity to prove that there was such a relationship through the live testimony of Mr. Wallace, and other evidence. I therefore deny Respondent's motion for summary decision.

At this juncture, it strikes me that Complainant has several options:

1. Rely on the evidence already submitted and petition the Commission for review of my conclusion that his radio communication of September 27, 1994, was not protected by section 105(c) of the Mine Act;

2. Try to convince me through live testimony and/or other additional evidence that he would not have been discharged but for other alleged protected activities, such as the contacts with MSHA and his inquiries regarding miners' representatives.

Therefore, this matter is scheduled for hearing on **March 5 and 6, 1996, at 9:00 a.m. in Elko, Nevada,** at a site to be determined. Complainant is to notify me and opposing counsel no later than **February 5, 1996,** as to the nature of the evidence it intends to introduce. Respondent is to notify me and opposing counsel no later than **February 20, 1996,** as to the nature of the evidence it intends to introduce.


Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

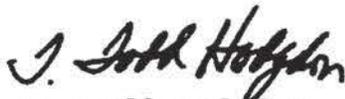
January 24, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. LAKE 94-72, etc.
Petitioner :
v. : Buck Creek Mine
: :
BUCK CREEK COAL INC., :
Respondent :

ORDER DENYING CERTIFICATION FOR INTERLOCUTORY REVIEW

On November 14, 1995, an order was issued granting a continued stay of 45 orders and citations, found in 14 civil penalty dockets, in these cases. *Buck Creek Coal, Inc.*, 17 FMSHRC 2149 (Judge Hodgdon, November 1995). On December 19, 1995, Buck Creek filed a motion requesting certification of that order to the Commission for interlocutory review. On January 12, 1996, the Secretary filed an opposition to the motion.¹

The order did not involve a controlling question of law, the immediate review of which would materially advance the final disposition of these proceedings. *Buck Creek Coal Inc.*, 17 FMSHRC 1677 (October 1995). In addition, the stay expired on this date, making the motion moot. Accordingly, the motion to certify is **DENIED**.



T. Todd Hodgdon
Administrative Law Judge

¹ I take note of the fact that the federal government, including the Solicitor's office and the Commission's Office of Administrative Law Judges, was not in operation from December 18, 1995, until January 5, 1996. In addition, all government offices in the Washington, D.C., area were closed due to weather conditions January 8-10 and 12, 1996.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 25, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. LAKE 94-72, etc.
Petitioner :
v. : Buck Creek Mine
:
BUCK CREEK COAL INC., :
Respondent :

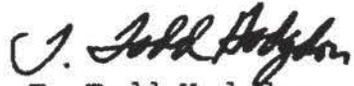
ORDER DENYING RECONSIDERATION
AND
DENYING CERTIFICATION FOR INTERLOCUTORY REVIEW

On December 8, 1995, an order was issued in these cases granting, in part, and denying, in part, Buck Creek's motion to compel the Secretary to produce certain documents. The Respondent now seeks reconsideration, or in the alternative certification for interlocutory review, of the denial of its motion concerning memoranda relating to knowing/wilful violations and Section 110 files, Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. The Secretary opposes both requests. For the reasons set forth below, the motion is denied.

The motion for reconsideration has not identified any material factual or legal issues which have not already been considered and addressed. Therefore, it is **DENIED**. See *Monterey Coal Co.*, 5 FMSHRC 1399 (August 1983).

Commission Rule 76, 29 C.F.R. § 2700.76, requires that before a ruling can be certified for interlocutory review, the judge must conclude that it involves a controlling question of law, the immediate review of which will materially advance the final disposition of the proceeding. Ruling that the memoranda and files are protected from discovery does not involve such a

question. See *Asarco, Inc.*, 14 FMSHRC 1323, 1328 (August 1992); *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (June 1992). Accordingly, the motion for certification for interlocutory review is **DENIED**



T. Todd Hodgdon
Administrative Law Judge

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